BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

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

AMEREN MISSOURI'S REPLY TO THE STAFF'S AND THE OFFICE OF THE PUBLIC COUNSEL'S RESPONSES TO AMEREN MISSOURI'S MOTION FOR SUMMARY DISPOSITION

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or "Company") and, pursuant to the agreed-upon procedural schedule submitted in this case and approved by the Commission, hereby files its reply to the Staff's and Office of the Public Counsel's ("OPC") responses[1] in opposition to the Company's Motion for Summary Determination and, for its reply, states as follows:

1. **Staff and OPC's position require re-writing the Utility Incentive Component of the DSIM and the Commission's MEEIA rules, and consequently is unlawful.**

The facts and arguments the Staff and OPC ignored are perhaps more telling than the ones they attempted to rebut (which we will address in more detail below). Staff and OPC pay lip service to the MEEIA rules' definition of "utility incentive component" and "avoided costs," but then ignore the rules and argue their position as if the rules provide for something different than they actually do.

[1] In this Reply, the Company will refer to the Staff's pleading as the "Staff's Response" and to OPC's pleading as "OPC's Response."

As the Staff and OPC admit, there is no dispute: Ameren Missouri used the same methodology to develop avoided cost estimates for the preferred plan from its 2011 IRP, and to develop avoided cost estimates used for its MEEIA 1 Plan[2]; however, the avoided cost estimates themselves are *not the same*.[3] Having admitted that this is so, the Staff then contradicts itself claiming (without citation) that Ameren Missouri "did change its IRP methodology." Staff Response, p. 8. That statement is completely untrue. If, as Mr. Michel's affidavit (and the Staff's admission of its accuracy) establishes; that is, that the same methodology was used, then Ameren Missouri could not have changed its methodology.

What changed from the 2011 IRP to the MEEIA 1 Plan to the 2014 IRP were the *results* produced by the same methodology that was used in all three instances. Those results are the avoided cost estimates, and those avoided cost estimates then become *inputs* in the DSMore program that calculates net shared benefits ("NSB").

As explained in our Motion,[4] a "methodology" and an "input" are patently not the same. For the Staff's and OPC's position to prevail, the MEEIA rules' definition of "avoided costs" would have to provide that the utility "shall use the same INPUTS used in its most recently-adopted . . ." IRP; i.e., if the rule was that the same "avoided cost estimates" be used in both the IRP and the MEEIA filing, then the rule would have said so; there was no need to talk about a "methodology" at all. The fact is that the rule does not say that the same inputs (same avoided costs) must be used, no matter how many times the Staff claims otherwise. And under the most

[2] Capitalized terms and phrases used but not otherwise defined herein have the same meaning as given them in Ameren Missouri's Motion for Summary Disposition and the accompanying Memorandum of Law (sometimes collectively referred to as "Ameren Missouri's Motion").

[3] Michels Affidavit, ¶¶ 12 and 13 (undisputed by the Staff's and OPC's Responses). OPC's claim (OPC Response, p. 8) that the Company used "no methodology" at all is just plain wrong. The methodology (the procedure, which as our legal memorandum in support of summary determination explained is what a methodology is) is outlined in the Report and the Stipulation: use EM&V to determine program costs, measure attributes and energy savings, account for opt out and input those parameters in DSMore. The Company followed that methodology exactly.

[4] See Ameren Missouri's Memorandum of Law, pp. 8-10.

basic principles of construction, the plain meaning of the word "methodology" cannot be discarded and converted to a totally different word with a totally different meaning.[5]

