

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

In the Matter of Kansas City Power & Light)
Company’s Notice of Intent to File an)
Application for Authority to Establish a) Case No: EO-2019-0132
Demand-Side Programs Investment)
Mechanism)

In the Matter of KCP&L Greater Missouri)
Operations Company’s Notice of Intent)
to File an Application for Authority to) Case No: EO-2019-0133
Establish a Demand-Side Programs)
Investment Mechanism)

PUBLIC COUNSEL’S APPLICATION FOR REHEARING

The Office of the Public Counsel (OPC) requests a rehearing before the Missouri Public Service Commission (Commission) pursuant to Section 386.500, RSMo.¹ The Commission should grant this request to rehear issues of fact and law to cure the unlawful and arbitrary nature of the Commission’s Report and Order. Those issues justifying a rehearing are as follows:

1. On December 11, 2019, the Commission issued its Report and Order approving Energy Missouri Metro and Energy Missouri West’s² (collectively Evergy) joint application for demand-side programs and associated Demand-Side Investment Mechanisms (DSIM) under the Missouri Energy Efficiency Investment Act (MEEIA). Evergy’s MEEIA Cycle 3 (MEEIA 3) application was the third in a series of demand-side program cycles offered by Evergy. The Commission’s Report and Order approves Evergy’s application in substantially the same form as when the Companies filed it on November 29, 2018.

¹ All statutory references are to the 2019 rendition by the Missouri Revisor of Statutes unless otherwise noted.

² Kansas City Power & Light and KCP&L Greater Missouri Operations renamed themselves as Energy Missouri Metro and Energy Missouri West during the pendency of this case.

2. The Commission's Report and Order does so over the advice of both the OPC and the Staff of the Public Service Commission (Staff). The Commission's justifications for its disagreement with its Staff and the OPC are not grounded in facts and are not in compliance with the MEEIA statute.

3. Commission Orders must only act within the bounds prescribed by legislative act.³ Commission Orders must also be reasonable, being based on "substantial, competent evidence on the whole record" rather than being arbitrary or capricious or an abuse of discretion.⁴

4. The MEEIA statute provides that it is State policy to "value demand-side investments equal to traditional investments in supply and delivery infrastructure."⁵ Equally valuing demand-side and supply-side investments means three things: 1) providing "timely cost recovery," which the Commission does via a DSIM, 2) aligning utility incentives to encourage energy efficiency, and 3) approving applications with "cost-effective measurable and verifiable efficiency savings."⁶ The total resource cost (TRC) test is the preferred test to determine cost-effectiveness.⁷ The TRC test requires a comparison of avoided utility costs to the costs of the energy efficiency measures. A TRC test result of at least one demonstrates a preliminary showing of cost-effectiveness.

5. By Commission definition, avoided costs are "the cost savings obtained by substituting demand-side programs for existing and new supply-side resources."⁸ Commission

³ *State ex rel. Utility Consumers Council v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. 1979); *Pub. Serv. Comm'n v. Mo. Gas Energy*, 388 S.W.3d 221, 230 (Mo. Ct. App. 2012).

⁴ *State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n*, 344 S.W.3d 178, 184 (Mo. banc 2011).

⁵ Mo. Rev. Stat. §393.1075.3.

⁶ *Id.*

⁷ Mo. Rev. Stat. § 393.1075.4.

⁸ 20 CSR 4240-20.092(1)(C).

rules determine benefits and cost-effectiveness of demand-side programs by measuring a company's avoided costs as a result of a MEEIA portfolio.⁹

6. The MEEIA statute requires demand-side programs to benefit all customers “in the customer class in which the programs are proposed, regardless of whether the programs are utilized by all customers.”¹⁰ Benefit is shown by a demand-side program being cost-effective, which, again, the MEEIA statute directs the TRC to be the preferred method of determining cost-effectiveness.¹¹

The Commission's Report and Order Unlawfully and Arbitrarily does not Equally Value Demand-Side and Traditional Utility Investments.

7. The Commission's approval of Evergy's application does not equally value demand-side and traditional utility investments contrary to statute. By not equally valuing demand and supply-side assets, there is no guarantee that all customers benefit from Evergy's MEEIA 3. The only guarantee is that wealth will be transferred from non-participants to participants.

8. The MEEIA statute instructs that equally valuing demand and supply-side investments requires three elements: 1) an approved DSIM for timely recovery of program costs, 2) aligning utility incentives to encourage energy efficiency, and 3) “cost-effective measurable and verifiable efficiency savings.”¹² The Commission's Order approves a DSIM, and claims to encourage energy efficiency, but fails to meet the third prong. This failure makes the Commission's Order unlawful.

9. The Commission previously and correctly noted in 2015 that demand-side and supply-side investments are equally valued when MEEIA programs place “shareholders in a

⁹ *See id.*

¹⁰ Mo. Rev. Stat. § 393.1075.4.

¹¹ *See id.*

¹² Mo. Rev. Stat. § 393.1705.3.

financial position comparable to the earnings opportunity they would have had if those shareholders made a future supply-side investment.”¹³ If an earnings opportunity with a DSIM is coupled with a deferral of a supply-side or other identifiable investment then “such a performance incentive would compensate [Evergy] for foregone earnings opportunity that are not actually foregone.”¹⁴

10. Conversely, if a utility’s MEEIA application and DSIM are approved without deferring any cost, the earnings opportunity will reward the utility beyond the situation it would have if the company had instead invested into a future supply-side investment alone. This excessive earnings opportunity is because, without proving avoided costs associated with a MEEIA proposal, a utility can invest in both demand-side programs and additional supply-side investments. Investing in both resources simultaneously provides a DSIM earnings opportunity and the earnings on the new supply-side investment. Restated, in the Commission’s words, a MEEIA application with no avoided costs produces a “double-recovery windfall”, and does not equally value demand-side and supply-side measures.¹⁵ This double-recovery scenario does not equally value demand and supply-side resources because the utility’s finances are positioned far greater with an approved MEEIA program than had it invested in a supply-side asset.

