BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

The Staff of the Missouri Public Service Commission, Complainant, vs. KCP&L Greater Missouri Operations Company, Respondent.	)))))))))))	**Case No. EC-2016-0012**

STAFF'S SUGGESTIONS IN SUPPORT OF ITS MOTION FOR SUMMARY DETERMINATION

COMES NOW the Staff of the Missouri Public Service Commission ("Staff"), by and through counsel, and for its *Suggestions in Support of its Motion for Summary Determination* pursuant to Commission Rule 4 CSR 240-2.117(1), states as follows:

Introduction

Staff filed its *Complaint* on July 13, 2015, asserting that Respondent KCP&L Greater Missouri Operations Company ("GMO"), failed to provide its independent evaluation, measurement and verification ("EM&V") contractors with the most recent avoided cost information needed for the calculation of the portion of the annual net shared benefits that are to be awarded to GMO as a performance incentive as a result of the energy efficiency savings the Company has achieved from its Missouri Energy Efficiency Investment Act ("MEEIA") demand-side programs for Program Year ("PY") 2014, in violation of § 393.1075.3 and .4, RSMo.,[1] Commission

[1] All statutory references, unless otherwise indicated, are to the Revised Statutes of Missouri (RSMo.), revision of 2000, as amended.

Rule 4 CSR 240-20.093(1)(F), and the Commission's *Order Approving Non-Unanimous Stipulation and Agreement Resolving KCP&L Greater Missouri Operations Company's MEEIA Filing* in Case No. EO-2012-0009.[2] This *Order* directs GMO to comply with the provisions of the *2012 Stipulation,* which the Commission approved.[3] The Commission has already heard Staff's complaint in EC-2015-0315, a complaint nearly identical to this matter against Union Electric Company d/b/a Ameren Missouri, and issued its order granting Staff's *Motion for Summary Determination* and its order regarding clarification. For relief, Staff prays that the Commission will provide statutory notice to Respondent and determine that GMO has also violated a statute and Commission rules and orders as alleged herein by Staff, and order GMO to provide its most recent avoided cost information needed for the calculation of the portion of the annual net shared benefits that are to be awarded to GMO as a performance incentive as a result of the energy efficiency savings the utility has achieved from its MEEIA demand-side programs for PY2014.

<u>Argument</u>

Summary Determination:

Commission Rule 4 CSR 240-2.117(1)(E) authorizes summary determination "if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is no genuine issue as to any material fact, that any party is entitled to relief as a matter of law as to all or any part of the case, and the commission determines that it is in the public interest." Filed simultaneously herewith are Staff's motion and affidavits; these *Suggestions* constitute the "separate legal memorandum" that must be "attached"

[2] Hereinafter, "the 2012 Order."

[3] Hereinafter, "the 2012 Stipulation."

to a motion for summary determination pursuant to Rule 4 CSR 240-2.117(1)(B).[4] Staff suggests that its motion, affidavits and suggestions demonstrate that there is no dispute of material fact, that Staff is entitled to relief as a matter of law and that the public interest demands that Staff's complaint be sustained.

Staff urges the Commission to recognize that this complaint is nearly identical to the one filed in EC-2015-0315, in which the Commission issued its order granting Staff's *Motion for Summary Determination* November 18, 2015. Due to the similarity of the complaints Staff believes it is unnecessary to hold a hearing in this matter and instead suggests the Commission should grant this *Motion for Summary Determination* as it did in the other complaint case.

What is this Case about?

This case presents a legal and policy controversy; there are no material facts in dispute. GMO is an investor-owned electric utility, regulated by this Commission. GMO voluntarily chose to participate in the financial incentives available through the Missouri Energy Efficiency Investment Act ("MEEIA"),[5] filing its *Application* and supporting documents on December 22, 2011, in Case No. EO-2012-0009. Disputes regarding GMO's Cycle 1 MEEIA Plan were resolved by a *Stipulation and Agreement* on October 29, 2012*,* which the Commission approved on November 15, 2012. This dispute arises from the administration of GMO's Cycle 1 MEEIA Plan, specifically, the calculation of GMO's utility incentive.

