

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

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| The Staff of the Missouri Public Service Commission, | ) |                              |
|  | ) |                              |
|  | ) |                              |
| Complainant,   | ) |                              |
|  | ) |                              |
| vs.  | ) | <b>File No. EC-2015-0315</b> |
|  | ) |                              |
| Union Electric Company d/b/a                         | ) |                              |
| Ameren Missouri                                      | ) |                              |
| Respondent.  | ) |                              |

**RESPONSE TO AMEREN’S MOTION FOR SUMMARY DETERMINATION**

COMES NOW the Office of the Public Counsel (“Public Counsel” of “OPC”) and hereby responds in opposition to Union Electric Company d/b/a Ameren Missouri’s (“Ameren”) Motion for Summary Determination.

**Introduction**

Upon Conclusion of its Cycle 1 (2013-2015) energy efficiency programs, the company will be awarded a performance incentive. At issue in this complaint is the calculation of the company’s performance incentive award. The Commission must answer whether the Company should receive a performance incentive based on a percentage of actual net benefits created by its energy efficiency program or whether the company should receive a performance incentive based on a percentage of some pre-determined number. As will be explained herein, the terms of the *Unanimous Stipulation and Agreement Resolving Ameren Missouri’s MEEIA Filing* (“Cycle 1 Stipulation”) require the performance incentive award to be calculated based on actual net benefits. See *In the Matter of Union Electric Company d/b/a Ameren Missouri’s Filing to Implement Regulatory Changes in Furtherance of Energy Efficiency as allowed by MEEIA*, Case

No. EO-2012-0142, Unanimous Stipulation and Agreement Resolving Ameren Missouri's MEEIA Filing (Doc. No. 119) ("Cycle 1 Stipulation").

## **Background**

This case is related to the Union Electric Company d/b/a Ameren Missouri ("Ameren") energy efficiency program. In 2012, Ameren filed its *Application to Approve DSIM Filing, Request for Variances and Motion to Adopt Procedural Schedule (See In the Matter of Union Electric Company d/b/a Ameren Missouri's Filing to Implement Regulatory Changes in Furtherance of Energy Efficiency as allowed by MEEIA, Case No. EO-2012-0142, Doc. No. 3)*. The application was Ameren's request to implement a three-year energy efficiency program. Contained in the Company's application was a 2013-2015 Energy Efficiency Plan ("Plan") (*Id.*). In the months that followed the application, multiple parties filed testimony contesting various aspects of the company's proposed Plan.

Ultimately, the parties to the application case entered into an agreement that, once approved by the Commission, allowed Ameren to pursue an energy efficiency program. *See* Cycle 1 Stipulation. The terms contained in the Cycle 1 Stipulation, filed July 5, 2012, modified significantly the company's initial proposal. *Id.* Thereafter, the Commission issued an order approving the Cycle 1 Stipulation on August 1, 2012. *See Order Approving Unanimous Stipulation and Agreement Resolving Ameren Missouri's MEEIA Filing and Approving Stipulation and Agreement Between Ameren Missouri And Laclede Gas Company*, File No. EO-2012-0142, *Iss'd* Aug. 1, 2012 (Doc. No. 127). In that order, the Commission approved the demand-side programs investment mechanism ("DSIM") described in the company's proposed Plan subject to the modifications in the stipulation and agreement. *Id.* at 3.

## **Staff's Complaint**

The Staff of the Missouri Public Service Commission ("Staff") filed its complaint, stating, "AmMo has failed and refused to provide the required avoided costs, being those used in AmMo's most recently-adopted preferred resource plan, to its independent evaluation, measurement, and verification ("EM&V") contractors ... so that the Evaluators could correctly calculate the PY 2014 annual net shared benefits for use in determination of AmMo's performance incentive award[.]" (*Staff Complaint*, p. 4).

At the heart of Staff's complaint is the company's improper calculation of the utility performance incentive. Staff alleges that the company is in violation of the Commission's rules because Ameren did not provide updated avoided cost information to the independent evaluation, measurement, and verification contractor. *See Ameren's Motion for Summary Determination*, p. 9 (Doc. No 21). Staff concludes that Ameren's failure to provide the updated information led to an incorrect calculation of performance incentive. *Staff's Suggestions in Support of Its Motion for Summary Determination*, p. 13 (Doc. No. 22). Staff asserts that Ameren's conduct constitutes a violation of Mo. Rev. Stat. §§ 393.1075.3 and .4, Commission Rule 4 CSR 240-20.093(1)(F), and the 2012 and 2013 Orders related to approving Ameren's energy efficiency program. *Staff Complaint*, p. 6. (Doc. No. 1).

