BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Union Electric Company d/b/a Ameren Missouri's 2nd Filing to Implement Regulatory Changes in Furtherance of Energy Efficiency as Allowed by MEEIA	))))	File No. EO-2015-0055

UNITED FOR MISSOURI'S INITIAL BRIEF

COMES NOW United for Missouri, Inc. ("UFM"), by and through its counsel, and for its *Initial Brief,* states as follows:

Introduction

On December 22, 2014, Ameren Missouri filed its application requesting the Missouri Public Service Commission ("Commission") approve its demand-side programs, Technical Resource Manual, and the DSIM proposed in its second filing to implement regulatory changes in compliance with the Missouri Energy Efficiency Act (MEEIA),[1] known as its MEEIA Cycle 2 filing. On June 30, 2015, in response to various criticisms of parties, Ameren Missouri and a number of parties filed the Non-Unanimous Stipulation and Agreement ("Utility Stipulation"). Subsequently, Staff and a number of parties filed the Non-Unanimous Stipulation and Agreement Regarding Ameren Missouri's MEEIA Cycle 2 as well as an Amended Non-Unanimous Stipulation and Agreement Regarding Ameren Missouri's MEEIA Cycle 2 (jointly, "Non-Utility Stipulation"). Hearings were held on the two competing Stipulations on July 20

[1] Section 393.1075, RSMo. (Cum. Supp. 2010).

through 22, 2015. The issue before the Commission is should it approve Ameren Missouri's MEEIA Cycle 2 application as modified in the Utility Stipulation.[2]

This proceeding is Exhibit No. 1 in the case of how government regulation distorts good business and economic efficiency. The record is replete with evidence of the multiple uncertainties in the realistic achievable potential of the proposed energy efficiency programs in this case. The realistic achievable potential of energy efficiency programs is an estimate built upon estimates. There are free riders and spillovers. The total resource cost test is an estimate, no better, of energy and capacity to be saved by certain programs as compared to a projected, uncertain avoided cost. The central planning of these services inevitably leads to the situation decried by Staff Witness Rodgers when he responded to Commissioner Stoll, "This is a difficult case. We have a lot of diverse interests represented in this case. It's very technical. Nobody knows all the details. It's impossible."[3]

Free markets do not have these uncertainties. In free markets, merchants sell and customers buy. Merchants know the benefit, or profit, they derive from the sale of a product or service; customers anticipate the benefit they achieve by the purchase of a product or service. Ameren Missouri Witness Lynn Barnes described the situation in a free market. In a free market, a merchant can sell a product or service for the price he can get for it and, likewise, a customer can negotiate a price for a product or service that he thinks will benefit him. In a free market a merchant and a customer could enter into a contract to reduce the customer's usage of a particular product for a price, based on energy efficiency measures a customer proposes to

[2] UFM recognizes the existence of the Non-Utility Stipulation. However, at this time, UFM will not address whether the Commission should approve that stipulation inasmuch as it appears to be the consensus of all parties that the Commission may not require Ameren Missouri to implement that proposal without Ameren Missouri's assent. UFM will address any arguments to the contrary in its reply brief.

[3] Transcript, p. 774.

install.[4] At the end of the day, or at least the fiscal year, the market participants can measure for themselves the benefits derived from their decisions.

Unfortunately, regulation prohibits the negotiation of special contract terms between buyers and sellers, for fear of monopoly power being used to perpetuate discriminatory conduct between customers. Such regulation prevents the free exercise of supply and demand forces and competition in bringing new services to the fore, such as measures to implement energy efficiency. If energy efficiency is truly the least cost investment option compared to the next unit of generation, in a free market, parties could negotiate terms for such services that would maximize the benefit to both buyer and seller.[5]

MEEIA is one potential avenue to reverse this distortion. It proposes to permit utility companies to create and manage energy efficiency programs "in a manner that sustains or enhances utility customers' incentives to use energy more efficiently." But rather than allowing the freedom to negotiate terms for achieving efficiencies that are mutually beneficial to both buyer and seller, MEEIA permits utility companies to implement new regulatory processes. It is a distortion upon a distortion. MEEIA establishes the use of elaborate tests, such as the total resource cost test. It requires projections and estimates, such as lost revenue calculations and throughput disincentives compensation. These are poor substitutes for a transaction negotiated between parties for a mutual benefit. Finally, legislation creates what appears to be mixed signals for the Commission in setting a standard that the proposed programs must have "a goal of achieving all cost-effective demand-side savings" and be "beneficial to all customers in the customer class in which the programs are proposed."