[4] Rule 4 CSR 240-2.117(1) states certain other requirements for summary determination, all of which are met here as detailed in Staff's accompanying motion.

[5] Section 393.1075.

MEEIA:

MEEIA was created by the Missouri General Assembly in 2009.[6] MEEIA provides that, "It shall be the policy of the state to value demand-side investments equal to traditional investments in supply and delivery infrastructure and allow recovery of all reasonable and prudent costs of delivering cost-effective demand-side programs."[7] In furtherance of this policy, the Commission is directed to:[8]

- Provide timely cost recovery for utilities;
- Ensure that utility financial incentives are aligned with helping customers use energy more efficiently and in a manner that sustains or enhances utility customers' incentives to use energy more efficiently; and
- Provide timely earnings opportunities associated with cost-effective measurable and verifiable efficiency savings.

With respect to "timely cost recovery," MEEIA provides that "the commission may develop cost recovery mechanisms to further encourage investments in demand-side programs including, in combination and without limitation: capitalization of investments in and expenditures for demand-side programs, rate design modifications, accelerated depreciation on demand-side investments, and allowing the utility to retain a portion of the net benefits of a demand-side program for its shareholders."[9]

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[6] ***State ex rel. Public Counsel v. Public Service Comm'n,*** 397 S.W.3d 441, 444 (Mo. App., W.D. 2013).

[7] *Id.,* at .3. The term "demand-side" refers to the consumers' side of the meter; the utility is on the "supply side." In view of the staggering expense required to construct new generation, a cost-effective way to increase supply is to reduce demand.

[8] *Id.*

[9] *Id.,* at .5.

MEEIA contemplates the promulgation of implementing rules by the Commission.[10] The Commission issued its *Final Orders of Rulemaking* on February 9, 2011, promulgating four rules:

- 4 CSR 240-3.163, *Electric Utility Demand-Side Programs Investment Mechanisms Filing and Submission Requirements;*
- 4 CSR 240-20.093, *Demand-Side Programs Investment Mechanisms;*
- 4 CSR 240-3.164, *Electric Utility Demand-Side Programs Filing and Submission Requirements;* and
- 4 CSR 240-20.094, *Demand-Side Programs.*

Challenges to these rules by electric utilities and the Public Counsel were unsuccessful.[11]

To implement MEEIA's directive regarding timely cost recovery, financial incentives and timely earnings opportunities, the Commission's rules created the Demand-Side Programs Investment Mechanism ("DSIM").[12] Section 393.1075.5 expressly authorizes the Commission to "develop cost recovery mechanisms to further encourage investments in demand-side programs[.]" A DSIM may include, "in combination and without limitation,"[13]

- Cost recovery of demand-side program costs through capitalization of investments in demand-side programs;

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[10] *E.g.,* § 393.1075, .5, .8, .9, .11, and .15.

[11] ***State ex rel. Public Counsel v. Public Service Comm'n,*** 397 S.W.3d 441 (Mo. App., W.D. 2013).

[12] Rule 4 CSR 240-3.163 and 4 CSR 240-20.093.

[13] Rule 4 CSR 240-20.093(1)(M); *compare* § 393.1075.5: "including, in combination and without limitation: capitalization of investments in and expenditures for demand-side programs, rate design modifications, accelerated depreciation on demand-side investments, and allowing the utility to retain a portion of the net benefits of a demand-side program for its shareholders."

- Cost recovery of demand-side program costs through a demand-side program cost tracker;
- Accelerated depreciation on demand-side investments;
- Recovery of lost revenues; and
- Utility incentive based on the achieved performance level of approved demand-side programs.