The Staff doggedly continues to claim otherwise because it has no choice, a fact made even more clear by facts showing that either the Staff has been completely asleep at the wheel for the past three years, or facts showing that the Staff itself realizes that the rule does not say (and thus can't mean) what the Staff argues. As pointed out in our Motion, the Staff knew that the avoided cost estimates in the 2011 IRP were different than those in the MEEIA 1 Plan. If Staff's reading of the rule were correct, the Company committed the violation Staff claims it has committed in this Complaint more than three years ago on the day it filed the MEEIA 1 Plan, and the parties and the Commission sanctioned this "violation" by entering into/approving a stipulation resolving MEEIA 1.[6] Does the Staff make such a claim? No, it does not. The Staff tries to shrug off this inconsistency in its position by stating that it "found the change in avoided costs to be reasonable and therefore made no objection in the context of the MEEIA Cycle 1 filing." Staff's Response, pp. 1-2. Is Staff saying that it exercised some kind of "prosecutorial discretion" in the face of a violation of the rule (if Staff were right) by letting the violation slide because of the Staff's subjective view that the violation was "reasonable"? We don't know, because the Staff tries to ignore this very inconvenient fact.

The Staff completely ignores other inconvenient facts. As pointed out in our Motion, the Company has twice filed annual MEEIA reports and in each case the reports were crystal clear: the avoided cost estimates used to calculate the NSB reflected in those reports were the same as those used in the MEEIA 1 Plan filing but were different than those used in the IRP. If the Staff is right

[5] Nor are the "results" of a methodology part of the methodology itself, as the Staff claims. The results are just that, the result of *using* the methodology, the process,that then produces results.

[6] As we have previously indicated, the Commission didn't approve a MEEIA 1 Plan that was out of compliance with its rules because the Staff's strained reading; its re-write of the rule, is simply wrong.

then those reports are wrong since the Staff claims that the avoided cost estimates had to be the same based on Staff's theory that an "input" and a "methodology" are the same. Staff directly admits that this is so by admitting the Company's undisputed material fact nos. 38 to 45. Was this more prosecutorial discretion on the Staff's part? Does the Staff get to rewrite Commission rules when it thinks it is "reasonable" to do so? The answer to these rhetorical questions is, of course, "no." The rules are the rules, meaning the Staff, the Commission and the Company (absent a proper waiver) are bound by them, 100% of the time.

The Staff also tries to extricate itself from the fact that the rule requires the use of the same methodology, and *not* the use of the same inputs, by claiming that the Staff's failure to take action on what (according to its theory) must have been Company violations of the rule "cannot be construed as . . . a waiver of . . . 4 CSR 240-20.093(1)(F)." Staff's Response, p. 2. The Company never once argued, nor is it arguing, that the Staff waived the rule because there is no need for a waiver. The rule doesn't say what the Staff wants it to say; the Company has fully complied.

The Staff (and OPC) also attempt to rewrite the Utility Incentive Component ("UIC") itself. As we previously explained, the UIC is one of the components of the Commission-approved DSIM. The DSIM itself is defined by two documents, the Report and by the MEEIA 1 Stipulation, but the Stipulation only comes into play in defining the terms of the DSIM *if and to the extent the Stipulation modified the Report*. We know this because the MEEIA 1 Stipulation so provides when it states that the "Plan" consists of the MEEIA Programs and the DSIM "described in the MEEIA Report, modified to reflect the terms and conditions herein."[7] The MEEIA 1 Stipulation goes on to address the DSIM more specifically, providing that

> The Signatories agree that the Commission should approve the DSIM described in the MEEIA Report, after being modified as set forth in this paragraph [¶ 5],

[7] MEEIA 1 Stipulation, ¶ 4.

paragraph 6 and paragraph 7, including all of their subparts.[8]

Consequently, if the MEEIA 1 Stipulation didn't modify some aspect of the DSIM as outlined in the Report, the DSIM, as outlined in the Report, stands.

Sub-paragraph 5.b.ii addresses the modifications to the determination of NSB for the UIC described in the Report. Nothing in that sub-paragraph modifies the provisions of Sub-section 2.6 of the Report, nor does anything modify the specific provisions in Table 2.12 of the Report which, as noted, expressly prohibits the updating of avoided costs. The UIC in the Commission-approved DSIM is, therefore, as described in Section 2 of the Report, as modified (but only as modified) by sub-paragraph 5.b.ii of the MEEIA 1 Stipulation. If, however, the terms of the DSIM outlined in the Report were not modified by the MEEIA 1 Stipulation, those terms remain and they cannot be modified now, as the Staff and OPC effectively urge the Commission to do.[9]

OPC (and presumably the Staff, since the Staff attached it to the Staff Response) claim that Appendix B to the MEEIA 1 Stipulation modifies the UIC in a way that means that avoided cost estimates are to be updated. For that to be so would require that the Stipulation (including Appendix B) provide that avoided cost estimates are to be updated since the Report plainly provides for the opposite. An examination of Appendix B demonstrates that it does not provide for the updating of avoided cost estimates and, indeed, it directly rebuts their claim.