## **Standard of Review for Summary Determination**

The Commission may grant a motion for summary determination when, based on the pleadings, testimony, discovery, affidavits, and memoranda on file, it determines that (1) there is no genuine issue as to any material fact, (2) that any party is entitled to relief as a matter of law as to all or any part of the case, and (3) that granting summary relief is in the public interest. *See*

*Earth Island Institute d/b/a Renew Missouri, et al v. Kansas City Power & Light Company*, Case No. EC-2013-0379, Order Denying Motions for Summary Determination of Renew Missouri and KCP&L/GMO, But Granting Motion for Summary Determination of Empire, *Iss'd* Oct. 3, 2013, p. 3; Commission Rule 4 CSR 240-2.117(1)(E).

### **Staff's Motion for Summary Determination**

Staff alleges that Ameren has “improperly skewed the results of the EM&V used to determine the Performance Incentive Award by providing incorrect inputs to the third-party evaluator in violation of Rule 4 CSR 240-20.093(1)(F)[.]” *Staff's Suggestions in Support of Its Motion for Summary Determination*, p. 13 (Doc. No. 22). Staff argues that the failure to provide updated avoided costs is a violation of the Commission rule that requires the utility to “use the same methodology used in its most recently adopted preferred resource plan to calculate its avoided costs[.]” *Id.* at 14. Failing to use updated costs results in an improper calculation of the company's performance incentive award. *Staff Complaint*, p. 4 (Doc. No. 1).

Staff is correct that the company is required to use the same methodology as was used in the company's most recently adopted preferred resource plan. The Staff is also correct that the Cycle 1 Stipulation “includes express waivers of several provisions of the Commission's MEEIA rules, but Rule 4 CSR 240-20.093(1)(F) is not among them.” *Id.* at 16.

### **Ameren's Motion for Summary Determination**

Ameren does not dispute that it did not update the avoided costs, but instead boldly asserts that the avoided costs used to calculate the performance incentive must not be updated. *See Ameren Missouri's Memorandum of Law in Support of Motion for Summary Disposition*, pp. 2-3 (Doc. No. 21) (“Ameren's Memorandum”). In support of its position, Ameren asserts – incorrectly – that the Commission-approved Cycle 1 energy efficiency plan provides that

avoided costs will not be updated and because of that, 4 CSR 240-20.093(2)(J) prohibits the Company and the Commission from updating the avoided costs for the entire MEEIA Cycle 1. *See Ameren's Memorandum*, p. 7.<sup>1</sup>

Implicit in Ameren's argument is an admission that where the Cycle 1 Stipulation modified the terms of the company's proposal, the terms of the Cycle 1 Stipulation will control. *See generally Ameren's Memorandum*, p. 4. The Company argues that when the Commission approved the Cycle 1 Stipulation, the Commission also approved the portions of Ameren's initial Plan that relate to the calculation of net benefits. Notably, Ameren's memorandum of law fails to recognize that the Cycle 1 Stipulation provides two distinct methods for calculating the net benefits in Cycle 1 – one for the throughput disincentive and a second for the performance incentive.

Because the Cycle 1 Stipulation modified the performance incentive, the modified version controls. The company states, without support, that the stipulation did not modify the performance incentive component of the DSIM. *Ameren's Memorandum*, p. 6. In its memorandum of law, Ameren concludes "[t]he utility incentive component of the DSIM is, therefore, as described in Section 2 of the Report, plus modifications in sub-paragraph 5.b.ii of the Stipulation[.]" *Id.* This self-serving interpretation of the Cycle 1 Stipulation is wrong.

Ameren's interpretation is flawed because it is clear that the Cycle 1 Stipulation directly modifies and replaces the utility's original application as it related to the performance incentive. In its *Memorandum*, the company fails to mention the terms included in Appendix B of the Cycle 1 Stipulation. Appendix B is important because the Cycle 1 Stipulation specifically says that

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<sup>1</sup> 4 CSR 240-20.093(2)(J) provides, in pertinent part, "[i]f the commission approves utility incentive component of a DSIM, such utility incentive component shall be binding ...for the entire term of the DSIM[.]"

Ameren will be allowed to recover a performance incentive “which is a percentage of NSB [Net Shared Benefits] as described in Appendix B[.]” *See* Cycle 1 Stipulation, p. 4, para. 5.b.ii. Thus, the Cycle 1 stipulation specifically lays out the method for calculating the NSB – superseding any and all portions of the company’s plan that related to the calculation of the NSB.

