

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

In the Matter of Union Electric Company d/b/a)	
Ameren Missouri's Filing to Implement)	
Regulatory Changes in Furtherance of Energy)	<u>Case No. EO-2012-0142</u>
Efficiency as allowed by MEEIA.)	
)	

**MOTION FOR VARIANCE DETERMINATIONS
AND MOTION FOR EXPEDITED TREATMENT**

COMES NOW the Staff of the Missouri Public Service Commission (“Staff”) and, due to the 120-day decision time frame of Rule 4 CSR 240-20.094(3),¹ moves the Commission to give Staff guidance as to how to proceed in this docket by determining as expeditiously as possible, ideally by February 23, 2012, (1) which variances, if any, from Rules 4 CSR 240-3.163, 3.164, 20.093, and 20.094 the Commission must grant Union Electric Company d/b/a Ameren Missouri before the Commission can approve Ameren Missouri’s proposed demand-side programs and proposed demand-side programs investment mechanism (“DSIM”); (2) whether Ameren Missouri has shown good cause for the Commission to make decisions on each of those variances; (3) whether the 120-day decision time frame of Rule 4 CSR 240-20.094(3) does not apply until after the Commission determines whether to grant each of those variances, or, if the Commission finds the time frame does apply, toll it until after it determines whether to grant the variances; and (4) for each required variance for which Ameren Missouri has not shown good cause, (i) order Ameren Missouri to do so expeditiously, (ii) order Staff to file its recommendation on Ameren Missouri’s good cause showings within five business days after each is made and, thereafter, (iii) promptly rule on whether to grant each variance.

¹ Rule 4 CSR 240-20.094(3) provides, in part, “The commission shall approve, approve with modification acceptable to the electric utility, or reject such applications for approval of demand-side program plans within one hundred twenty (120) days of the filing of an application”

Staff is not suggesting in this motion that the Commission grant Ameren Missouri any of these variances or that the Commission should approve Ameren Missouri's proposed demand-side programs or proposed DSIM. While, with the possible exception of its request to allow it to recover through its DSIM charges all costs associated with customers who opt out of energy efficiency programs, if the rules as written do not, Ameren Missouri thus far has not presented sufficient good cause to support these variances, requested and unrequested, Ameren Missouri may be able to do so with additional information. However, consideration of such additional information would necessarily require additional time. Staff would present its position on the propriety of each variance in its recommendations on Ameren Missouri's good cause showings.

Staff supports the creation and implementation of quality demand-side programs. Staff's goal with this pleading is not to obstruct implementation of demand-side programs, but to bring the benefits of energy efficiency to utilities, their customers and the general public in compliance with the law, including the Missouri Energy Efficiency Investment Act of 2009² ("MEEIA") and the Commission's rules to implement the MEEIA.

In support of its *Motion*, Staff states:

Background

The MEEIA became law on August 28, 2009. The MEEIA permits electric corporations to implement Commission-approved demand-side programs "with the goal of achieving all cost-effective demand-side savings." Based upon the legislature's mandate, the Commission initiated a rulemaking to implement the MEEIA.³ Several stakeholders, including Ameren Missouri, participated in the rulemaking, File No. EX-2010-0368. After the proper

² § 393.1075, RSMo Supp. 2011.

³ File No. EX-2010-0368, Commission's *Notice Finding Necessity for Rulemaking*, June 17, 2010.

comment period, where Ameren Missouri filed comments, a public hearing, at which Ameren Missouri participated, on February 9, 2011, after carefully considering the comments filed in the rulemaking, the Commission filed an *Order of Rulemaking* with the Office of the Missouri Secretary of State for each of the following proposed rules: 4 CSR 240-3.163, 3.164, 20.093, and 20.094 (*Orders of Rulemaking*).⁴ The rules became effective on May 30, 2011.

On January 20, 2012, Ameren Missouri filed its application, *Application to Approve DSIM Filing, Request for Variances and Motion to Adopt Procedural Schedule* (“*Application*”), for Commission approval of proposed demand-side programs and for authority to establish a Demand-Side Programs Investment Mechanism (“DSIM”) creating Case No. EO-2012-0142.

As part of its *Application*, Ameren Missouri specifically requests variances from the following provisions of the MEEIA rules: 4 CSR 240-20.093(2)(H), 4 CSR 240-20.093(2)(H)3, 4 CSR 240-20.093(1)(EE), 4 CSR 240-20.094(1)(Z), 4 CSR 240-3.163(1)(A), 4 CSR 240-20.093(1)(C), 4 CSR 240-20.094(1)(C), 4 CSR 240-3.163(1)(F)5, 4 CSR 240-20.093(1)(M)5, 4 CSR 240-20.094(1)(J)5, 4 CSR 240-20.093(1)(O), 4 CSR 240-3.163(1)(H), 4 CSR 240-20.093(1)(P), 4 CSR 240-3.163(1)(I), 4 CSR 240-20.093(1)(A), 4 CSR 240-20.093(1)(Q), 4 CSR 240-20.093(2)(M), and 4 CSR 240-3.163(1)(J). Ameren Missouri states in its *Application* that these requested variances are for four categories—to allow it to prospectively, not retrospectively, recover “net shared benefits”; to base the energy savings and costs of end-use measures to calculate the utility incentive component of its DSIM on a technical resource manual it has created, not on the actual performance of its demand-side programs; to allow it to recover through its DSIM charges all costs associated with customers who opt out of energy efficiency programs, if the rules as written do not; and to not restrict the customer-utility sharing of benefits of demand-side

⁴ File No. EX-2010-0368, *Memorandum*, February 9, 2011.

programs to be a sharing of the annual benefits and, instead, allow it to be a sharing of the lifetime benefits.⁵ While Ameren Missouri provides some qualitative rationales for the good cause required by Rules 4 CSR 240-20.093(13) and 4 CSR 240-0.094(9), they are insufficient.