11. Four years later, the Commission arbitrarily disregards how deferring traditional investments is a necessary element of equally valuing demand-side and traditional investments.

12. This latest Report and Order begins by noting the deficiencies in Evergy’s avoided cost calculations. “Using Evergy’s proposed avoided costs overstates the avoided costs of

¹³ *Report and Order*, EO-2015-0055 p. 11 (Oct. 22, 2015) (“A successfully implemented performance incentive would accomplish the policy goal of valuing equally supply-side and demand-side investments”).

¹⁴ *Id.* at 12.

¹⁵ *Report and Order*, EO-2015-0055 p.13.

generation transmission and distribution facilities” and the Company’s avoided cost calculations rely “on outdated data from 2015.”¹⁶ The Commission also recognized Evergy’s prior estimations of the cost to build a new combustion turbine (CT) during its last IRP filing as “outdated”.¹⁷ Evergy’s last integrated resource plan (IRP) filing purported to use the CT valuation to look for “the lowest net present value of revenue requirement.”¹⁸ However, as the Commission also explains, a “hypothetical CT is a representative valuation and has no link to an actual avoided “existing or new supply-side resource.””¹⁹

13. After finding Evergy’s avoided cost calculations and reliance on its prior IRP filing to be dubious, the Commission also observes that Evergy’s MEEIA application and proposed demand-side programs “do not defer any specific identifiable supply-side resource.”²⁰ In fact, rather than deferring any resource expense, Evergy is expected to spend upwards of a billion dollars in capital investment through plant-in-service accounting.²¹

14. Paradoxically, after acknowledging that Evergy’s MEEIA 3 is not deferring any traditional investments, and hence will not create any avoided costs, the Commission then admonishes its Staff for concluding that Evergy’s avoided costs are zero.²² Recall that the definition the Commission selected for “avoided costs” within its MEEIA rules is “the cost savings obtained by substituting demand-side programs for existing and new supply-side resources.”²³ With Evergy substituting no supply-side resources for demand-side programs, and actually

¹⁶ *Report and Order*, EO-2019-0132 p. 10-11 (Dec. 11, 2019).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 11.

²⁰ *Id.*

²¹ *See Exhibit 200, Rebuttal Testimony of Geoff Marke*, EO-2019-0132 p. 12 (Aug. 19, 2019); *see also* Transcript of Proceedings, Evidentiary Hearing, EO-2019-0132 p. 398 (Sep. 23-24, 2019).

²² *Report and Order*, EO-2019-0132 p. 11.

²³ 20 CSR 4240-20.092(1)(C).

investing more in supply-side resources, there are no cost savings, and thus by definition zero avoided costs.

15. The Commission's recitation of facts rejects this syllogism though; calling Staff's conclusions "inappropriate because the MEEIA statute does not require deferral of capacity."²⁴ The Commission's assertion does not explore its own chosen definition of "avoided costs" or how avoided costs underpin the TRC, which is ultimately used to determine cost-effectiveness and benefits. Instead the Commission merely states that "demand-side programs that produce capacity savings have an avoided cost greater than zero even if the subject utility is long on capacity."²⁵ The Commission does not corroborate this assertion with an explanation as to which of Evergy's demand-side programs are producing capacity savings or even citing to a source that performs that exploration. All the Commission relies upon is the testimony of Charles Caisley. Mr. Caisley premised his assertion on demand-side programs supposedly reducing Evergy's revenue requirement.²⁶ Mr. Caisley's statement does not substantiate why any particular demand-side program or how Evergy's MEEIA 3 earnings opportunity actually reduces the Company's revenue requirement.

16. The Commission also provides no explanation as to why it rejects Evergy's CT valuation to determine the lowest revenue requirement for determining avoided costs earlier, but why it later accepts that same logic for avoided costs when it is uttered by Mr. Caisley. This inconsistent practice of recognizing the unreliability of theoretical arguments only to later rely upon them exemplifies arbitrary administrative decision making.

²⁴ *Report and Order*, EO-2019-0132 p. 11.

²⁵ *Id.* at 12.

²⁶ Exhibit 5, *Surrebuttal Testimony of Charles A. Caisley*, EO-2018-0211 p. 6 (Sep. 17, 2018).

17. The Commission continues this reliance by cherry-picking from its IRP rules. According to the Commission, its IRP rules “permit the use of a market-based equivalent for calculating avoided costs” for modeling purposes.²⁷ From this assertion the Commission then cites solely to an in-camera closed portion of the evidentiary hearing to claim that if a market-based approach is used to calculate avoided costs, then all but one of Evergy’s proposed MEEIA programs is cost effective.²⁸ The pertinent quote is as follows:

* _____

_____ **

A leading question from Evergy’s counsel, with an answer of **_____** and **_____** is not substantial or competent evidence supporting a finding that the market-based approach actually creates avoided costs. Relying on a witness who says **_____** for a statement to the contrary is de facto arbitrary. Such reliance is also not “verifiable” or “measurable,” and thus does not equally value demand-side and traditional investments.