### **What does the Cycle 1 Stipulation say about the Performance Incentive?**

The Cycle 1 Stipulation contains specific terms related to the DSIM components, including the Net Shared Benefits (“NSB”) related to the throughput disincentive and the NSB related to the utility performance incentive. *See* Cycle 1 Stipulation, pp. 2-4. In addition to the text of the Cycle 1 Stipulation, Appendices A and B include example calculations for the modified throughput disincentive component and the modified utility performance incentive component. *See* Cycle 1 Stipulation, Appendices A and B. Of particular consequence to the arguments in this case, the Cycle 1 Stipulation specifies that “Ameren will be allowed to recover the performance incentive, which is a percentage of NSB as described on Appendix B[.]” Cycle 1 Stipulation, p. 4. Appendix B includes example calculations for determining the performance incentive award. Importantly, the examples in Appendix B make clear that Ameren’s performance incentive is based on a percentage of “actual net benefits.” *See* Appendix B, p. 2. Further, Appendix B contains a footnote that explains “[a]ctual net benefits are based on actual program costs for the three-year MEEIA plan and the actual net MWh savings as determined by EM&V.” Cycle 1 Stipulation, Appendix B, p. 2. This instruction is in contrast to the method for determining the benefits for purposes of the throughput disincentive portion – which does not measure and verify the actual energy savings – and clarifies that the performance incentive requires EM&V to determine the energy savings so that the actual net benefits can be calculated. This is fundamentally different than what was provided for in the Ameren plan. Because the

Cycle 1 Stipulation specifically modified the performance incentive proposal, it is the stipulation that controls. And the Cycle 1 Stipulation says that the actual net benefits should be used.

### **Why do Avoided Costs Matter When Calculating the Performance Incentive Award?**

The Cycle 1 Stipulation establishes the ways to calculate the benefits for both the throughput disincentive component and the performance incentive component of Ameren's approved DSIM. Determining the performance incentive award requires the use of actual net benefits – which means updating the avoided costs. This is because the avoided costs are the benefits to customers. *In the Matter of Union Electric Company d/b/a Ameren Missouri's Filing to Implement Regulatory Changes in Furtherance of Energy Efficiency as Allowed by MEEIA*, File No. EO-2012-0142 MEEIA Report, p. 22, (Doc. No. 4).

As explained on page 22 of Ameren's Plan, "[b]enefits are clearly defined as the avoided costs which include energy, capacity, and transmission and distribution costs." *Id.* In other words, these avoided costs are the very *essence* of benefits that customers receive under the MEEIA program. It follows, then, that updating the avoided costs is indispensable to determining the actual benefits. Without updating the avoided costs Ameren is not actually compensated as a percentage of benefits based on evaluation, measurement, and verification – but rather, on a percentage of a pre-determined number. No party agreed to such an interpretation, and the Cycle 1 Stipulation does not provide for that.

### **Why is Ameren Wrong?**

The terms of the Cycle 1 Stipulation require Ameren to calculate the "actual net benefits." The company failed to do so entirely. Instead, Ameren applies – unlawfully and inappropriately – the method the parties agreed to use for the calculation of benefits for the throughput disincentive to calculate the performance incentive. *See* Cycle 1 Stipulation, pp. 3-4,

9. By using the throughput disincentive method, the company did not actually calculate the benefits using *any* methodology; it simply kept the avoided costs the same and seeks to base its performance incentive payout on pre-determined values. As the Staff points out in its *Complaint*, if the Commission were to accept Ameren's position, the Commission would be required to use stale inputs to grant performance incentive awards based on initial projections rather than on measured achievements. *Complaint*, p. 6. The company has no such authority to do so, and under the Cycle 1 Stipulation, must calculate the actual net benefits for the performance incentive.

Ameren cites to Commission Rule 4 CSR 240-20.093(2)(J) in an attempt to support its position that avoided costs should not be updated. That rule provides that if the Commission approves a utility performance incentive, that incentive component shall be binding for the entire term of the MEEIA program. *See* 4 CSR 240-20.093(2)(J). However, the company's application of this rule is incorrect. In fact, rather than support the company's position, this rule serves to highlight the fact that the company's argument must fail.

The terms of the Cycle 1 Stipulation provide that the performance incentive will be based on a percentage of net benefits as described in Appendix B. Cycle 1 Stipulation, p. 4. In turn, Appendix B requires that the performance incentive is a percentage of "actual net benefits." Cycle 1, Stipulation, Appendix B, p. 2. As explained above, calculating net benefits requires updating the avoided costs because avoided costs *are* the benefits created. Because of the plain language of the Cycle 1 Stipulation, the rule cited by Ameren does not – and cannot – mean that the avoided costs should not be updated; instead, the avoided costs *must* be updated.