Ameren Missouri's proposed prospective shared benefit performance incentive component of its proposed DSIM does not comply with Rule 4 CSR 240-20.093. For the Commission to find a variance from Rule 4 CSR 240-20.093 is necessary to avoid a manifest injustice—the standard for good cause which is discussed below—Ameren Missouri's proposed prospective shared benefit performance incentive component of its proposed DSIM must quantitatively be shown to be superior to a baseline DSIM that complies with Rule 4 CSR 240-20.093. Ameren Missouri has not even attempted to do that yet.

Ameren Missouri has not requested all the variances the Commission would need to grant before the Commission could approve Ameren Missouri's proposed demand-side programs. Based on Staff's limited review, Ameren Missouri has not requested variances from Rules 4 CSR 240-20.094(3)(D), 4 CSR 240-20.094(4), 4 CSR 240-20.094(2)(A), and 4 CSR 240-3.164(4). Variances from each of these rules would be required to give Ameren Missouri the demand-side programs "implementation flexibility" that it desires.⁶ Ameren Missouri has not requested variances from the annual demand savings targets for each demand-side program in Rules 4 CSR 240-3.164(2)(C)9 and 4 CSR 240-20.094(3)(A). Although it acknowledges in its 2013–2015 Energy Efficiency Plan the Commission's non-mandatory annual energy savings and annual demand savings goals that start with 2012,⁷

⁵ *Application*, para. 12 at pp. 6-11.

⁶ Ameren Missouri 2013–2015 Energy Efficiency Plan, Section 3.5 Implementation Flexibility, pp. 60–64.

⁷ Ameren Missouri 2013–2015 Energy Efficiency Plan, Table 3.2, p. 41. "Note: Ameren Missouri considers 2012 as a MEEIA first docket filing year. Consequently, for purposes of comparing its proposed annual RAP load reduction estimates for 2013 – 2015 to MEEIA rulemaking annual goals, Ameren Missouri considers the MEEIA 2012 goal of 0.3% of total annual energy and 1.0% of annual peak demand to actually begin in 2013. Subsequent MEEIA annual load reduction goals would also be pushed back one year."

Ameren Missouri has not requested a variance from the rule where those goals are established—Rule 4 CSR 240-20.094(2). In that rule the Commission states, “The commission shall also use the greater of the cumulative realistic achievable energy savings and demand savings as determined through the utility’s market potential study or the following cumulative demand-side savings goals as a guideline to review progress toward an expectation that the electric utility’s demand-side programs can achieve a goal of all cost-effective demand-side savings:” Staff is not suggesting now that the Commission grant any of these variances or that the Commission should approve Ameren Missouri’s proposed demand-side programs or its proposed DSIM.

Staff requests the Commission to expeditiously decide, before it addresses the merits of Ameren Missouri’s proposed demand-side programs and proposed DSIM, which, if any, variances to grant for Ameren Missouri’s proposed demand-side programs and proposed DSIM. Specifically, Staff requests the Commission at this time (1) determine which variances, if any, from Rules 4 CSR 240-3.163, 3.164, 20.093, and 20.094 the Commission must grant Ameren Missouri before the Commission can approve Ameren Missouri’s proposed demand-side programs and proposed DSIM; (2) determine whether Ameren Missouri has shown good cause for the Commission to make decisions on each of those variances; (3) find the 120-day decision time frame of Rule 4 CSR 240-20.094(3)⁸ does not apply until after the Commission determines whether to grant each of those variances, or, if the Commission finds the time frame does apply, toll it until after it determines whether to grant the variances; (4) for each required variance for which Ameren Missouri has not shown good cause, (i) order Ameren Missouri to do so expeditiously, (ii) order Staff to file a recommendation on Ameren Missouri’s good cause

⁸ Rule 4 CSR 240-20.094(3) provides, in part, “The commission shall approve, approve with modification acceptable to the electric utility, or reject such applications for approval of demand-side program plans within one hundred twenty (120) days of the filing of an application”

showings within five business days after each is made and, thereafter, (iii) promptly rule on whether to grant each variance. Again, Staff is not suggesting in this motion that the Commission grant Ameren Missouri any of these variances or that the Commission should approve Ameren Missouri's proposed demand-side programs or proposed DSIM. While, with the possible exception of its request to allow it to recover through its DSIM charges all costs associated with customers who opt out of energy efficiency programs, if the rules as written do not, Ameren Missouri thus far has not presented sufficient good cause to support these variances, requested and unrequested, Ameren Missouri may be able to present additional information to justify them. Staff would present its position on the propriety of each variance in its recommendations on Ameren Missouri's good cause showings.