18. The reliance on this quote for the proposition that all of Evergy’s proposed demand-side programs are cost-effective except one is also misplaced because the underlying position is not true. As Staff calculated after the evidentiary hearing, the TRC test “for the Residential Heating, Cooling, & Home Comfort Program, Residential Home Energy Report Program, and Business Smart Thermostat Program for both Evergy Metro and Evergy West is not greater than one (1)” using the market-based equivalent approach to avoided costs.²⁹ A TRC result less than

²⁷ *Report and Order*, EO-2019-0132 p. 12.

²⁸ *Id.*

²⁹ *Staff’s Amended Recommendation Regarding Approval of Compliance Tariff Sheets and Revised Technical Resource Manual*, EO-2019-0132 (Dec. 20, 2019).

one means that at least three, not one as the Commission claims, are not cost-effective even with the Evergy's market approach.

19. The Commission's diversion to the IRP rules to rehabilitate Evergy's application is misguided. It is misguided because Evergy did not use this "market-based approach" in its last IRP. Evergy did not find a market-based approach sufficient for its own resource planning or as a basis for its MEEIA 3 when it initially filed its application. Furthermore, the "market-based equivalent" is not used to calculate "avoided" costs" per the IRP rules as the Commission asserts. Rather, the market-based equivalent may be used when determining "utility avoided *demand* cost" and "utility avoided *energy* cost."³⁰ Those terms as used in Chapter 22 of the Commission's rules are not the same as "avoided costs" used in Chapter 20, which is specifically delineated to be the cost savings from deferring traditional utility assets.

20. Even more misguided, the "market-based equivalent" as offered by Evergy is not truly based on markets. Evergy's offered number through its "market-based equivalent" is an average of several bids that Evergy Missouri West put out for capacity in 2017. It is more accurate to call this an "average-of-the-bids" approach. The bids received were for varying time durations and amounts, making any average of the units circumspect, but most undermining is the realization that the winning bid was offered by Evergy Missouri Metro.³¹ The Commission will recall that the Commission's Order decides to "consolidate Evergy Missouri Metro's and Evergy Missouri West's applications, because the [Southwest Power Pool] treats Evergy Missouri Metro and Evergy Missouri West as a single load serving entity."³² It is then misguided and arbitrary to rule

³⁰ 20 CSR 4240-22.050(5)(A) (emphasis added).

³¹ See Exhibit 4, *Surrebuttal Report on Behalf of Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company*, EO-2019-0132 p. 18 (Sep. 16, 2019).

³² *Report and Order*, EO-2019-0132 p. 18.

Evergy will be judged as one entity for its MEEIA 3 application, but also approve that application using a number premised on a legal fiction that Evergy is actually two separate companies.

21. The Commission's tangent into the IRP rules is additionally inconsistent because the Commission's Order explains earlier that relying on Evergy's prior IRP data is "outdated," but then turns immediately back to the IRP rules to justify this average-of-the-bids alternative. This is yet another example of the Commission's Order arbitrarily criticizing arguments only to later use their underlying logic for no discernible reason.

22. The Commission's Order sees the swapping of definitions between regulatory chapters as equally valuing supply and demand-side resources because the average-of-the-bids approach produces "avoided costs sufficient to encourage Evergy Missouri to continue to offer energy efficiency demand-side programs."³³ This justification is legally insufficient though. Encouraging energy efficiency alone does not equally value demand-side resources. It is not enough to value growth for the sake of growth. Demand-side resources must also produce verifiable savings. Those savings do not exist here. The Commission's Order is consequentially counter to statute, and arbitrarily dances around Commission regulatory language to find a more convenient definition of "avoided cost."

The Commission's Report and Order Unlawfully and Arbitrarily Departs from the Total Resource Cost Standard.

23. In order to approve Evergy's application, the Commission had to depart from the TRC test, and invent a new one not rooted in statute, Commission practice, or reality.

24. . Venturing away from the legislatively-preferred TRC test requires sufficient cause. The Commission provides none in its Order.

³³ *Id.* at 21.

25. The Commission’s Order notes that the TRC requires a showing of actual avoided costs, per its own rule, but then says that cannot work for Evergy because “MEEIA is not just about saving ratepayers money.”³⁴ This answer misses the point. A lawful MEEIA application must benefit all customers, and verifying those benefits requires an objective test reviewing avoided costs calculations.

26. This time though, the Commission employs “avoided demand costs” per the Commission’s IRP rule language of “market-based equivalent” to then justify Evergy’s average-of-the-bids. As mentioned earlier, Evergy did not use market-based equivalents for its last IRP though, so it is not clear how the average-of-the-bids number represents reality or can substitute for avoided costs.

27. The Commission’s reasoning to inconsistently disparage Evergy’s hypothetical CT modeling only to then accept an equally hypothetical average-of-the-bid approach later is that “Evergy Missouri has said it is agreeable to a market-based avoided cost approach.”³⁵ Evergy proposed this methodology in surrebuttal, four days before the evidentiary hearing, because otherwise it has no avoided costs, and, as the Commission’s Order recognizes, without them Evergy’s MEEIA application fails.³⁶ The applicant being agreeable to a different methodology lest its application fail is not sufficient cause to divert from the TRC’s avoided cost methodology.

28. Restated, not being able to give an applicant utility what it wants is not justification enough for abandoning the Legislature’s preferred TRC test.