The DSIM functions as follows: a DSIM revenue requirement is developed which is apportioned to the various rate classes by the Commission[14] and recovered via the separately-stated DSIM rate,[15] which can be adjusted every six months outside of a general rate case, "to include a true-up for over- and under-collection of the DSIM revenue requirement as well as the impact on the DSIM cost recovery revenue requirement as a result of approved new, modified, or deleted demand-side programs."[16] The DSIM revenue requirement is the sum of three components: the DSIM cost recovery revenue requirement, the DSIM utility lost revenue requirement and the DSIM utility incentive revenue requirement.[17] Only the cost recovery DSIM component can be adjusted outside of a general rate case.[18]

The DSIM cost recovery revenue requirement is "the revenue requirement approved by the commission in a utility's filing for demand-side program approval or a

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[14] Rule 4 CSR 240-20.093(2)(K).

[15] Rule 4 CSR 240-20.093(1)(O).

[16] Rule 4 CSR 240-20.093(2)(I).

[17] Rule 4 CSR 240-20.093(1)(P).

[18] Rule 4 CSR 240-20.093(4): "Semiannual adjustments to DSIM rates between general rate proceedings **shall only include adjustments to the DSIM cost recovery revenue requirement** and shall not include any adjustments to the DSIM utility lost revenue requirement or the DSIM utility incentive revenue requirement" (emphasis added).

semiannual DSIM rate adjustment case to provide the utility with cost recovery of demand-side program costs based on the approved cost recovery component of a DSIM."[19] It is "based on costs of demand-side programs approved by the commission in accordance with 4 CSR 240-20.094 Demand-Side Programs"[20] and may encompass "[i]ndirect costs associated with demand-side programs, including but not limited to costs of [a] utility market potential study and/or [the] utility's portion of [a] statewide technical resource manual[.]"[21]

The DSIM utility lost revenue requirement is "the revenue requirement explicitly approved (if any) by the commission to provide the utility with recovery of lost revenue,"[22] which is defined as "the net reduction in utility retail revenue, taking into account all changes in costs and all changes in any revenues relevant to the Missouri jurisdictional revenue requirement, that occurs when utility demand-side programs approved by the commission in accordance with 4 CSR 240-20.094 cause a drop in net system retail kWh delivered to jurisdictional customers below the level used to set the electricity rates,"[23] with the proviso that "[l]ost revenues are only those net revenues lost due to energy and demand savings from utility demand-side programs approved by the commission in accordance with 4 CSR 240-20.094 Demand-Side Programs and measured and verified through EM&V[.]"[24] It is calculated by the utility lost revenue component of the DSIM which is "the methodology approved by the commission in a

[19] Rule 4 CVSR 240-20.093(1)(N).

[20] Rule 4 CSR 240-20.093(2)(F).

[21] *Id.*

[22] Rule 4 CSR 240-20.093(1)®

[23] Rule 4 CSR 240-20.093(1)(Y).

[24] *Id.*

utility's filing for demand-side program approval to allow the utility to receive recovery of lost revenue[.]"[25] The rule further specifies that "[a]ny utility lost revenue component of [a] DSIM shall be based on energy or demand savings from utility demand-side programs approved by the commission in accordance with 4 CSR 240-20.094 Demand-Side Programs and measured and verified through EM&V."[26] Certain restrictions apply:

- "A utility cannot recover revenues lost due to utility demand-side programs unless it does not recover the fixed cost as set in the last general rate case, i.e., actual annual billed system kWh is less than the system kWh used to calculate rates to recover revenues as ordered by the commission in the utility's last general rate case."[27]

- The Commission shall order any utility lost revenue component of a DSIM simultaneously with the programs approved in accordance with 4 CSR 240-20.094 Demand-Side Programs.[28]

- In a utility's filing for demand-side program approval in which a utility lost revenue component of a DSIM is considered, there is no requirement for any implicit or explicit utility lost revenue component of a DSIM or for a particular form of a lost revenue component of a DSIM.[29]

- The Commission may address lost revenues solely or in part, directly or indirectly, with a performance incentive mechanism through a utility incentive component of [a] DSIM.[30]

- Any explicit utility lost revenue component of a DSIM shall be implemented on a retrospective basis and all energy and demand savings to determine a DSIM utility lost revenue requirement must be measured and verified through EM&V prior to recovery.[31]

[25] Rule 4 CSR 240-20.093(1)(FF).