Ameren Missouri's MEEIA Rulemaking Position

In considering the variances Ameren Missouri requests, it is important to review the various filings Ameren Missouri made in the Commission's MEEIA rulemaking. Essentially, Ameren Missouri is seeking through variances to rewrite the rules to conform to the versions of the proposed rules it supported in the rulemaking, but that the Commission rejected by the rules it adopted. What Ameren Missouri seeks here is analogous to the Commission having issued a rule requiring the game to be Bridge and Ameren Missouri proposing variances to make the game Pinochle instead, after the Commission had considered Pinochle in the rulemaking and rejected it in favor of Bridge. As explained below, Ameren Missouri is requesting a shared benefit incentive component as part of its DSIM. Its shared benefit incentive component is not based on actual annual energy and demand savings levels as retrospectively measured and verified through evaluation, measurement and verification (EM&V) of MEEIA programs. Instead, Ameren Missouri is asking to prospectively collect an incentive on

the *expected* results of its MEEIA programs as soon as the programs start, *i.e.*, based on the annual energy and demand savings levels it has collected in a “technical resource manual” (“TRM”) it has assembled.

Similar to the approach it takes here, Ameren Missouri argued, unsuccessfully, in the rulemaking that the prospective recovery of lost revenues and performance incentives should be allowed in a DSIM if they are tracked for later true-up.

Ameren Missouri argued in the rulemaking that Rule 4 CSR 240-20.093(2)(G) should provide that:

“lost revenues should be recovered on a one-for-one basis and should not be subject to meeting any targets. It is inconsistent for the Commission to approve a three-year plan with a budget, targets, cost recovery, and incentives, then only allow the lost revenue component to be retrospective. Customer rates should be updated to include the Commission-approved plan, which would include forecasts for cost recovery, lost revenues and incentives.”⁹

Staff provides this example to illustrate that the relief Ameren Missouri seeks in its variances here is the same type of relief that Ameren Missouri, and other stakeholders, promoted, and the Commission considered and rejected, during the Commission’s MEEIA rulemaking. Ameren Missouri argues in this case that the Commission should allow it to prospectively collect upfront part of the annual shared benefits from its demand-side programs. Because Rule 4 CSR 240-20.093 contemplates utility incentives be collected on a retrospective basis only, there is no consideration in the MEEIA rules for the prospective recovery of a utility performance incentive as part of its DSIM through a tracker, rider (tariffed rates), or any other means.

Staff consistently advocated during the MEEIA rulemakings, that retrospective recovery is appropriate because the MEEIA states that investments in demand-side resources should be

⁹ File No. EX-2010-0368, Missouri Energy Development Association Comments to Proposed Rules to Implement the Missouri Energy Efficiency Investment Act (SB 376), paragraph 6, p. 5.

valued on an equivalent basis as investments in supply-side resources. A utility’s recovery of its investment in a supply-side resource does not begin, *i.e.*, it lags, until after that resource is “fully operational and used for service.”¹⁰ In addition, the MEEIA directs that “the Commission shall . . . [p]rovide timely earnings opportunities associated with cost-effective measureable and verifiable efficiency savings.” Savings are measured and verified through the EM&V process.

Variances Ameren Missouri Requests

As stated above, in its *Application* Ameren Missouri requests rule variances for four categories of relief—to allow it to prospectively, not retrospectively, recover “net shared benefits”; to base the energy savings and costs of end-use measures to calculate the utility incentive component of its DSIM on a technical resource manual it has created, not on the actual performance of its demand-side programs; to allow it to recover through its DSIM charges all costs associated with customers who opt out of energy efficiency programs, if the rules as written do not; and to not restrict the customer-utility sharing of benefits of demand-side programs to be a sharing of the annual benefits and, instead, allow it to be a sharing of the lifetime benefits.¹¹ For these categories, Ameren Missouri requests variances from the following rules.

Prospective Recovery of “net shared benefits”

To the extent that, as written, the following rules would allow Ameren Missouri to recover retrospectively only a portion of the net shared benefits of its proposed demand-side programs, Ameren Missouri requests variances from them: Rules 4 CSR 240-20.093(2)(H), 4 CSR 240-20.093(2)(H)3, 4 CSR 240-20.093(1)(EE), 4 CSR 240-20.094(1)(Z),

¹⁰ §393.135, RSMo 2000.

¹¹ *Application*, para. 12, pp. 6-11.

4 CSR 249-3.163(1)(A), 4 CSR 249-20.093(1)(C), 4 CSR 240.094(1)(C),
4 CSR 240-3.163(1)(F)5, 4 CSR 240-20.093(1)(M)5, and 4 CSR 240-20.094(1)(J)5.¹²

Ameren Missouri proposes to recover through its proposed DSIM a portion of the net shared benefits on a *prospective* basis; in particular, it requests that “the minimum sharing percent [be] 15.4% [of net shared benefits] ... for [energy savings] performance levels from zero through 70 percent [of the Commission-approved energy savings target].¹³ Ameren Missouri alleges, “This minimum sharing percentage provides adequate fixed cost recovery, but any performance below 70 percent would yield no earnings opportunity.”¹⁴ However, as Ameren Missouri notes in its *Application*,¹⁵ Rule 4 CSR 240-20.093(2)(H)3 requires, “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.” (Emphasis added.) While Ameren Missouri has provided quantifications of the net shared benefits it anticipates may occur,¹⁶ it has not provided good cause—quantification of a comparison of its proposal with an appropriate rule compliant proposal—for why the Commission should grant these variances.