29. Failing under the TRC test, the Commission appears to attempt to employ a societal cost test (SCT) or some variant to rehabilitate Evergy’s application. The OPC says “appears”

³⁴ *Id.* at 20.

³⁵ *Id.* at 21.

³⁶ *See id.* at 12.

because although the Commission explores other supposed benefits beyond avoided costs, the Commission does not clearly explain what cost-benefit analysis it is using.

30. The Commission focuses on supposed “reduced emissions” and other “societal benefits, such as improved health and safety, investment in local economies, and local job creation.”³⁷ Neither of the sources the Commission relies upon substantiates that Evergy’s application is beneficial. The Staff Surrebuttal Report and testimony of Renew Missouri witness James Owen speak to the abstract benefits of energy efficiency, not any benefits that Evergy’s customers may actually experience. Reduced emissions and public health may be recognized benefits of energy efficiency, but the abstract alone is an insufficient record to approve Evergy’s application when it cannot show actual benefits specific to MEEIA 3. Otherwise, any conceptual benefit can be invoked to justify any MEEIA budget regardless of effectiveness or limited benefits.

31. Consider that exercise is widely recognized as beneficial, but that abstract understanding does not mean that every exercise regimen will produce positive results or even not be harmful. Recognizing that running is healthy does not mean that running fifty miles a day is beneficial or effective training for a beginner.

32. The same logical pitfall applies here because the benefits the Commission focuses on are not “measurable and verifiable,” contrary to statute, and are arbitrarily concluded to exist without proof contrary to Commission Rule.³⁸ The Commission explained during its recent revisions to the MEEIA rules that non-energy benefits may be considered for calculating cost-effectiveness, “but only if they are quantifiable and result in avoided electric utility costs.”³⁹ This

³⁷ *Id.* at 14 & 22.

³⁸ *Contra* Mo. Rev. Stat. § 393.1075.3; 20 CSR 4240-20.092(1)(II).

³⁹For convenience’s sake, the OPC has attached the quoted rulemaking order to this Application.. *Order of Rulemaking*, Mo. Pub. Serv. Comm’n, 4 CSR 240-20.092 (June 28, 2017).

latest Order forgets this explanation and finds that unverified and unquantifiable benefits are enough to approve a MEEIA 3 application that avoids no costs.

33. However, even if these societal benefits were properly founded in the evidentiary record, the Commission recognized SCT “means the total resource cost test [TRC] with the addition of non-energy benefits,” and those non-energy benefits must be calculated “with a reasonable degree of confidence.”⁴⁰ The TRC is a necessary element of the SCT, but this Commission Order disregards the TRC because it alone shows Evergy’s application to be not cost-effective. It is then not entirely clear what test the Commission is employing now, but it is certainly not the SCT or TRC. The Commission is instead pointing to theoretical benefits alone. This is inconsistent with the Commission’s own word.

34. It is arbitrary for this Commission to reject Evergy’s hypothetical CT avoided cost methodology for being a mere “representative evaluation and has no link to an actual” avoided cost, only to then accept hypothetical benefits with no established link to actual benefits enjoyed by Evergy’s customers.⁴¹

35. The Commission’s Order is unlawful for diverting from the TRC test without sufficient justification, ignoring its own rules as to what the SCT includes, and is arbitrary for inconsistently accepting unfounded modeling exercises and ignoring avoided costs all together.

The Commission’s Report and Order Unlawfully and Arbitrarily Approves Demand-Side Programs that are not Beneficial to All Customers.

36. By departing from the TRC, the Commission’s Order approves ostensibly beneficial demand-side programs without any substantive evidence of benefits. Rather than relying on demonstrable avoided costs as this Commission has previously required, this latest Commission

⁴⁰ 20 CSR 4240-20.092(1)(PP).

⁴¹ *Report and Order*, EO-2019-0132 p. 11.

Order declares that valuing avoided generation “overlooks the purpose of MEEIA, which is to encourage energy efficiency.”⁴² The Commission goes on to claim that non-participant customers will benefit from Evergy’s MEEIA 3 because “the programs will be cost-effective” and because of other “social benefits, such as improved health and safety, investments in local economies, and local job creation.”⁴³ The Commission’s Order also claims as fact that all of Evergy’s customers will benefit from MEEIA due to a lower net present value of revenue requirement.

37. This reasoning is unlawful because it negates statutory requirements for cost-effectiveness to be corroborated with “measurable and verifiable” accuracy.⁴⁴ The reasoning is arbitrary because it supplants prior Commission practice without sufficient basis.

38. As previously discussed, the Commission’s determination of benefits relies solely on abstract notions of how energy efficiency itself may benefit customers, not how Evergy’s MEEIA 3 actually realizes those benefits. If this benefit determination stands, then all future MEEIA applications may prove cost-effectiveness simply by likewise gesturing to theory and meta-analysis. This treatment devalues all meaning from the MEEIA statutes’ language of requiring “cost-effective measurable and verifiable efficiency savings.”⁴⁵

39. Compare these latest determination of benefits with this Commission’s denial of Union Electric d/b/a Ameren Missouri’s MEEIA Cycle 2. Rather than pointing to ephemeral benefits that might exist for Missouri’s customers based on abstract research, the Commission previously voiced that “reducing annual sales of kWh can benefit ratepayers. But not all kWh are the same.”⁴⁶ The Commission continued:

⁴² *Report and Order*, EO-2019-0132 p. 13.

⁴³ *Report and Order*, EO-2019-0132 p. 13-14.

⁴⁴ Mo. Rev. Stat. § 393.1075.3.