[26] Rule 4 CSR 240-20.093(2)(G).

[27] Rule 4 CSR 240-20.093(2)(G)1.

[28] Rule 4 CSR 240-20.093(2)(G)2.

[29] Rule 4 CSR 240-20.093(2)(G)3.

[30] Rule 4 CSR 240-20.093(2)(G)4.

[31] Rule 4 CSR 240-20.093(2)(G)5.

The DSIM utility incentive revenue requirement is "the revenue requirement approved by the commission to provide the utility with a portion of annual net shared benefits[.]"[32] It is calculated via the utility incentive component of the DSIM, which is "the methodology approved by the commission in a utility's filing for demand-side program approval to allow the utility to receive a portion of annual net shared benefits achieved and documented through EM&V reports[.]"[33] It is based on "the performance of demand-side programs approved by the commission in accordance with 4 CSR 240-20.094 Demand-Side Programs"[34] and it includes "a methodology for determining the utility's portion of annual net shared benefits achieved and documented through EM&V reports for approved demand-side programs."[35] The rule specifies that "[e]ach utility incentive component of a DSIM shall define the relationship between the utility's portion of annual net shared benefits achieved and documented through EM&V reports, annual energy savings achieved and documented through EM&V reports as a percentage of annual energy savings targets, and annual demand savings achieved and documented through EM&V reports as a percentage of annual demand savings targets."[36] Certain restrictions apply:

- "Annual energy and demand savings targets approved by the commission for use in the utility incentive component of a DSIM are not necessarily the same as the incremental annual energy and demand savings goals and cumulative annual energy and demand savings goals specified in 4 CSR 240-20.094(2)."[37]

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[32] Rule 4 CSR 240-20.093(1)(Q).

[33] Rule 4 CSR 240-20.093(1)(EE).

[34] Rule 4 CSR 240-20.093(2)(H).

[35] *Id.*

[36] *Id.*

[37] Rule 4 CSR 240-20.093(2)(H).1.

- "The commission shall order any utility incentive component of a DSIM simultaneously with the programs approved in accordance with 4 CSR 240-20.094 Demand-Side Programs."[38]

- "Any utility incentive component of a DSIM shall be implemented on a retrospective basis and all energy and demand savings used to determine a DSIM utility incentive revenue requirement must be measured and verified through EM&V."[39]

If a DSIM includes a utility incentive component, it "shall be binding on the commission for the entire term of the DSIM, and such DSIM shall be binding on the electric utility for the entire term of the DSIM, unless otherwise ordered or conditioned by the commission when approved."[40] The incentive is defined as "a portion of annual net shared benefits[.]"[41] "Annual net shared benefits" are "the utility's avoided costs measured and documented through evaluation, measurement, and verification (EM&V) reports for approved demand-side programs less the sum of the programs' costs including design, administration, delivery, end-use measures, incentives, EM&V, utility market potential studies, and technical resource manual on an annual basis[.]"[42] "Avoided costs," in turn, are:

> the cost savings obtained by substituting demand-side programs for existing and new supply-side resources. Avoided costs include avoided utility costs resulting from demand-side programs' energy savings and demand savings associated with generation, transmission, and distribution facilities including avoided probable environmental compliance costs. **The utility shall use the same methodology used in its most recently adopted preferred resource plan to calculate its avoided costs[.]**[43]

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[38] Rule 4 CSR 240-20.093(2)(H).2.

[39] Rule 4 CSR 240-20.093(2)(H).3.