[4] Transcript, p. 512-514.
[5] *Id*.

UFM recognizes that the propriety and wisdom of the regulatory compact and the MEEIA are not on trial in this proceeding. UFM recognizes that electric services have in the past been natural monopolies and the state must constrain monopoly market power for the public good. However, it is important to set the regulatory context for this case. Rather than subject energy efficiency to market forces in which merchants sell and customers buy electric and efficiency services under transparent price signals, the system designed to achieve the best result, the Missouri Legislature has adopted a regulatory scheme under which a regulated entity is encouraged to offer services from which it believes its customers will benefit, the compensation therefor this Commission must approve. MEEIA permits utilities to offer these services under terms that the utilities find compensable. Staff, OPC and several of the environmental advocates have taken the position that this is not the best program that could be proposed. That may be true, but it is one that, under the auspices of MEEIA, Ameren Missouri is willing to undertake. If the proposal complies with the regulatory scheme, the Commission shall approve it. The Commission must stand in the stead of the compromised free market and determine if Ameren Missouri's strategy for its MEEIA program is not the best, but at least adequate. At this time, UFM believes it is.

Legal Standard

The Commission's decision in this proceeding is directed by two interdependent standards. First, "the commission shall permit electric corporations to implement commission-approved demand-side programs . . . with a goal of achieving all cost-effective demand-side savings."[6] Second, "Recovery for such programs shall not be permitted unless the programs are approved by the commission, result in energy and demand savings and are beneficial to all

[6] Section 393.1075.4.

customers in the customer class in which the programs are proposed, regardless of whether the programs are utilized by all customers."[7]

There is an inherent tension between the two standards before the Commission. The Commission must approve programs "with a goal of achieving all cost-effective demand side savings," and it may permit cost recovery for programs if such programs will produce energy and demand savings and be beneficial to all customers. At first reading, it appears that the one limits the other. In this proceeding, it is necessary to discern the Legislature's meaning in these two competing standards.

Construction of a statute is purely a question of law. *Delta Airlines, Inc. v. Director of Revenue*, 908 S.W.2d 353, 355 (Mo. banc 1995). The rules of statutory construction are designed to allow a court to ascertain and apply a statute in a manner consistent with the legislative intent.

> Generally, "[a] provision in a statute must be read in harmony with the entire section." *PDQ Tower Servs., Inc. v. Adams*, 213 S.W.3d 697, 698 (Mo. App. W.D.2007). Statutes relating to the same subject matter are *in pari materia* and should be construed harmoniously. *Id*. This principle "is all the more compelling when the statutes are passed in the same legislative session." *State v. Knapp*, 843 S.W.2d 345, 347 (Mo. banc 1992). Where two statutory provisions covering the same subject matter are unambiguous when read separately but conflict when read together, the reviewing court must attempt to harmonize them and give effect to both. *City of Clinton v. Terra Found., Inc*., 139 S.W.3d 186, 189 (Mo.App. W.D.2004).[8]

"Construction of statutes should avoid unreasonable or absurd results." *Reichert v. Bd. of Educ. of St. Louis*, 217 S.W.3d 301, 305 (Mo. banc 2007). And, more specific statutory provisions control over more general statutory provisions.[9]

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[7] *Id*.
[8] *Anderson v. Ken Kauffman & Sons Excavating*, 248 S.W.3d 101, 108 (Mo. App., 2008).
[9] *Id*.

Working from the most general of provisions to the most specific, the policy of the state of Missouri, as found in subsection 3 of MEEIA, is to "value demand-side investments equal to traditional investments in supply and delivery infrastructure." The procedural implementation of that policy is found in subsection 4. Subsection 4, in its discussion of the process, moves from the more general to the more specific, addressing in order, the standard for approval of programs, the standard for the approval of cost recovery, the standard for judging the cost-benefit relationship of the programs, how low-income programs are to be treated within the cost-benefit analysis, and how customer contributions are to be treated in the cost-benefit analysis.