⁴⁵ *Contra id.*

⁴⁶ *Report and Order*, EO-2015-0055, p. 12.

“Even if thousands of kWh were saved, if the summer peak demands are the same with and without a MEEIA Cycle 2, then Ameren Missouri would likely require the same capacity. Thus it would not forego a future supply side investment opportunity. In other words, such a performance incentive would compensate Ameren Missouri for foregone earnings opportunities that are not actually foregone.”

40. This logic was sound because it was rooted in the expectation that the applicant utility needs to demonstrate verifiable avoided costs to substantiate cost-effectiveness, and to then rely upon cost-effectiveness to justifiably conclude that customers would benefit from demand-side programs regardless of whether customers participate in them.

41. By contrast, the Commission’s Order approving Evergy’s MEEIA 3 arbitrarily adopts a new cost-effective test using an average-of-the-bids approach to simply decree that there are cost-effective benefits. The Commission correctly scrutinizes Evergy’s CT methodology for being hypothetical, but then supports a new methodology concluding that hypothetical benefits are sufficient. The Commission is not just being arbitrary, but inexplicably so.

42. The Commission should also take note that any purported cost saving benefits of MEEIA 3 are undoubtedly being undermined as Evergy continues to invest a billion dollars in plant-in-service accounting and more **

_____ **⁴⁷ Evergy notified the Commission of this latest development only after securing its MEEIA 3.

The Commission’s Report and Order Arbitrarily Found that Demand-Side Programs have Avoided Costs Even if a Utility is Long on Capacity.

43. The Commission also acted in an arbitrary and capricious manner when it declared that demand-side programs avoid utility costs even when a utility is long on capacity.

⁴⁷ *Notice of Determination of Change*, EO-2018-0268 (Dec. 16, 2019).

44. The Commission may enjoy an “indulgence of deference” for evidentiary decisions, but that is not license to make conclusory opinions without backing.⁴⁸

45. The Commission treats as fact that “demand-side programs that produce capacity savings have an avoided cost greater than zero even if the subject utility is long on capacity.”⁴⁹ As a matter of language though, no costs are being avoided when a utility with surplus capacity continues to not defer any future or current cost.

46. Nonetheless, the Commission relies on Mr. Caisely’s testimony for its statement. Mr. Caisely made no such assertion though. He did not speak of capacity savings, but rather that when “a resource reduces the present value of long-run utility costs, the benefits of choosing that resource are independent of whether the utility is long or short on capacity.”⁵⁰ “Present value of long-run utility costs” does not consider the known concurrent supply-side investments that will increase Evergy’s revenue requirement far beyond any supposed reduction offered by MEEIA 3. By using the phrase “present value,” Mr. Caisely is instead referring to the logic that the net present value of a utility’s revenue requirement is reduced with demand-side programs as compared to without. This is the same logic that the Commission rejected as speculative when Evergy presented its CT valuation proposal.⁵¹ To accept this “present value” logic here when it is simply rephrased with an average-of-the-bids approach is inconsistent and arbitrary.

47. Nothing in Mr. Caisley’s general assertion or the record supports the conclusion that Evergy’s proposed demand-side programs actually produce capacity savings. Remember, Evergy’s surrebuttal report did not support its application with actual “capacity savings.” Evergy attempted to salvage its argument by resorting to hypothetical valuations from an average-of-the-

⁴⁸ *State ex rel. Marco Sales, Inc. v. Pub. Serv. Comm’n*, 685 S.W.2d 216, 220 (Mo. App. W.D. 1984).

⁴⁹ *Report and Order*, EO-2019-0132 p. 12.

⁵⁰ Exhibit 5, p. 6.

⁵¹ *Report and Order*, EO-2019-0132 p. 11.

bids approach. An approach premised on a request-for-proposal that Evergy itself won. The Commission's Order is not relying on a competent and substantive record, but rather a new, hypothetical number that Evergy created at the eleventh hour to justify itself after its original numbers could not show any "cost savings obtained by substituting demand-side programs for existing and new supply-side resources."⁵² The Commission's Order that sanctions this behavior, and then makes unsubstantiated statements as fact as to capacity savings is then arbitrary.

The Commission's Report and Order Arbitrarily Invented a New Definition of Avoided Costs.

48. The Commission's Order is also arbitrary in that it fabricated a new conceit for avoided costs in order to justify a MEEIA proposal that does not benefit all of Evergy's customers.

49. As previously noted, the Commission agrees that Evergy's avoided cost methodology is out of date and overstated.⁵³ The Commission's Order still grants "the fifth variance even though the Commission is not approving Evergy Missouri's avoided costs."⁵⁴ The Commission felt the need to do this presumably because using the TRC test with Evergy's avoided costs reveals that its proposed MEEIA 3 is not cost-effective.

50. Rule variances may be necessary for particular, discrete fact circumstances. In this instance though, the Commission did not vary its rules for one instance. Although called a variance, rewriting a definition because it is inconvenient for a utility that did not present its MEEIA application accordingly is simply rewriting the rules after the game started. The Commission did not grant variances from the rules. The Commission is rewriting them ad hoc.

⁵² 20 CSR 4204-20.092(1)(C).

⁵³ *Report and Order*, EO-2019-0132 p. 9-10.

⁵⁴ *Id.* at 25.