EM&V—evaluation, measurement and verification—after the fact balances the risk of Ameren Missouri’s demand-side programs on both Ameren Missouri and its customers. Basing the shared benefits of a program on EM&V, as set out in the rule, ensures that Ameren Missouri is not just going through the motions of particular demand-side programs, but ensures that both Ameren Missouri and its customers benefit from them.

¹² *Application*, para. 12. A., pp. 6-7.

¹³ Ameren Missouri 2013–2015 Energy Efficiency Plan, p. 29, lines 3–4.

¹⁴ Ameren Missouri 2013–2015 Energy Efficiency Plan, p. 29, lines 4–6.

¹⁵ Para. 12.A.2, p. 6.

¹⁶ Ameren Missouri 2013–2015 Energy Efficiency Plan, Table 2.2, p. 26.

Staff has consistently advocated that *retrospective* recovery of net shared benefits is appropriate because the MEEIA states that investments in demand-side resources should be valued on a basis equivalent to investments in supply-side resources. Utilities do not begin to recover their supply-side resource investments until after that resource is “fully operational and used for service,” *i.e.*, the recovery lags the investment.¹⁷ The MEEIA directs that “the Commission shall . . . [p]rovide timely earnings opportunities associated with cost-effective measureable and verifiable efficiency savings.” Savings are measured and verified through EM&V.

Technical Resource Manual

To allow Ameren Missouri to base the energy savings and costs of end-use measures to calculate the utility incentive component of its DSIM on a technical resource manual¹⁸ it has created, not on the actual performance of its demand-side programs, Ameren Missouri requests the Commission grant it a variance from Rule 4 CSR 240-20.093(2)(H) to permit it to do so.¹⁹ The purpose of this request is to permit Ameren Missouri to use prospectively its current estimate of energy and demand savings based on information in its technical resource manual for determining its proposed 20.2 percent portion of net shared benefits, rather than the retrospective actual energy and demand savings that are measured and verified through EM&V, the Commission’s rule requires.²⁰ As stated above, Rule 4 CSR 240-20.093(2)(H)3 requires, “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

¹⁷ §393.135, RSMo 2000.

¹⁸ Ameren Missouri 2013–2015 Energy Efficiency Plan, Appendix A – Technical Resource Manual, p. 1 states: “The Ameren Missouri Technical Resource Manual (TRM) was developed to establish deemed measure level values and/or protocols for measures that cannot be deemed. These values and protocols will be used prospectively for the three year implementation cycle”

¹⁹ *Application*, para. 12. B., p. 9.

²⁰ Ameren Missouri 2013–2015 Energy Efficiency Plan, p. 13.

must be measured and verified through EM&V.” (Emphasis added.) Also, as stated above, *retrospective* recovery of net shared benefits is appropriate because the MEEIA states that investments in demand-side resources should be valued on a basis equivalent to investments in supply-side resources.

Opt-Out Customers

If the MEEIA rules as written do not allow Ameren Missouri to recover through its DSIM charges all costs associated with customers who opt out of energy efficiency programs, then Ameren Missouri requests variances from the definition of “DSIM rate” in Rules 4 CSR 240-20.093(1)(O) and 4 CSR 240-3.163(1)(H), and from the definition of “DSIM revenue requirement” in Rules 4 CSR 240-20.093(1)(P) and 4 CSR 240-3.163(1)(I). Ameren Missouri believes that if “[t]aken together and without a variance, these definitions would mean that only charges reflected in a DSIM approved as part of a MEEIA filing could be included on a separate energy efficiency line item on a customer’s bill; [h]owever, the MEEIA statute allows certain customers to opt-out of all energy efficiency charges, which is more than just the cost of Ameren Missouri’s DSIM.”²¹ This is a new argument that was not raised during the MEEIA rulemaking or elsewhere before, the merits of which Staff is exploring.

Lifetime Benefits Sharing

To the extent Rules 4 CSR 240-3.163(1)(A), 4 CSR 240-20.093(1)(A), 4 CSR 240-20.094(1)(C), 4 CSR 240-20.093(1)(Q), 4 CSR 240-20.093(2)(M), 4 CSR 240-3.163(1)(J), 4 CSR 240-20.093(2)(H), 4 CSR 240-20.093(1)(EE), and 4 CSR 240-20.094(1)(Z) require the sharing of net benefits be done on an annual basis rather than a lifetime basis, Ameren Missouri requests the Commission grant it variances from these rules because, according to Ameren Missouri, “[Ameren Missouri’s] analysis shows that it is only logical to share the lifetime net

²¹ *Application*, para. 12. C., pp. 9–10.

benefits.”²² Without more, this is an insufficient basis upon which to grant his variance. Staff notes that Ameren Missouri’s proposal moves its recovery of net shared benefits earlier in time relative to using an annual basis.