[40] Rule 4 CSR 240-20.093(2)(J).

[41] Rule 4 CSR 240-20.093(1)(Q).

[42] Rule 4 CSR 240-20.093(1)(C).

[43] Rule 4 CSR 240-20.093(1)(F); emphasis added.

The dispute in this case concerns the inputs used to calculate GMO's performance incentive.

GMO's Cycle 1 MEEIA Plan:

GMO's proposed MEEIA Plan consisted of a portfolio of 19 demand-side programs, including 14 already approved by the Commission and five new proposals. The *Application* included a request for a DSIM, which included a utility performance incentive component as permitted by Rule 4 CSR 240-20.093(2)(H), along with requests for variances from certain provisions of the MEEIA rules. The *2012 Stipulation,* which led to the approval of GMO's MEEIA Plan, included certain modifications to GMO's proposed DSIM.[44] At ¶ 5, the *2012 Stipulation* provided that "[t]he Signatories agree to the DSIM described in this Stipulation."

At ¶ 5, the *2012 Stipulation* states, "It is the intent of the Signatories that GMO shall ultimately collect from customers an amount as close as reasonably practicable to (addressed differently in this Stipulation for customers in residential versus the non-residential customer classes):

-the MEEIA Programs' costs;

-the GMO TD-NSB[45] Share; and

-GMO's Performance Incentive Award earned as provided for herein.[46]

The *2012 Stipulation* provided that one-third of GMO's estimated MEEIA program costs ($13,944,367) and 90% of its estimated lost revenue ($4,788,509) would be included in

[44] *2012 Stipulation,* ¶ 5.

[45] "TD" is Throughput Disincentive, *i.e.,* lost revenues. "NSB" is Net Shared Benefits.

[46] The Performance Incentive is explained at ¶ 5.b.ii. and 6.c.

base rates.[47] Following a true-up after the end of the three-year program period, any under-recovery would be recovered from the ratepayers and any over-recovery would be returned to the ratepayers.[48] The Performance Incentive Award would only be recovered after the end of the three-year plan period.[49]

Paragraph 5.b.ii. provides:

> NSB Relating to the Performance Incentive. After the conclusion of the three-year Plan period, using final Evaluation, Measurement and Verification ("EM&V") results, GMO will be allowed to recover the performance incentive award, which is a percentage of NSB as described on Appendix B attached hereto and incorporated herein by this reference (the "Performance Incentive Award"). The cumulative annual net megawatt-hours ("MWh") and megawatts ("MW") determined through EM&V to have been saved during the three-year Plan period as a result of the MEEIA Programs will be used to determine the amount of GMO's Performance Incentive Award. The cumulative annual net MWh performance achievement level (expressed as a percentage) will be equal to cumulative annual net MWh savings determined through EM&V divided by GMO's total targeted 150,346 MWh (which is the cumulative annual net MWh savings in the third year of the three-year Plan period).5 The cumulative annual net MW performance achievement level (expressed as a percentage) will be equal to cumulative annual net MW savings determined through EM&V divided by GMO's total targeted 37.521 MW (which is the cumulative annual net MW savings expected to be captured in the third year of the three-year Plan period).6 The MWh performance achievement level (expressed as a percentage) will be weighted 80% and the MW performance achievement level (expressed as a percentage) will be weighted 20% to determine the overall level of achievement for the Plan when determining the Performance Incentive Award amount. The targeted net energy and demand savings shall be adjusted annually for full program year impacts on targeted net energy and demand savings caused by actual opt-out. 7 Actual net energy and demand savings will be determined through the EM&V, including full retrospective application of net-to-gross ratios at the program level using EM&V results. The total evaluated net cumulative annual net energy and demand savings achieved by the end of the three-year Plan period will be used to determine the amount of the Performance Incentive Award. Recovery of the Performance Incentive Award is addressed in paragraph 6.c.