51. Missouri Courts explain that “arbitrary and capricious” in the context of rules is “willful and unreasoning action, without consideration of and in disregard of the facts.”⁵⁵ A Commission decision “that completely fails to consider an important aspect or factor of the issue before it may be found to have acted arbitrarily and capriciously.”⁵⁶ Approving Evergy’s MEEIA 3 requires disregarding that Evergy’s application presents no avoided costs, and instead reinvents a new definition of “avoided costs” rather than face that deficiency.

52. Simply changing the rules when an applicant does not measure up is unlawful and arbitrary. If rules are to be varied, they can only do so for good cause and should only be done when necessary. Evergy’s variances are only necessary in the sense that the bar had to be reimagined so its insufficient application could clear the Company’s burden of proof. Consider that Evergy’s MEEIA 3 application apparently requires fourteen rule variances, whereas Ameren Missouri’s MEEIA 3 required only three.⁵⁷ An application supported with a competent record would not require this much rewriting in order to pass muster.

The Commission’s Report and Order Unlawfully Permits Industrial Customers with the Privilege of Participating in Demand-Side Programs at the Expense of Customers who Cannot Elect to Not Pay DSIM.

53. The Commission compounds the illegality of its Order by permitting industrial customers the unique ability to enjoy the benefits of MEEIA incentives, while choosing to not financially support those incentives.

54. The MEEIA statute provides that customers meeting certain size and demand parameters may choose to not pay the DSIM charge associated with a utility’s MEEIA programs.⁵⁸

⁵⁵ *Beverly Enterprises-Missouri, Inc. v. Dep’t of Soc. Servs., Div. of Med. Servs.*, 349 S.W.3d 337, 345 (Mo. Ct. App. W.D. 2008).

⁵⁶ *Id.*

⁵⁷ *Order Approving Stipulation and Agreement and Granting Waivers*, EO-2018-0211 (Dec. 5, 2018).

⁵⁸ Mo. Rev. Stat. § 393.1075.7.

The statutory parameters for eligible customers effectively designate industrial customers as having this privilege as opposed to residential customers. This opt-out privilege is one afforded to them by the Legislature. The OPC takes no issue with that privilege alone, but permitting those opt-out customers to still participate in MEEIA programs while residential customers must pay for the opt-out customers is unlawful.

55. The Commission's Order only addresses this issue by determining that Evergy's proposed Business Demand Response program is "interruptible or curtailable," and therefore opt-out customers may participate in the Business Demand Response program without paying a DSIM. This reasoning ignores Evergy made no showing that any actual demand curtailing or interruption is occurring for those industrial customers on the supposedly interruptible or curtailable rate. The OPC also explained in its briefing that after electing to not support MEEIA charges, opt-out customers "shall not subsequently be eligible to participate in demand-side programs except under guidelines established by the commission in rulemaking."⁵⁹ This Commission has drafted no rules on point, but the Commission's Order does not explore this oversight.

56. The Commission's Order also fails to account how the MEEIA's language of opt-out customers still being "allowed to participate in interruptible or curtailable rate schedules or tariffs" does not refer to MEEIA specific tariffs.⁶⁰ Instead the statute broadly refers to tariffs and schedules, including those demand-side response tariffs that Evergy had for industrial customers before MEEIA was enacted.

57. The Legislature's use of the phrase "schedules or tariffs" indicates its knowledge of those pre-existing offerings, and therefore we should conclude that the language at issue simply protects industrial customers' existing ability to otherwise participate in demand response tariffs

⁵⁹ Mo. Rev. Stat. § 393.1075.8.

⁶⁰ See Mo. Rev. Stat. § 393.1075.10.

outside of MEEIA rather than codifies an inequity where residential classes are forced to support industrial customers' DSIM charges.

Conclusion.

58. The Commission's Order notes that avoided costs are necessary for the TRC. The Order then notes that Missouri's Legislature desires the TRC to be the guiding test for cost-effectiveness, and consequentially benefits. The Order notes also that Evergy's avoided cost calculations are not credible, and hence Evergy's argument that its application passes the TRC test fails. After noting these issues, the Commission then decides it will depart from avoided costs as it defined them to be, admonishes its Staff for following the previous definition as written, and then turns to an entirely different regulatory chapter for a definition of avoided costs to suppose that an average-of-the-bids approach demonstrates avoided costs. After denouncing the Company's net present value argument as to a CT valuation, the Commission then turns back to hypothetical net present value arguments to support its newly concocted average-of-the-bids approach.

59. The Commission's Order grants Evergy's Application by not equally valuing demand and supply-side resources, departing from the TRC test without explanation, assuming benefits not demonstrated in the record, contravening past Commission explanations of avoided costs and benefits, concluding that demand-side programs always have avoided costs without supporting evidence, inventing a new definition of "avoided cost," and by allowing opt-out customers to be subsidized by residential customers.

60. Further intensifying all of the aforementioned issues, Staff's latest recommendation to the Commission notes that at least three of Evergy's MEEIA 3 programs are still not cost-

effective even with the average-of-the-bids approach,⁶¹ and yet the Commission still approved Evergy's tariffs implementing those programs without any rebuttal as to Staff's conclusions.⁶² The MEEIA statute plainly, with few exceptions not at issue here, only permits the Commission to approve cost-effective energy efficiency programs.⁶³ The Commission's decision to approve Evergy's MEEIA tariffs with deficiencies notwithstanding is thus an unlawful departure from statutory text.

61. A rehearing on these issues of fact and law is justified to correct these inconsistencies, and to judge Evergy's application on previously established statutory and regulatory frameworks.

Wherefore, the OPC applies for rehearing as to these issues of fact and law.