The standard for approving programs, in comparison to the standard for approving cost recovery, is expressed in general terms. The Commission shall find that the proposal has "a goal" of achieving "all cost-effective demand side savings." It need not find that the proposal will actually achieve all savings. It is sufficient if there is "a goal" to achieve such savings. The word "all" then must be considered within the context of the words with which it keeps company. In this context, the word "all" can be given a meaning similar to the following analogy: "When the Cardinals won the World Series in 2011, all of St. Louis rejoiced." Certainly, in 2011, there were Cubs fans and Royals fans in St. Louis, so it is not reasonable to interpret this statement as indicating that every single individual in St. Louis rejoiced in the Cardinal's victory. What it does indicate is the there was a discernable and substantial trend in the community, one of enjoyment of the outcome of the World Series. Likewise, in MEEIA, it would be unreasonable to require that Ameren Missouri actually achieve all demand-side savings. Its role in the market place does not give it that omnipotence. It is enough if there is discernable and substantial progress in achieving demand-side savings.

This interpretation is borne out in light of not only the general policy of the state to treat demand-side investments equal to traditional infrastructure investments but also in light of the more specific second sentence of subsection 4 addressing cost recovery. The standard for permitting cost recover is more precisely stated. Programs may be approved by the Commission only if they "result in" energy or demand savings and are "beneficial to all customers" whether those customers participate in the programs or not.[10] In other words, there must be savings of a sort that would constitute a benefit comparable to a traditional investment in the supply infrastructure. There must be a benefit that would cause the Commission to conclude the investment is prudently incurred consistent with the utility's obligation to provide its customers safe and reliable service at just and reasonable rates. Staff witness Kliethermes captures the concept well in her Rebuttal to Supplemental Testimony:

> For non-participants (those ratepayers who pay a MEEIA charge, but are unable or unwilling to take part in a MEEIA program directly) the benefits of energy efficiency come from using energy efficiency programs as a least cost resource. In other words, the basic idea of MEEIA is that the Commission makes a determination that ratepayers as a whole will be better off if all ratepayers pay now to help some ratepayers reduce their energy usage, than the non-participating ratepayers would be if they had to pay the utility to build a power plant.[11]

Argument

I. The Ameren Missouri Proposed Demand-Side Programs Have a Goal of Achieving All Cost-Effective Demand-Side Savings.

The programs, as proposed by Ameren Missouri and outlined in the Utility Stipulation have a goal of achieving all cost-effective demand-side savings. There is very little dispute on this issue. Ameren Missouri witness Dan Laurent makes the point:

[10] UFM recognizes that one of the conditions of cost recovery is that the programs must be approved by the Commission. However, in this discussion, the requirement becomes something of a tautology in that the commission shall approve the program if it finds the other conditions are met.
[11] Ex. 703, p. 4.

> The Stipulation reflects an increase in the targeted cumulative savings to 583,563 megawatt-hours ("MWh") as compared to the targeted savings in the original MEEIA 2 Plan of 426,382 MWh. To achieve this total, the Stipulation calls for a substantial increase in the multi-family, low-income program offering based primarily on input from the National Housing Trust ("NHT") and Tower Grove Neighborhoods Community Development Corporation ("TGNCD"). The Stipulation also proposes to implement a small business direct install ("SBDI") program based in part on input from the National Resource Defense Council ("NRDC") and the Sierra Club. Based on input from the Division of Energy, the Stipulation proposes to incentivize compact fluorescent lamp ("CFL") purchases in grocery, drug, discount and online store channels in 2016, which will also increase savings. Additionally, based in part on input from the NRDC, the Stipulation reflects the signatories' agreement that energy efficiency incentives will be provided to public facilities in order to achieve additional energy savings. Finally, based on input primarily from the Division of Energy, the Stipulation proposes to include Combined Heat and Power as an eligible measure under the business custom 1 program. In summary, the Stipulation proposes to increase energy savings by approximately 37% and to increase the overall Plan budget by approximately 47%.[12]

The Division of Energy's witness Hyman agrees that the Utility Stipulation "represents substantially greater movement towards the goal of achieving all cost-effective demand-side savings compared to both the original filing and the alternative of no MEEIA portfolio in the Company's Missouri service territory."[13]

UFM can find no dispute from any other party regarding the programs having a goal of achieving all cost-effective demand-side savings. The main point of contention in this case is whether the investments will be beneficial to all customers.