Appendix B *defines* the phrase "actual net benefits" for purposes of determining the performance incentive provided by the UIC: "Actual net benefits are based on [1] actual program costs for the three-year MEEIA plan and [2] the actual net MWh savings as determined by EM&V." Consistent with Table 2.12 of the Report, "avoided costs" are not listed. In order to

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[8] MEEIA 1 Stipulation, ¶ 5.

[9] ¶¶ 6 and 7 of the Stipulation address true-up of the various components of the DSIM, and how a rider might be implemented for the DSIM depending on the outcome of a then-pending appeal, but do not modify the DSIM in any way pertinent to the issue in this complaint.

trump, to modify, the prohibition on updating avoided cost estimates that plainly appears in the Report, Appendix B would have had to define "actual net benefits" as follows: ""Actual net benefits" are based on [1] actual program costs for the three-year MEEIA plan, *[2] updated avoided costs* and [3] the actual net MWh savings as determined by EM&V." If that is what Appendix B provided for then we would agree that the Report has been modified such that this aspect of the DSIM outlined in the Report would have been changed and that red "X" in Table 2.12, which clearly prohibits updating avoided cost estimates, would have effectively disappeared. Put another way, the Stipulation would have changed the methodology for determining the performance award and since the UIC is, itself, a methodology, would have changed the UIC component of the DSIM. The problem for the Staff and OPC is that no such change was made.

OPC simply ignores Appendix B's terms. OPC says that the performance incentive is to be a share of NSB "as described in Appendix B."[10] OPC implies the "as described" language somehow helps its argument, but instead of looking at how NSB are determined "as described in Appendix B" (as we explained in the prior paragraph) OPC focuses on the word "share." There is no question, Appendix B specifies the "share" (i.e., the percentage[11]) of NSB that the Company can earn at various performance levels (see the "Percent of % MWh Target" column in the table at the top of the first page of Appendix B). But the shares "as described in Appendix B" don't determine the NSB. To the contrary, Appendix B tells us how NSB are determined and as we just explained, avoided cost estimates are not – under the Report or under Appendix B – updated.

Nor is there anything in the Stipulation's provisions regarding the UIC (including in

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[10] OPC Response, p. 6.

[11] A "share" is defined as a "portion belonging to." *Merriam-Webster's Collegiate Dictionary* (4th ed.). The NSB themselves are not a share or a portion, as OPC's argument implies. To the contrary, the NSB are the thing that is being apportioned, and Appendix A does that by listing the portions – the percentages – with the percentages listed being the Company's portion and the rest (after subtracting the percentage for the TD-NSB) being the customers' portion.

Appendix B) that is “fundamentally different than what is provided for in the Ameren plan.”[12] The plan (reflected in the Report) outlines the UIC -- the method – and that method does not call for updating avoided cost estimates; the same thing is true of the MEEIA 1 Stipulation, including its Appendix B.

The Staff and OPC also try to emphasize EM&V, suggesting that since EM&V is mentioned in the definition of a UIC this somehow suggests that avoided costs are to be updated. However, they both admit that EM&V has nothing to do with determining (i.e., developing) avoided cost estimates.[13] EM&V evaluates, measures and verifies the number of measures installed, the attributes of those measures (e.g., is the measure a light bulb or an HVAC unit and, which light bulb and which HVAC unit) and the net-to-gross. *None* of those parameters have anything to do with avoided costs. One does not “update” avoided costs “based on” EM&V, as OPC implies at page 7 of its Response. The parameters EM&V determines (number of measures installed, the attributes of those measures and the net-to-gross) are those that must be determined in order to calculate the “actual net MWh savings” and it is those parameters – and those parameters alone -- that are provided for explicitly in Appendix B. Again, “Actual net benefits are based on [1] actual program costs for the three-year MEEIA plan and [2] the actual net MWh savings as determined by EM&V.”[14]