[47] *2012 Stipulation,* ¶ 5, a. and b.i.

[48] *Id.,* ¶ 6.

[49] *Id.,* ¶ 6.c.

Paragraphs 6 and 6.c. deal with the method of recovery of GMO's Performance Incentive Award and need not be set out here. They provide for recovery either through the amortization over two years of a trued-up regulatory asset/liability or via a DSIM, depending on whether or not the Commission's rules are ultimately upheld, as, in fact, they were.[50]

What is the Dispute of the Parties?

Central to the operation of GMO's MEEIA Program is the measurement of the results obtained by an independent third-party EM&V contractor.[51] Rule 4 CSR 240-20.093(2)(H)3 provides, "[a]ny utility incentive component of a DSIM shall be implemented on a retrospective basis and all energy and demand savings used to determine a DSIM utility incentive revenue requirement must be measured and verified through EM&V." Staff alleges that GMO has improperly skewed the results of the EM&V used to determine the portion of its Performance Incentive Award for PY2014 by providing incorrect inputs to the third-party EM&V contractor in violation of Rule 4 CSR 240-20.093(1)(F), which provides in pertinent part: "[t]he utility shall use the same methodology used in its most recently adopted preferred resource plan to calculate its avoided costs[.]"

Why Does Staff Win?

GMO admits that it did not provide to the third-party EM&V contractor the avoided costs in GMO's most recently-adopted preferred resource plan, which is the

[50] ***State ex rel. Public Counsel v. Public Service Comm'n,*** 397 S.W.3d 441 (Mo. App., W.D. 2013).

[51] Rule 4 CSR 240-20.093(1)(V): "Evaluation, measurement, and verification, or EM&V, means the performance of studies and activities intended to evaluate the process of the utility's program delivery and oversight and to estimate and/or verify the estimated actual energy and demand savings, utility lost revenue, cost effectiveness, and other effects from demand-side programs[.]" Rule 4 CSR 240-20.093(7) provides for the hiring by the utility of an independent third-party evaluator and for the hiring by the Commission of an independent third-party auditor.

plan adopted as a result of GMO's April 1, 2015, Chapter 22 triennial compliance filing in Case No. EO-2015-0252.[52] Instead, GMO admits that it provided to the contractor, and that the contractor used the avoided costs in GMO's previous adopted preferred resource plan.[53] Staff wins because GMO's admissions make out a violation of the requirement of Rule 4 CSR 240-20.093(1)(F) that "[t]he utility shall use the same methodology used in its most recently adopted preferred resource plan to calculate its avoided costs[.]"

Administrative rules and regulations are interpreted under the same principles of construction as statutes.[54] Words are given their ordinary, plain meaning.[55] Where the language of the statute or rule is clear and unambiguous, there is no room for construction.[56] There is nothing ambiguous about the language of Rule 4 CSR 240-20.093(1)(F). The phrase "most recently adopted preferred resource plan" can only mean the preferred resource plan adopted next prior to the date upon which the avoided costs are calculated. "The rules of a state administrative agency duly promulgated pursuant to properly delegated authority have the force and effect of law and are binding upon the agency adopting them."[57] Staff has shown that it is entitled to summary determination.

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[52] *Answer,* ¶¶ 13 and 14.

[53] *Id.*

[54] ***McGough v. Director of Revenue,*** 462 S.W.3d 459, 462 (Mo. App., E.D. 2015).

[55] *Id.*

[56] ***Pennell v. State,*** ___ S.W.3d ___, ___, 2015 WL 2393272, 3 (Mo. App., E.D. 2015).

[57] ***State ex rel. Martin–Erb v. Missouri Com'n on Human Rights,*** 77 S.W.3d 600, 607 (Mo. banc 2002).