Variations Ameren Missouri is Not Requesting

Based on Staff’s limited review, Ameren Missouri requires seven variances for its proposed demand-side programs that Ameren Missouri is not requesting in its *Application*-variances it should have requested, and received, prior to filing its *Application*. Ameren Missouri should have requested variances from Rules 4 CSR 240-20.094(3)(D), 4 CSR 240-20.094(4), 4 CSR 240-20.094(2)(A), and 4 CSR 240-3.164(4), to give Ameren Missouri the demand-side programs “implementation flexibility” that it desires.²³ Ameren Missouri should have requested variances from the annual demand savings targets for each demand-side program in Rules 4 CSR 240-3.164(2)(C)9 and 4 CSR 240-20.094(3)(A). Further, Ameren Missouri should have requested a variance from Rule 4 CSR 240-20.094(2) to relieve it from the start date of 2012 of the Commission’s non-mandatory annual energy savings and annual demand savings goals.²⁴ In that rule the Commission states, “(A) The commission shall use the greater of the annual realistic achievable energy savings and demand savings as determined through the utility’s market potential study or the following incremental annual demand-side savings goals as a guideline to review progress toward an expectation that the electric utility’s demand-side programs can achieve a goal of all cost-effective demand-side savings: . . .” and “(B) The commission shall also use the greater of the cumulative realistic

²² *Application*, para. 12. D., pp. 10–11.

²³ Ameren Missouri 2013–2015 Energy Efficiency Plan, Section 3.5, Implementation Flexibility, pp. 60–64.

²⁴ Ameren Missouri 2013–2015 Energy Efficiency Plan, Table 3.2, p. 41. “Note: Ameren Missouri considers 2012 as a MEEIA first docket filing year. Consequently, for purposes of comparing its proposed annual RAP load reduction estimates for 2013 – 2015 to MEEIA rulemaking annual goals, Ameren Missouri considers the MEEIA 2012 goal of 0.3% of total annual energy and 1.0% of annual peak demand to actually begin in 2013. Subsequent MEEIA annual load reduction goals would also be pushed back one year.”

achievable energy savings and demand savings as determined through the utility’s market potential study or the following cumulative demand-side savings goals as a guideline to review progress toward an expectation that the electric utility’s demand-side programs can achieve a goal of all cost-effective demand-side savings:” Staff cannot state its position on whether the Commission should grant these variances until after Ameren Missouri provides what Ameren Missouri considers to be the good cause required for the Commission to grant them.

Unrequested Variances Related to Demand-Side Plan Implementation Flexibility

These unrequested variances are needed for Ameren Missouri’s request for broad discretion—“flexibility”—in managing its programs. In its 2013 - 2015 Energy Efficiency Plan Ameren Missouri proposes it have broad discretion—“flexibility”—to manage its demand-side programs at the demand-side program and portfolio level that is well beyond that contemplated for a utility in the Commission’s MEEIA rules. While Staff does not agree with every statement in the following quotes from Ameren Missouri’s plan, in it Ameren Missouri specifically states:

Proposed Program Tariffs

Historically, the primary purpose of a tariff was to provide information to customers about the specifics of an Ameren Missouri program that included payment of incentives to customers. Today, electric utilities across the nation nearly universally provide customers with that type of information via their websites. Because of the website technology, there is no longer a need for extremely detailed tariffs for energy efficiency programs. In fact, a customer normally would have to search for a specific Ameren Missouri energy efficiency program tariff via a web browser search.

More importantly, however, the Ameren Missouri proposed business model for energy efficiency is based upon maximizing the net benefits of energy efficiency attributable to Ameren Missouri customers. Such a business model requires that the Company move nimbly to react to markets. That may mean changing incentive levels for certain energy efficiency measures. It may mean changing delivery mechanisms for certain products or services. Ultimately, it means managing an energy efficiency portfolio such that costs are as low as possible and customer benefits are as high as possible.²⁵

²⁵ Ameren Missouri 2013–2015 Energy Efficiency Plan, p. 62, lines 4–18.

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Portfolio Flexibility

While the information found within the MEEIA program templates (Appendix B) may change and update as market conditions warrant, the overall kWh goals for the 2013-2015 implementation period will remain fixed. Ameren Missouri recommends that the Commission both approve and encourage portfolio flexibility, which allows for adjustment of portfolio elements (program costs, targets, incentives, etc., in addition to stopping or starting programs), as needed to achieve portfolio success. Portfolio success is defined as achieving total portfolio level kWh and kW load reductions within the total portfolio budget parameters specified in the 2013-2015 MEEIA implementation plan.²⁶

Rule 4 CSR 240-20.094(3)(D)

Rule 4 CSR 240-20.094(3)(D) provides, “Utilities shall file and receive approval of associated tariff sheets prior to implementation of demand-side programs.” Although Ameren Missouri has filed exemplar tariff sheets for its *Business Energy Efficiency Program* and for its *Residential Energy Efficiency Program*, it did not file exemplar tariff sheets for individual business or residential demand-side programs. This rule does not require Ameren Missouri to file exemplar tariff sheets for its proposed demand-side programs with its *Application*, although doing so would be helpful. However, Ameren Missouri requires a variance from Rule 4 CSR 240-20.094(3)(D) for the broad discretion describes in its plan for managing the implementation of its demand-side programs.