In summary, we defy the Staff and OPC to point to a single word in the MEEIA 1 Stipulation, including in Appendix B, which actually *modifies* Section 2.6 of the MEEIA Report and Table 2.12 thereof, both of which make crystal clear that avoided cost estimates *shall not be*

[12] OPC Response, p. 6.
[13] Staff Response, ¶ 2 (admitting the Company’s undisputed material fact no. 46); OPC Response, p. 13 (also admitting this fact). Company’s undisputed material fact no. 46 unequivocally establishes that EM&V does not determine avoided costs.
[14] Appendix B.

updated.[15] If the Stipulation did not modify Section 2.6 and Table 2.12 to reverse the prohibition on updating avoided cost estimates, then the UIC, by its terms, precludes updating avoided cost estimates. And, since the UIC is binding (4 CSR 240-20.093(2)(J)), it cannot be changed.[16]

2. The Staff's (and OPC's) "actual avoided costs" mantra is misleading, and it is also just plain wrong.

Throughout its response, the Staff refers to "actual avoided costs" and attempts to support the argument that it wouldn't make sense for the UIC to be determined on anything other than what it claims are "actual" avoided costs. OPC jumps on the bandwagon, referring to "measured achievements."[17] However, neither the Staff nor OPC propose to use "actual" avoided costs, nor do they propose to "measure" avoided costs in any way.[18] To the contrary, they claim that different *estimates* of avoided costs should be used than those that are required to be used by the MEEIA Report.

We know this because we know – and they agree – that all of the "avoided costs" are in fact long-term (20 years or more) *estimates* of the costs that will be avoided over the entire period when energy efficiency measures installed during MEEIA cycle 1 are in place.[19] To follow the "logic" of the Staff's argument would require Ameren Missouri to look back, after MEEIA cycle 1 is over, to calculate what energy and capacity prices *actually were* from 2013 to 2015, and (and this is likely

[15] OPC spills much ink over several pages of its Response trying to infer that because sub-paragraph 5.b.*i* of the MEEIA 1 Stipulation, which discusses the TD-NSB component of the DSIM (and Appendix A, which also relates only to the TD-NSB component of the DSIM) mentions that avoided costs will not be updated, and sub-paragraph 5.b.*ii* of the MEEIA 1 Stipulation, which addresses the UIC component of the DSIM but does not mention that avoided costs will not be updated, means that avoided costs are to be updated for the UIC. As we already explained, that could only be true if the Stipulation *modified* the Report. Not only did it not modify it, but Appendix B *confirms* that the Report was not modified in this regard because it defines "actual net benefits" in a manner that makes clear that only actual program costs and actual net MWh savings are updated when calculating NSB for the UIC.
[16] We need not repeat here in detail why the Staff's "interplay" argument fails. The Staff's interplay argument depends entirely on the Staff's re-write of the Commission's rule and its definition of "avoided costs."
[17] OPC Response, p. 8.
[18] As noted, EM&V doesn't measure avoided costs.
[19] Company undisputed material fact nos. 10, 11, 14, 31, 34, 35, 36, all of which are not controverted by the Staff or OPC.

not possible) to calculate the revenue requirement impact of the transmission, distribution and supply-side resources that were not installed because of energy efficiency measures. Those calculations (at least for energy and capacity) would be "actual" avoided costs. However, even then, the "actual" energy and capacity costs that were avoided could only be determined for 2013 to 2105, yet the NSB that are shared are NSB based on *lifetime* avoided costs (over 20 years – through 2032), further demonstrating that the Staff's and OPC's positions lead to illogical results. No one proposes to truly determine the actual avoided costs; it can't be done for a performance award to be determined right after the end of the MEEIA 1 cycle (i.e., in 2016).