GMO's Affirmative Defenses:

Part of Staff's burden on its *Motion for Summary Determination* is to show "the non-viability" of Respondents' affirmative defenses.[58]

GMO's First Affirmative Defense:

GMO's first affirmative defense is that "[t]he Complaint fails to state a claim upon which relief may be granted and therefore must be dismissed."[59] A motion to dismiss for failure to state a claim tests only the legal sufficiency of the complaint.[60] All well-pleaded factual allegations in the complaint must be accepted as true and the facts must be liberally construed to support the complaint.[61] Complainants enjoy the benefit of all reasonable inferences.[62] The complaint should not be dismissed unless it shows no set of facts entitling it to relief.[63] A complaint under the Public Service Commission Law is not to be tested by the technical rules of pleading; if it fairly presents for determination some matter which falls within the jurisdiction of the Commission, it is sufficient.[64] This rule does not stand for the proposition that complaints filed with this Commission need not meet any pleading requirements nor that they are immune from dismissal for insufficiency. Rather, the case means that the factual allegations of an administrative complaint are generally to be judged against the standard of notice pleading rather than the stricter standard of fact pleading. The Eastern District of the

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[58] ***ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.***, 854 S.W.2d 371, 381 (Mo. banc 1993).

[59] *Answer,* ¶ 20.

[60] For this discussion, *see* J.R. Devine, ***Missouri Civil Pleading and Practice,*** Section 20-3 (1986).

[61] ***Nazeri v. Missouri Valley College,*** 860 S.W.2d 303, 306 (Mo. banc 1993).

[62] *Id.*

[63] *Id.*

[64] ***St. ex rel. Kansas City Terminal Railway Co. v. Public Service Commission,*** 308 Mo. 359, 372, 272 S.W. 957, 960 (banc 1925).

Missouri Court of Appeals has said the same thing:

> On appeal, petitioner contends that the charges stated for his dismissal in the letter from Chief Heberer were vague and indefinite. In support of this argument, however, he relies upon cases pertaining to criminal indictments and civil pleadings. These cases obviously deal with judicial proceedings, and they are not controlling in administrative proceedings. The charges made against a public employee in an administrative proceeding, while they must be stated specifically and with substantial certainty, do not require the technical precision of a criminal indictment or information. It is sufficient that the charges fairly apprise the officer of the offense for which his removal is sought.[65]

Staff has shown that GMO has admitted, in its *Answer,* that the data provided to the third-party contractor to calculate its Performance Incentive Award was not the data specifically required by Rule 4 CSR 240-20.093(1)(F). The *Complaint* undeniably states a claim under § 386.390.1 for violation of a Commission rule and this affirmative defense must fail.

GMO's Second Affirmative Defense:

GMO's second affirmative defense is that "[t]he Complaint cannot be maintained because GMO has performed its obligations under the Stipulation filed and approved in File No. EO-2012-0009 and it is in compliance with the Commission's Order approving the Stipulation, issued in the same file."[66] The short answer to this purported defense is that nothing contained in either the *2012 Stipulation* or the *2012 Order* excuses GMO's admitted violation of Rule 4 CSR 240-20.093(1)(F). Indeed, the *2012 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. Rule 4 CSR 240-20.093(1)(F) is not

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[65] ***Sorbello v. City of Maplewood,*** 610 S.W.2d 375, 376 (Mo. App., E.D. 1980); ***Schrewe v. Sanders,*** 498 S.W.2d 775, 777 (Mo. 1973); *and see* ***Giessow v. Litz,*** 558 S.W.2d 742, 749 (Mo. App.1977).

[66] *Answer,* ¶ 21.

mentioned in either the *2012 Stipulation* or the *2012 Order* and this affirmative defense must therefore fail.