Respectfully,

OFFICE OF THE PUBLIC COUNSEL

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**Attorney for the Office of the Public
Counsel**

⁶¹ *Staff's Amended Recommendation.*

⁶² *Order Approving Tariff In Compliance with Commission Order*, EO-2019-0132 (Dec. 20, 2019).

⁶³ Mo. Rev. Stat. § 393.1075.4.

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 31st day of December, 2019, with notice of the same being sent to all counsel of record.

/s/ Caleb Hall

John R. Ashcroft

**Secretary of State
Administrative Rules Division**

RULE TRANSMITTAL

Administrative Rules Stamp

Rule Number 4 CSR 240-20.092

Use a "SEPARATE" rule transmittal sheet for EACH individual rulemaking.

Name of person to call with questions about this rule:

Content Morris Woodruff Phone 573-751-2849 FAX 573-526-6010

Email address Morris.Woodruff@psc.mo.gov

Data Entry Chris Koenigsfeld Phone 573-751-4256 FAX 573-526-6010

Email address Christine.Koenigsfeld@psc.mo.gov

Interagency mailing address Public Service Commission, 9th Fl., Gov. Ofc. Bldg., JC, MO

TYPE OF RULEMAKING ACTION TO BE TAKEN

- Emergency rulemaking, include effective date
 Proposed Rulemaking
 Withdrawal Rule Action Notice In Addition Rule Under Consideration
 Request for Non-Substantive Change
 Statement of Actual Cost
 Order of Rulemaking

Effective Date for the Order _____

Statutory 30 days OR Specific date _____

Does the Order of Rulemaking contain changes to the rule text? NO

YES—LIST THE SECTIONS WITH CHANGES, including any deleted rule text:

Sections (1) and (2)

Small Business Regulatory
Fairness Board (DED) Stamp

JCAR Stamp

JOINT COMMITTEE ON
JUN 28 2017
ADMINISTRATIVE RULES



GOVERNOR OF MISSOURI
JEFFERSON CITY
65102

ERIC R. GRETTENS
GOVERNOR

P.O. Box 720
(573) 751-3222

June 23, 2017

Daniel Hall
Public Service Commission
200 Madison Street
P.O. Box 360
Jefferson City, Missouri 65102

Dear Chairman Hall:

This office has received your rulemaking for demand-side programs: 4 CSR 240-20.092; 4 CSR 240-20.093; and 4 CSR 240-20.094.

Executive Order 17-03 requires this office's approval before state agencies release proposed regulations for notice and comment, amend existing regulations, or adopt new regulations. After our review of this rulemaking, we approve the rules' submission to JCAR and the Secretary of State.

Sincerely,

A handwritten signature in black ink, appearing to read "Justin D. Smith".

Justin D. Smith
Deputy Counsel



Commissioners
DANIEL Y. HALL
Chairman
STEPHEN M. STOLL
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NATELLE DIETRICH
Staff Director

John R. Ashcroft
Secretary of State
Administrative Rules Division
600 West Main Street
Jefferson City, Missouri 65101

Re: 4 CSR 240-20.092 Definitions for Demand-Side Programs and Demand-Side Programs
Investment Mechanisms

Dear Secretary Ashcroft,

CERTIFICATION OF ADMINISTRATIVE RULE

I do hereby certify that the attached is an accurate and complete copy of the order of rulemaking lawfully submitted by the Missouri Public Service Commission.

Statutory Authority: sections 393.1075.11, RSMo 2016

If there are any questions regarding the content of this order of rulemaking, please contact:

Morris L. Woodruff, Chief Regulatory Law Judge
Missouri Public Service Commission
200 Madison Street
P.O. Box 360
Jefferson City, MO 65102
(573) 751-2849
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Morris L. Woodruff
Chief Regulatory Law Judge

Enclosures

**Title 4 – DEPARTMENT OF ECONOMIC DEVELOPMENT
Division 240 – Public Service Commission
Chapter 20 – Electric Utilities**

ORDER OF RULEMAKING

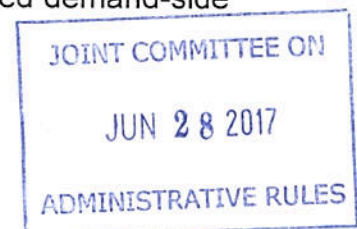
By the authority vested in the Public Service Commission under section 393.1075.11 and 393.1075.15 RSMo 2016, the commission adopts a rule as follows:

4 CSR 240-20.092 is adopted

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on February 1, 2017 (42 MoReg 160-162). Those sections with changes are reprinted here. The proposed rule becomes effective thirty (30) days after publication in the *Code of State Regulations*.

SUMMARY OF COMMENTS: The public comment period ended April 27, 2017, and the commission held a public hearing on the proposed rule on May 4, 2016. The commission received timely written comments from The Office of the Public Counsel; Union Electric Company, d/b/a Ameren Missouri; Kansas City Power & Light Company (KCP&L) and KCP&L Greater Missouri Operations Company (GMO); Renew Missouri; the Missouri Department of Economic Development - Division of Energy; the Natural Resources Defense Council (NRDC); Walmart Stores, Inc.; the National Housing Trust; the Midwest Energy Efficiency Alliance; and the Staff of the Commission. In addition, the following people offered comments at the hearing: Martin Hyman and Barbara Meisenheimer on behalf of the Division of Energy; Andrew Linhares on behalf of Renew Missouri; Phil Fracica on behalf of Energy Efficiency for All; David Woodsmall on behalf of Walmart; Tim Opitz and Geoff Marke on behalf of the Public Counsel; Lewis Mills on behalf of the Missouri Industrial Energy Consumers (MIEC); Jim Fischer and Tim Nelson on behalf of KCP&L and GMO; Paula Johnson and Bill Davis on behalf of Ameren Missouri; and Natelle Dietrich, John Rogers, Robert Berlin, and Brad Fortson on behalf of staff. Many comments and suggested changes were offered. The commission will address those comments as they pertain to the various provisions of the rule.