### **Response to Ameren's Statement of Undisputed Material Facts**

In accordance with Commission Rule 4 CSR 240-2.117(C), Public Counsel makes the following response to each of the statements in paragraphs 1 through 55 of Ameren's motion



wherein Ameren alleges no genuine issue of material fact exists. Ameren's statement of facts is largely irrelevant to any allegation made against the company or to the question of whether the company is entitled to summary determination as a matter of law. Applying the actual material facts to the controlling law, the Commission's Order enacting the terms of the Cycle 1 Stipulation, Ameren's argument must fail. Public Counsel's response to Ameren's statement of facts is as follows:

1. Ameren's statement in paragraph 1 is not controverted.
2. Ameren's statement in paragraph 2 is not controverted.
3. Ameren's statement in paragraph 3 is not controverted.
4. Ameren's statement in paragraph 4 is not controverted.
5. Ameren's statement in paragraph 5 is not controverted.
6. Ameren's statement in paragraph 6 is not controverted.
7. Ameren's statement in paragraph 7 is not controverted.
8. Ameren's statement in paragraph 8 is not controverted.
9. Ameren's statement in paragraph 9 is not controverted.
10. Ameren's statement in paragraph 10 is not controverted.
11. Ameren's statement in paragraph 11 is not controverted.
12. Ameren's statement in paragraph 12 is not controverted.
13. Ameren's statement in paragraph 13 is not controverted.
14. Ameren's statement in paragraph 14 is not controverted.
15. Ameren's statement in paragraph 15 is not controverted.
16. Ameren's statement in paragraph 16 is not controverted, but the statement is not material to any allegation made against the company, nor to the question of whether

the company is entitled to summary determination as a matter of law. The net benefits inputs reflected in the Cycle 1 Stipulation were included for illustrative purposes only. The stipulation makes clear that the company's performance incentive award will be based on actual net benefits. Cycle 1 Stipulation, Appendix B.

17. Ameren's statement in paragraph 17 is not controverted, but the statement is not material to any allegation made against the company, nor to the question of whether the company is entitled to summary determination as a matter of law. The net benefits inputs reflected in the Cycle 1 Stipulation were included for illustrative purposes only. The stipulation makes clear that the company's performance incentive award will be based on actual net benefits. Cycle 1 Stipulation, Appendix B.
18. Ameren's statement in paragraph 18 is not controverted, but the statement is not material to any allegation made against the company, nor to the question of whether the company is entitled to summary determination as a matter of law. The net benefits inputs reflected in the Cycle 1 Stipulation were included for illustrative purposes only. The stipulation makes clear that the company's performance incentive award will be based on actual net benefits. Cycle 1 Stipulation, Appendix B.
19. Ameren's statement in paragraph 19 is not controverted.
20. Ameren's statement in paragraph 20 is not controverted.
21. Ameren's statement in paragraph 21 is not controverted.
22. Ameren's statement in paragraph 22 is not material to any allegation made against the company or to the question of whether the company is entitled to summary determination as a matter of law. Subject to the foregoing and only to the extent required, OPC offers that this statement is not controverted.

23. Ameren's statement in paragraph 23 is not controverted.
24. Ameren's statement in paragraph 24 is not controverted.
25. Ameren's statement in paragraph 25 is not controverted.
26. Ameren's statement in paragraph 26 is not controverted.
27. Ameren's statement in paragraph 27 is not material to any allegation made against the company or to the question of whether the company is entitled to summary determination as a matter of law. Subject to the foregoing and only to the extent required, OPC offers that this statement is not controverted.
28. Ameren's statement in paragraph 28 is not controverted. Further responding, Public Counsel notes specifically that the language cited by Ameren states, in part, "[t]he avoided energy costs represent an update to the IRP planning scenarios and a description of those updates is found below. The avoided capacity costs have been updated[.]" MEEIA Report, p. 73.
29. Ameren's statement in paragraph 29 is not material to any allegation made against the company or to the question of whether the company is entitled to summary determination as a matter of law. Further responding, OPC notes that while not material, the testimony cited does not contain any reference to the calculation of NSB. *See In the Matter of Union Electric Company d/b/a Ameren Missouri's Filing to Implement Regulatory Changes in Furtherance of Energy Efficiency as Allowed by MEEIA*, Case No. EO-2012-0142, Rebuttal Testimony of Hojong Kang, Doc. No. 51, p. 2, l:20 to p. 3, l:1.
30. Ameren's statement in paragraph 30 is not controverted.
31. Ameren's statement in paragraph 31 is not controverted.