GMO's Third Affirmative Defense:

GMO's third affirmative defense is that "[t]he Complaint cannot be maintained because the Complaint is an unlawful collateral attack upon the Commission's Order approving the Stipulation in File No. EO-2012-0009, in violation of Section 386.550, RSMo."[67] However, neither the *2012 Stipulation* nor the *2012 Order* even mentions Rule 4 CSR 240-20.093(1)(F); consequently, the enforcement of that rule can hardly be considered an "unlawful collateral attack" on the *2012 Order.*

It is true that § 386.550 prohibits collateral attacks on Commission orders:

> Section 386.550 states: "In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." "If a statutory review of a PSC order is unsuccessful, the order is final and cannot be attacked in a collateral proceeding." "So frequently have we held such orders not subject to collateral attack we need not elaborate upon the effect and meaning of these statutes." Section 386.550 "is declaratory of the law's solicitude for the repose of final judgments." "A judgment of a court having jurisdiction cannot be impeached collaterally."[68]

But that well-established rule has no reference here. The Commission's *2012 Order* and the *2012 Stipulation* it approves simply do not refer to Rule 4 CSR 240-20.093(1)(F). This affirmative defense must fail.

GMO's Fourth Affirmative Defense:

GMO's fourth affirmative defense is that "[t]he Complaint cannot be maintained because the Complaint requests relief that would violate and otherwise collaterally

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[67] *Id.,* ¶ 22.

[68] ***State ex rel. MoGas Pipeline LLC v. Public Service Com'n,*** 395 S.W.3d 562, 566 (Mo. App., W.D. 2013) (citations omitted).

attack GMO's approved tariffs for its MEEIA cycle 1 programs."[69] The tariffs in question are GMO's Mo. P.S.C. No. 1, Revised Sheets R-63 to R-64.21 (MEEIA Programs) which are a total of fifty (50) tariff sheets. Nowhere do these tariff sheets reference Rule 4 CSR 240-20.093(1)(F). Nowhere do they require the use of data from GMO's prior IRP filed on April 9, 2012, Case No. EO-2012-0324 or GMO's Notification of Preferred Resource Plan Change filed on January 17, 2014, in Case No. EO-2014-2010. Therefore, this purported affirmative defense must fail because it is legally insufficient.

GMO's Fifth Affirmative Defense:

GMO's fifth affirmative defense is that "[t]he Complaint fails to invoke the Commission's complaint jurisdiction and cannot be maintained since it fails to allege a "violation of any provision of law, or of any rule or order or decision of the commission," as required to maintain a complaint pursuant to Sections 386.390 and 386.400, RSMo."[70] On the contrary, the *Complaint* charges at ¶ 17 that "GMO's conduct described in Paragraphs 9 through 16, above, constitutes a violation of § 393.1075.3 and .4, RSMo., Commission Rule 4 CSR 240-20.093(1)(F), and the *2012 Order*." GMO's purported fifth affirmative defense is factually incorrect and must therefore fail.

Conclusion

Staff has demonstrated that it is entitled to Summary Determination. In its *Answer,* GMO has admitted a violation of Rule 4 CSR 240-20.093(1)(F). A violation of a Commission rule constitutes a claim under § 386.390.1. Staff has examined each of GMO's affirmative defenses in turn and has demonstrated that each is either factually

[69] *Answer,* ¶ 23.

[70] *Answer,* ¶ 24.

incorrect, factually unsupported, legally inadequate, or simply not an avoidance to Staff's *Motion for Summary Determination.* For that reason, the Commission should grant Staff's *Motion for Summary Determination.*

WHEREFORE, Staff prays that the Commission will grant summary determination of its Complaint filed herein and enter its order (1) finding that GMO has violated Commission Rule 4 CSR 240-20.093(1)(F) by providing incorrect inputs to its third-party EM&V contractor for use in calculating GMO's Performance Incentive Award under its Commission approved DSIM; and (2) requiring GMO to provide the correct avoided costs inputs to its third-party EM&V contractor; and granting such other and further relief as the Commission deems just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **5th day of February, 2016,** on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case, which date is not later than the date on which this pleading is filed with the Commission as required by Rule 4 CSR 240-2.117(1)(B), relating to Summary Determination.

/s/ Whitney Payne