The bottom line is that neither the Staff nor OPC claim that use of any such "actuals" is required by the rule. The language does not exist. "Actual avoided costs," for purposes of determining NSB for the UIC, *do not exist*. Consequently, it is simply not true that it would "indeed be odd for a performance award [not to use these phantom "actual" avoided costs] because it would divorce the award from the actual performance," as the Staff claims.[20] Nor is the PIA (Staff's acronym for the UIC component) "based on actual achieved results" if, by "actual achieved" the Staff means "actual avoided costs." Ameren Missouri can't "achieve" avoided costs because it can't control avoided cost inputs. Moreover, it's not "odd" at all, because the only "actual performance," the only "achievement" that all agree is to be used for determining the performance award (under the UIC), are the actual program costs incurred and the actual MWh saved as *determined through EM&V*. Which is exactly what is provided for in the MEEIA 1 Report and the Stipulation.

3. Staff's analogy to returns that can vary from rate case to rate case is inapposite.

The Staff admits that the principal drivers of avoided costs (energy and capacity costs) are

[20] Staff Response, p. 7.

outside the Company's control. Consequently, the Staff cannot avoid the reality that if the Staff's view prevails, the amount of the performance incentive the Company will earn will be greatly impacted by how estimated prices for uncontrollable energy and capacity costs change over a period of two or three years, even though those estimated prices will continue to change, year after year, throughout the long period of time that measures installed under the MEEIA cycle 1 programs produce energy savings. We likened the impact of using ever-changing avoided cost estimates to the outcome of a lottery, and that description remains accurate. The Staff implicitly recognizes that it makes no sense for an award to be dependent on a lottery, so it attempts to distance the practical effect of its position from the fact that its position does create an energy and capacity cost lottery by essentially arguing that when utilities invest in infrastructure utilities don't know what return the utility can earn over the life of the investment and that therefore that too is a lottery. The Staff's argument does not withstand scrutiny.

As the Commission recognizes, the returns used to set rates in rate cases are designed to equal the cost of capital the utility incurs. The debt component of returns is based on actual debt costs, and while it is true that the return on equity component is based upon analyses by experts, the goal of setting an authorized return is to arrive at the utility's *cost of equity*. Consequently, while utilities cannot know what the cost of equity will be over the next 20 to 30 years, utilities can reasonably expect that its rates will be set to cover its cost of equity and utilities have a significant role in the process by which the Commission determines the cost of equity. Utilities file testimony in support of return requests, and are otherwise given due process in the Commission's ultimate determine of what the cost of equity is. What the cost of equity will be in a rate case isn't a lottery determined by chance, but from a utility's standpoint, commodity costs are.

This is because energy and capacity costs are set by national and international markets over which the Company has no control, and which can swing wildly over short time spans, and certainly over the long-term estimate periods of 20 years or more used to estimate avoided energy and capacity costs. Consider that while the cost of equity can change, utilities know they will earn a return and returns do not swing wildly like commodity prices do and as noted, utilities have some say in – some control over—cost of equity determinations. Over Ameren Missouri's last four rate cases concluded since the Great Recession in 2008-2009, the Commission has set its cost of equity within a range of only 67 basis points. Cost of equity determinations are hardly an uncontrollable lottery.

4. The Staff's unsupported allegation suggesting that the Company opportunistically did not update avoided costs is specious and false.

At page 4 of its Response, the Staff claims to read the Company's mind by brashly stating that "[w]e would not be hearing this sort of argument from AmMo had that [energy and capacity prices gone up in recent years] happened." There is nothing in the record beyond Staff's innuendo to support such a claim. The Company's position on avoided costs has been consistent since its original filing, Staff's protestations to the contrary notwithstanding. Since, as the Staff admits, the Company doesn't control energy and capacity costs, then how exactly does the Staff make the leap that the Company would now be arguing to use updated avoided cost estimates had those energy and capacity costs gone up a great deal over the past two to three years rather than having gone down, which is what actually happened? The MEEIA Report filed in early 2012 said then that avoided cost estimates would not be updated. The Stipulation, and Appendix B, provided for what "actual net benefits" would be – again in 2012. The Company *committed* to *not* updating avoided costs three to four years before the performance award would be determined, with no ability to know, when it made that commitment, what would happen to avoided cost estimates made at a later time.