Rules 4 CSR 240-20.094(4), 4 CSR 240-20.094(4)(A), and 4 CSR 240-3.164(4)

Rule 4 CSR 240-20.094(4) governs applications for approval of modifications to electric utility demand-side programs. Subpart (A) of that rule provides, “For any program design modifications approved by the commission, the utility shall file for and receive approval of associated tariff sheets prior to implementation of approved modifications.” A companion rule, Rule 4 CSR 240-3.164(4), provides, “When an electric utility files to modify demand-side

²⁶ Ameren Missouri 2013–2015 Energy Efficiency Plan, p. 64, lines 12–21.

programs as described in 4 CSR 240-20.094(4), the electric utility shall file a complete explanation for and documentation of the proposed modifications to each of the filing requirements of section [4 CSR 240-3.164](2).” Although Ameren Missouri’s statements in its plan regarding plan implementation flexibility make it clear it wishes to act in a way not allowed by Rules 4 CSR 240-20.094(4), 4 CSR 240-20.094(4)(A) and 4 CSR 240-3.164(4), *i.e.*, not to be required to file a “complete explanation for and documentation of the proposed modifications” or to obtain Commission approval of the tariff sheets associated with the program modifications when they are proposed, Ameren Missouri is not requesting variances from Rules 4 CSR 240-20.094(4) and Rule 4 CSR 240-3.164(4), nor does Ameren Missouri suggest that if the Commission approves its plan, then by doing so the Commission would have found that Ameren Missouri has complied with those rules.

Rules 4 CSR 240-3.164(2)(C)9 and 4 CSR 240-20.094(3)(A)

In Appendix B of its 2013 - 2015 Energy Efficiency Plan Ameren Missouri includes annual kWh savings targets (*i.e.*, annual energy savings targets) for each demand-side program it proposes, but it does not include annual kW savings targets (*i.e.*, annual demand savings targets) for each. Rule 4 CSR 240-3.164(2)(C)9 requires a “[d]etailed description of each proposed demand-side program to include at least: ... Proposed annual demand savings targets and cumulative demand savings targets;” Further, Rule 4 CSR 240-20.094(3)(A), in part, provides, “the commission shall approve demand-side programs or program plans, and annual demand and energy savings targets for each demand-side program it approves,” Ameren Missouri has not requested variances from these rules, although it has not provided annual kW savings targets (annual demand savings targets) for each of the demand-side programs it proposes.

4 CSR 240-20.094(2)

This rule, in its entirety, follows:

(2) Guideline to Review Progress Toward an Expectation that the Electric Utility's Demand-Side Programs Can Achieve a Goal of all Cost-Effective Demand-Side Savings. The fact that the electric utility's demand-side programs do not meet the incremental or cumulative annual demand-side savings goals established in this section may impact the utility's DSIM revenue requirement but is not by itself sufficient grounds to assess a penalty or adverse consequence for poor performance.

(A) The commission shall use the greater of the annual realistic achievable energy savings and demand savings as determined through the utility's market potential study or the following incremental annual demand-side savings goals as a guideline to review progress toward an expectation that the electric utility's demand-side programs can achieve a goal of all cost-effective demand-side savings:

1. For 2012: three-tenths percent (0.3%) of total annual energy and one percent (1.0%) of annual peak demand;
2. For 2013: five-tenths percent (0.5%) of total annual energy and one percent (1.0%) of annual peak demand;
3. For 2014: seven-tenths percent (0.7%) of total annual energy and one percent (1.0%) of annual peak demand;
4. For 2015: nine-tenths percent (0.9%) of total annual energy and one percent (1.0%) of annual peak demand;
5. For 2016: one-and-one-tenth percent (1.1%) of total annual energy and one percent (1.0%) of annual peak demand;
6. For 2017: one-and-three-tenths percent (1.3%) of total annual energy and one percent (1.0%) of annual peak demand;
7. For 2018: one-and-five-tenths percent (1.5%) of total annual energy and one percent (1.0%) of annual peak demand;
8. For 2019: one-and-seven-tenths percent (1.7%) of total annual energy and one percent (1.0%) of annual peak demand; and
9. For 2020 and for subsequent years, unless additional energy savings and demand savings goals are established by the commission: one-and-nine-tenths percent (1.9%) of total annual energy and one percent (1.0%) of annual peak demand each year:

(B) The commission shall also use the greater of the cumulative realistic achievable energy savings and demand savings as determined through the utility's market potential study or the following cumulative demand-side savings goals as a guideline to review progress toward an expectation that the electric utility's demand-side programs can achieve a goal of all cost-effective demand-side savings:

1. For 2012: three-tenths percent (0.3%) of total annual energy and one percent (1.0%) of annual peak demand;

2. For 2013: eight-tenths percent (0.8%) of total annual energy and two percent (2.0%) of annual peak demand;
3. For 2014: one-and-five-tenths percent (1.5%) of total annual energy and three percent (3.0%) of annual peak demand;
4. For 2015: two-and-four-tenths percent (2.4%) of total annual energy and four percent (4.0%) of annual peak demand;
5. For 2016: three-and-five-tenths percent (3.5%) of total annual energy and five percent (5.0%) of annual peak demand;
6. For 2017: four-and-eight-tenths percent (4.8%) of total annual energy and six percent (6.0%) of annual peak demand;
7. For 2018: six-and-three-tenths percent (6.3%) of total annual energy and seven percent (7.0%) of annual peak demand;
8. For 2019: eight percent (8.0%) of total annual energy and eight percent (8.0%) of annual peak demand; and
9. For 2020 and for subsequent years, unless additional energy savings and demand savings goals are established by the commission: nine-and-nine-tenths percent (9.9%) of total annual energy and nine percent (9.0%) of annual peak demand for 2020, and then increasing by one-and-nine-tenths percent (1.9%) of total annual energy and by one percent (1.0%) of annual peak demand each year after 2020.