32. Ameren's statement in paragraph 32 is not controverted.
33. Ameren's statement in paragraph 33 is not controverted.
34. Ameren's statement in paragraph 34 is not material to any allegation made against the company or to the question of whether the company is entitled to summary determination as a matter of law. Subject to the foregoing and only to the extent required, OPC offers that this statement is not controverted.
35. Ameren's statement in paragraph 35 is not material to any allegation made against the company or to the question of whether the company is entitled to summary determination as a matter of law. Subject to the foregoing and only to the extent required, OPC offers that this statement is not controverted.
36. Ameren's statement in paragraph 36 is not material to any allegation made against the company or to the question of whether the company is entitled to summary determination as a matter of law. Subject to the foregoing and only to the extent required, OPC offers that this statement is not controverted.
37. Ameren's statement in paragraph 37 is not controverted.
38. Ameren's statement in paragraph 38 is not controverted.
39. Ameren's statement in paragraph 39 is not controverted.
40. Ameren's statement in paragraph 40 is not controverted.
41. Ameren's statement in paragraph 41 is not material to any allegation made against the company or to the question of whether the company is entitled to summary determination as a matter of law. Subject to the foregoing and only to the extent required, OPC offers that this statement is not controverted.
42. Ameren's statement in paragraph 42 is not controverted.

43. Ameren's statement in paragraph 43 is not controverted.
44. Ameren's statement in paragraph 44 is not controverted.
45. Ameren's statement in paragraph 45 is not material to any allegation made against the company or to the question of whether the company is entitled to summary determination as a matter of law. Subject to the foregoing and only to the extent required, OPC offers that this statement is not controverted.
46. Ameren's statement in paragraph 46 is not controverted.
47. Ameren's statement in paragraph 47 is not controverted.
48. Ameren's statement in paragraph 48 is not controverted.
49. Ameren's statement in paragraph 49 is not controverted.
50. Ameren's statement in paragraph 50 is not material to any allegation made against the company or to the question of whether the company is entitled to summary determination as a matter of law. Subject to the foregoing and only to the extent required, OPC offers that this statement is not controverted.
51. Ameren's statement in paragraph 51 is not material to any allegation made against the company or to the question of whether the company is entitled to summary determination as a matter of law. Subject to the foregoing and only to the extent required, OPC offers that this statement is not controverted.
52. Ameren's statement in paragraph 52 is not material to any allegation made against the company or to the question of whether the company is entitled to summary determination as a matter of law. Subject to the foregoing and only to the extent required, OPC offers that this statement is not controverted.

53. Ameren's statement in paragraph 53 is not material to any allegation made against the company or to the question of whether the company is entitled to summary determination as a matter of law. Subject to the foregoing and only to the extent required, OPC offers that this statement is not controverted.
54. Ameren's statement in paragraph 54 is not material to any allegation made against the company or to the question of whether the company is entitled to summary determination as a matter of law. Subject to the foregoing and only to the extent required, OPC offers that this statement is not controverted.
55. Ameren's statement in paragraph 55 is not material to any allegation made against the company or to the question of whether the company is entitled to summary determination as a matter of law. Subject to the foregoing and only to the extent required, OPC offers that this statement is not controverted.

## **Conclusion**

Ameren is required to use updated avoided costs to calculate the net benefits for purposes of the performance incentive award. It is not disputed that Ameren did not use the same avoided costs in calculating the net benefits caused by its program in 2014 as the avoided costs that were used in its most recently adopted preferred resource plan. Rather than updating the avoided costs so that the performance incentive award is based on actual measured achievements, Ameren seeks to calculate its performance incentive based on stale inputs and in contravention of the Cycle 1 stipulation.

The Cycle 1 Stipulation is clear – Ameren's performance incentive is to be based on a percentage of actual net benefits. The company has failed to update its avoided costs, and so, has not calculated the actual net benefits as required by the Cycle 1 Stipulation. The Commission

should require Ameren to abide by the Cycle 1 Stipulation and calculate its performance incentive award using updated avoided costs. Without a Commission order requiring Ameren to do so, ratepayers inequitably and unlawfully will be forced to pay Ameren a performance incentive based on projected benefits rather than the actual benefits that ratepayers have experienced under the Company's MEEIA program.

WHEREFORE, for the reasons set forth above, Public Counsel offers this Response to Ameren's Motion for Summary Determination for the Commission's consideration.

Respectfully,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all counsel of record this 16<sup>th</sup> day of September 2015:

/s/ Tim Opitz