Assuming future MEEIA plans cycles are in place, avoided cost estimates that change over time may go up between the start of a MEEIA cycle and when the cycle is over, or they may go down – nobody knows. If the Staff's view were to prevail and they go up, the Company will hit the lottery; if the opposite occurs, the Company will have lost in the game of chance the Staff's position advocates for. To be clear, the Company was, in MEEIA cycle 1, and is, for future MEEIA cycles, willing to live with the consequences of leaving avoided cost estimates alone through each MEEIA cycle - because it is the logical and correct thing to do. That's why the Company's MEEIA 1 Report unequivocally fixed those avoided costs. The MEEIA 1 Stipulation did not change that. The Staff's Complaint is utterly without merit and must fail.

5. There is nothing unlawful about Ameren Missouri's position.

The Staff, with a simple citation to the statute that requires rates to be "just and reasonable" leaps to the conclusion that if "actual" avoided costs are not used then rates aren't just and reasonable and therefore the Company's position is "unlawful."

As explained above, the Staff is not proposing to use "actual" avoided costs. All the Staff proposes is to use a *different* long-term estimate that may turn out to be just as "wrong" over the life of the energy efficiency measures as any other estimate one could use. In addition, if the Staff is right, then the TD-NSB mechanism is just as unlawful because it would not be based on "actual" lower sales (i.e., the actual throughput disincentive) because no one can ever measure, with exact precision, just how much energy every light bulb, air conditioner, piece of insulation, appliance, etc. actually saved. EM&V is an exercise in estimation.

Finally, Staff's argument begs the question: are rates "unjust and unreasonable" when the Commission sets them using historic figures and estimates of things like the cost of equity, with those rates to be fixed for however long they are in effect (effectively "deeming" the historic figures and cost of equity estimates that were used) just because we don't later go back and use "actual" figures to see if the Commission got it just right? The answer is, of course not. Use of historic test year figures and other estimation techniques used to set rates admittedly will never produce rates in the future that exactly match what the "actual costs and revenues" the utility will actually experience.

This argument is truly absurd.

6. OPC Asks the Wrong Question.

OPC starts out its Response by claiming that the Commission must answer "whether the Company *should* receive a performance incentive . . ." based on claimed "actual" net benefits or based on a "pre-determined" number (emphasis added). That is not the question in a complaint case, including this one, where the claim is that the Company violated a Commission rule. The only question in this case is did the Company violate the rule the Staff claims it did. That question turns on whether the Company used the same methodology to estimate avoided costs for its 2011 IRP preferred plan and for estimating avoided costs for its MEEIA 1 Plan; it clearly did. That question also turns on whether the UIC, which is itself a methodology; a process, provides for using later avoided cost estimates; it clearly does not, and under the rules, Staff and OPC can't change it now. Moreover, the question OPC poses again exposes one of many fundamental flaws in the Staff's complaint: even using the Staff's argument, "actual" net benefits are never determined because actual avoided costs are never used.

7. Conclusion

The Company has followed every applicable MEEIA rule. The Company used the method provided for by its MEEIA 1 Plan and, on this issue, that method was not changed by the Stipulation; the Company was faithful to the approved UIC. The approved UIC can't be changed now. And, it is illogical to update the avoided cost estimates anyway. Performance by a utility in running MEEIA programs ought to be judged based on things the utility can control – how much it spends on the programs, how successful it is in installing measures, and measures with the greatest benefits, at that. That is the fundamental design of the UIC. It wasn't intended to be an energy and capacity cost lottery.

WHEREFORE, Ameren Missouri renews its prayer for an order of the Commission denying the Staff's Motion for Summary Disposition, and an order of the Commission granting the Company summary disposition of this case by dismissing the Staff's complaint with prejudice.

Respectfully submitted,

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Dated: September 25, 2015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 25th day of September, 2015, served the foregoing document and its attachment either by electronic mail, or by U. S. Mail, postage prepaid addressed to all parties of record.

/s/ James B. Lowery
James B. Lowery