Despite the rule starting with the year 2012 with a listing of “incremental annual demand-side savings goals” and “cumulative demand-side savings goals” to be used as guidelines “to review progress toward an expectation that the electric utility’s demand-side programs can achieve a goal of all cost-effective demand-side savings,” in Table 3.2 on page 41 of its plan, Ameren Missouri proposes to shift the goals for annual demand-side savings in the rule by one year to start in 2013 rather than 2012, without seeking a variance from the Commission to allow it to do so. That this is Ameren Missouri’s intent is expressed in the following note which appears in Table 3.2:

Note: Ameren Missouri considers 2012 as a MEEIA first docket filing year. Consequently, for purposes of comparing its proposed annual RAP load reduction estimates for 2013-2015 to MEEIA rulemaking annual goals, Ameren Missouri considers the MEEIA 2012 goal of 0.3% of total annual energy and 1.0% of annual peak demand to actually begin in 2013. Subsequent MEEIA annual load reduction goals would also be pushed back one year.

Good Cause

Although the term “good cause” is frequently used in the law,²⁷ Rules 4 CSR 240-3.163 (11), 4 CSR 240-3.164(6), 4 CSR 240-20.093(13) and 4 CSR 240-20.094(9) do not define it. The rules simply state, “Variances. Upon request and for good cause shown, the commission may grant a variance from any provision of this rule.” Therefore, it is appropriate to resort to the dictionary to determine the term’s ordinary meaning.²⁸ “Good cause” “generally means a substantial reason amounting in law to a legal excuse for failing to perform an act required by law.”²⁹ Similarly, “good cause” has also been judicially defined as a “substantial reason or cause which would cause or justify the ordinary person to neglect one of his [legal] duties.”³⁰ Similarly, it can refer “to a remedial purpose and is to be applied with discretion to prevent a manifest injustice or to avoid a threatened one.”³¹

Not just any cause or excuse will do. To constitute “good cause,” the reason or legal excuse given “must be real not imaginary, substantial not trifling, and reasonable not whimsical...”³² Moreover, some legitimate factual showing is required, not just the mere conclusion of a party or his attorney.³³

Neither in its *Application*, nor in its plan, with the possible exception of its request to allow it to recover through its DSIM charges all costs associated with customers who opt out of

²⁷ *State v. Davis*, 469 S.W.2d 1, 5 (Mo. 1971).

²⁸ *See State ex rel. Hall v. Wolf*, 710 S.W.2d 302, 303 (Mo. App. E.D. 1986) (In absence of legislative definition, court used dictionary to ascertain the ordinary meaning of the term “good cause” as used in a Missouri statute.); *Davis*, 469 S.W.2d at 4-5.

²⁹ *Black’s Law Dictionary*, p. 692 (6th ed. 1990).

³⁰ *Graham v. State*, 134 N.W. 249, 250 (Neb. 1912). Missouri appellate courts have also recognized and applied an objective “ordinary person” standard. *See Central Mo. Paving Co. v. Labor & Indus. Relations Comm’n*, 575 S.W.2d 889, 892 (Mo. App. W.D. 1978) (“[T]he standard by which good cause is measured is one of reasonableness as applied to the average man or woman.”)

³¹ *Bennett v. Bennett*, 938 S.W.2d 952 (Mo. App. S.D. 1997).

³² *Belle State Bank v. Indus. Comm’n*, 547 S.W.2d 841, 846 (Mo. App. S.D. 1977). *See also Barclay White Co. v. Unemployment Compensation Bd.*, 50 A.2d 336, 339 (Pa. 1947) (To show good cause, reason given must be real, substantial, and reasonable.).

³³ *See generally Haynes v. Williams*, 522 S.W.2d 623, 627 (Mo. App. E.D. 1975).

energy efficiency programs, if the rules as written do not, has Ameren Missouri provided “good cause” for the Commission to consider when deliberating whether to grant it variances from the Commission’s MEEIA rules.

Ameren Missouri was aware Staff expected Ameren Missouri to support its variance requests. In discussions and correspondence between Staff and Ameren Missouri on November 22, 2011, December 9, 2011 and January 19, 2012, Staff strongly encouraged Ameren Missouri to request variances from the Commission’s MEEIA rules before submitting an application seeking approval of its proposed demand-side programs and proposed DSIM, and to provide quantitative analysis supporting the need for the variance(s) at that time. It is Staff’s position that, with the possible exception of its request to allow it to recover through its DSIM charges all costs associated with customers who opt out of energy efficiency programs, if the rules as written do not, Ameren Missouri has not provided the Commission good cause to grant any variance; therefore, Staff moves the Commission to (1) order Ameren Missouri to expeditiously to provide good cause to support each of the variances the Commission finds are required for Ameren Missouri’s proposed demand-side programs and proposed DSIM, requested or not, (2) order Staff to file its recommendation on those variances within five business days after Ameren Missouri makes its “good cause” filing and, thereafter, (3) expeditiously rule on the variances. Part of Ameren Missouri’s showing of “good cause” should include providing a baseline DSIM model that complies with the rules and an explanation of why an alternative DSIM model is necessary to avoid a manifest injustice.