II. Ameren Missouri's proposed programs will (1) result in energy and demand savings and are (2) beneficial to all customers in the customer class in which the programs are proposed, regardless of whether the programs are utilized by all customers.

(1) Ameren Missouri's Proposed Programs will result in energy and demand savings.

Again, this point is not much in dispute. Ameren Missouri projects that under the terms of the Utility Stipulation, the targeted cumulative savings will be 583,563 megawatt-hours

[12] Ex. 110, p. 2-3.
[13] Ex. 202, Supplemental Rebuttal Testimony of Martin R. Hyman, p. 2.

("MWh") as compared to the targeted savings in the original MEEIA 2 Plan of 426,382 MWh.[14] Prior to the filing of the Utility Stipulation, it was the consensus of Staff and many of the other parties that Ameren Missouri's projection of realistically achievable energy savings was dramatically understated.[15] It is also the consensus that Ameren Missouri has been successful in the past in over-achieving its anticipated potential in energy savings. Staff reported that Ameren Missouri's MEEIA Cycle 1 spending was significantly under budget and its energy savings were significantly over expectations.[16] Under these circumstances, it is more than reasonable to anticipate that Ameren Missouri's proposed programs will result in energy and demand savings.

(2) Ameren Missouri's Proposed Programs are beneficial to all customers in the customer class in which the programs are proposed, regardless of whether the programs are utilized by all customers.

This is the issue that defines this case. UFM supports the Utility Stipulation only insofar as the energy efficiency portfolio proposed by the Utility Stipulation is more cost effective than adding additional generation.[17] This position is consistent with Staff's test for customer benefits as expressed by Staff witness Kliethermes and quoted above.

For UFM, the *prima facie* case on this issue is quite simple as expressed by Ameren Missouri witness Berk. Levelized rate calculations are a very useful tool in assessing how resources may stack up against other options.[18] With respect to Ameren Missouri's original MEEIA 2 proposal, Ms. Berk calculated that the RAP plan reduced levelized average rates by 0.035 cents/kWhr when compared to the no DSM option.[19] Ms. Berk recalculated that number and found that the Utility Stipulation diminishes the benefit of the RAP option compared to the

[14] Ex. 110, p. 2-3
[15] Ex. 1200, p. 5.; Ex. 708, p. 3; Ex. 800, p. 3; Ex. 301, unnumbered 5th page.
[16] Ex. 708, Schedule JAR-5-1.
[17] Utility Stipulation, p. 17.
[18] Transcript, p. 202; Ex. 104, p. 8.
[19] Ex. 104, p. 9.

no DSM option to 0.024 cents/kWhr.[20] The projected benefit of the Utility Stipulation proposals remains more beneficial than the next unit of generation. However, UFM will await and review the initial briefs of the other parties to assess whether this *prima facie* case can be rebutted.

However, UFM does not understand how an *ex post* analysis could change the conclusion that Ameren Missouri's proposal will be beneficial to all customers. It is well accepted law that a utility's actions must be judged based on the facts and circumstances that exist at the time of the decision, not with the advantage of hindsight. *Atmos Energy Corp. v. Office of Pub. Counsel*, 389 S.W.3d 224, 228 (Mo. App., 2012). This principle applies to the construction of a power plant. If the policy of the state of Missouri is to treat energy efficiency options equal to traditional investments in utility supply infrastructure, there is no reason to vary that principle for energy efficiency programs. As a result, the Commission must approve or reject this MEEIA 2 proposal based on what it knows today. Nothing justifies an *ex post* evaluation of these programs.

Respectfully submitted,

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[20] Transcript, p. 205; Ex. No. 114.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent to all parties of record via electronic transmission this 13th day of August, 2015.

By: /s/ David C. Linton