Good Cause for Expedited Treatment

Rule 4 CSR 240-2.080(14) provides:

(14) Any request for expedited treatment shall include the words “Motion for Expedited Treatment” in the title of the pleading. The pleading shall also set out with particularity the following:

(A) The date by which the party desires the commission to act;

(B) The harm that will be avoided, or the benefit that will accrue, including a statement of the negative effect, or that there will be no negative effect, on the party’s customers or the general public, if the commission acts by the date desired by the party; and

(C) That the pleading was filed as soon as it could have been or an explanation why it was not.

Staff is filing its *Motion for Commission Determinations on Variances* as soon as it could. The *Application* in this case is voluminous, as is the supporting information Ameren Missouri provided to Staff. It has taken Staff time to sufficiently review both and to file this pleading. Staff requests the Commission act as expeditiously on this pleading as possible, because the scope of Staff’s analysis and response to Ameren Missouri’s *Application* will be determined by how the Commission rules. Staff requests the Commission shorten response times to Staff’s *Motion for Commission Determinations on Variances* and, ideally, rule on it by February 23, 2012. This is because how the Commission rules will affect the time Staff will have to process this case and, therefore, the scope and quality of Staff’s analysis and response to Ameren Missouri’s *Application*; to the extent the Commission may rely on Staff’s response in ruling on Ameren Missouri’s *Application*, delay in ruling on Staff’s *Motion for Commission Determinations on Variances* may adversely affect Ameren Missouri’s customers and the general public. If the Commission does not act expeditiously Staff will undertake the broadest scope in responding to Ameren Missouri’s *Application*.

Relief Staff Requests

Rule 4 CSR 240-20.094(3) provides, “The commission shall approve, approve with modification acceptable to the electric utility, or reject such applications for approval of demand-side program plans within one-hundred twenty (120) days of the filing of an application under this section only after providing an opportunity for a hearing.” Staff is concerned with the abilities of the Commission and Staff to conduct a meaningful review of Ameren Missouri’s *Application* and associated required variances, and that the Commission will not have an adequate time to determine whether to grant the necessary variances, evaluate the proposed demand-side programs and proposed DSIM in light of its determination on those variances, and then approve, modify or reject the proposed demand-side programs and DSIM, even within one-hundred eighty (180) days.

It would be impracticable to interpret the 120-day decision time frame stated in 4 CSR 240-20.094(3) as contemplating the Commission is to consider and rule on the variance requests within that time frame. Certainly, the time frame does not include the requirement of Staff to identify variances from the rule that Ameren Missouri did not request, and then wait for Ameren Missouri to supplement its *Application*. Staff cannot efficiently and effectively review and evaluate Ameren Missouri’s *Application* until the Commission decides the scope of the allowed variances. The multitude of permutations Staff would have to consider if some, all, or none of the variances were granted would result in an insurmountable barrier to a thorough review, evaluation and a comprehensive report concerning Ameren Missouri’s *Application*. To review and evaluate the case without the variances decided upfront essentially results in Ameren Missouri putting the case before the Commission as an “all or nothing” request.

The Commission should not, nor did the rule intend to, box the Commission into such a corner. The rule allows the Commission to approve modifications.

As, with the possible exception of its request to allow it to recover through its DSIM charges all costs associated with customers who opt out of energy efficiency programs, if the rules as written do not, Ameren Missouri has not provided good cause to support the variances it is requesting and has not requested all the variances its proposed demand-side programs and proposed DSIM would require for the Commission to approve them, the Commission should find that Ameren Missouri's filing is deficient and that the 120-day time frame for decision has not yet begun. Alternatively, Staff believes the 120-day decision time frame was established with the expectation that a utility's MEEIA filing would comply with the Commission's MEEIA rules, and that any variances from those rules would necessarily need to be obtained prior to the utility making its MEEIA filing. Should the Commission find it must decide which MEEIA variances to grant Ameren Missouri, requested and not, prior to proceeding with this case, such a finding is good cause to extend the 120-day decision time frame, if the Commission determines the 120 days has started.

WHEREFORE, Staff moves the Commission to determine as expeditiously as possible, ideally by February 23, 2012, (1) which variances, if any, from Rules 4 CSR 240-3.163, 3.164, 20.093, and 20.094 the Commission must grant Ameren Missouri before the Commission can approve Ameren Missouri's proposed demand-side programs and proposed DSIM; (2) whether Ameren Missouri has shown good cause for the Commission to make decisions on each of those variances; (3) the 120-day decision time frame of Rule 4 CSR 240-20.094(3) does not apply until after the Commission determines whether to grant each of those variances, or, if the Commission finds the time frame does apply, toll it until after it determines whether to

grant the variances; (4) and for each required variance for which Ameren Missouri has not shown good cause, (i) order Ameren Missouri to do so expeditiously, (ii) order Staff to file its recommendation on Ameren Missouri's good cause showing within five business days after each is made and, thereafter, (iii) promptly rule on whether to grant each variance. As stated above, Staff is not suggesting in this motion that the Commission grant Ameren Missouri any of these variances or that the Commission should approve Ameren Missouri's proposed demand-side programs or proposed DSIM. While Ameren Missouri thus far has not presented sufficient good cause to support these variances, requested and unrequested, Ameren Missouri may be able to present additional information to justify the variances not expressly prohibited by the MEEIA. Staff would present its position on the propriety of each variance in its recommendations on Ameren Missouri's good cause showings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 17th day of February, 2012.

/s/ Nathan Williams