COMMENT #1: Staff recommends the Commission delete, as extraneous, one instance of "demand-side" from the definition of "approved demand-side program" found in subsection 20.092(1)(B).



RESPONSE AND EXPLANATION OF CHANGE: Staff is correct. The words are extraneous and will be removed from the definition.

COMMENT #2: Subsection 20.092(1)(C) defines the term “avoided cost or avoided utility cost.” Staff proposes that the definition be clarified by specifying that the utility use the integrated resource plan and risk analysis used in its most recently-adopted preferred resource plan to calculate its avoided costs. DE proposes that the definition specify additional categories of potential avoided costs, and would remove the linking reference to the utility’s integrated resource plan. KCP&L and GMO urge the commission to clarify the last sentence of the definition to require the utility to use the preferred resource plan that was in effect at the time of its application to calculate the avoided costs.

RESPONSE AND EXPLANATION OF CHANGE: Staff’s proposed changes help to clarify the definition and will be adopted. The clarification proposed by KCP&L and GMO to use the preferred reference plan in effect at the time the application is filed could result in the use of very old data in subsequent years. That change will not be adopted. Division of Energy’s listing of additional categories of potential avoided costs is not necessary and will not be adopted. Finally, Division of Energy’s opposition to the rule’s reference to the integrated resource plan is misguided. The commission believes that reference to the integrated resource plan is necessary to provide a benchmark for comparison.

COMMENT #3: Subsection 20.092(1)(D) defines the term “baseline demand forecast.” Staff proposes to clarify the wording of that definition.

RESPONSE AND EXPLANATION OF CHANGE: The change proposed by staff clarifies the meaning of the definition and will be adopted.

COMMENT #4: Subsection 20.092(1)(E) defines the term “baseline energy forecast.” Staff proposes to clarify the wording of that definition.

RESPONSE AND EXPLANATION OF CHANGE: The change proposed by staff clarifies the meaning of the definition and will be adopted.

COMMENT #5: Ameren Missouri asks the commission to add a new subsection to define the term “combined heat and power” because it is used in proposed rule 4 CSR 240-20.094 and is becoming an important technology.

RESPONSE: The additional definition proposed by Ameren Missouri is unnecessary and will not be incorporated into the rule. While combined heat and power is a useful tool, it does not always decrease the customer’s total electric consumption and thus may not always be a MEEIA-eligible measure.

The fact that it is not defined in this rule does not, however, preclude the inclusion of a combined heat and power measure as a MEEIA measure if it is shown to be appropriate to do so.

COMMENT #6: Subsection 20.092(1)(l) defines the term “deemed savings.” Staff advises the commission to modify the definition to refer to both a utility-specific technical reference manual and to a statewide technical reference manual. Similarly, the Division of Energy would add a reference to a statewide technical reference manual. Public Counsel would add the word “estimated” to clarify that deemed savings are estimated engineering savings, not realized savings. Public Counsel would also delete the last two sentences of the proposed definition as unnecessary.

RESPONSE AND EXPLANATION OF CHANGE: Staff’s proposed modification to include the use of either an approved technical resource manual, or a statewide technical reference manual is appropriate and will be adopted. The change proposed by staff incorporates the change proposed by the Division of Energy. Public Counsel’s proposal to add “estimated” to the definition is also an appropriate clarification of the definition and will be adopted. The commission disagrees with Public Counsel’s assessment of the last two sentences of the proposed definition. They do add value to the definition and will be retained in the rule.

COMMENT #7: Subsection 20.092(1)(M) defines “demand-side program.” The term “demand-side program” is defined by statute at section 393.1075.1(3), RSMo 2016. The proposed definition of that term in the rule expands upon the statutory definition by adding a reference to combined heat and power and distributed generation as types of programs that might qualify as a “demand-side program.” Staff advises the commission to remove combined heat and power and distributed generation from the definition because they do not necessarily modify the net consumption of electricity on the retail customer’s side of the electric meter, and therefore, do not meet the statutory definition. The Division of Energy and Renew Missouri urge the Commission to retain combined heat and power and distributed generation in the definition, and the Division of Energy would add “conservation voltage reduction” as an example of an eligible demand-side measure. Public Counsel would retain “combined heat and power” but not “distributed generation. It would also add language indicating that demand-side program does not include “deprivation of service” or “low-income weatherization.

RESPONSE AND EXPLANATION OF CHANGE: Staff is correct, combined heat and power and distributed generation should be removed from this definition. While combined heat and power and distributed generation may qualify for a demand-side program under some circumstances, they should not be included in a definition of “demand-side program” as if they would

always qualify. Division of Energy's proposal to add an additional example of a qualifying program will not be adopted because it is not necessary to include a comprehensive list of qualifying programs in this definition. Public Counsel's proposal to exclude deprivation of service and low-income weatherization from the definition is appropriate and will be adopted.

COMMENT #8: Subsection 20.092(1)(N) defines "demand-side programs investment mechanism (DSIM). Staff and Public Counsel propose minor modifications to clarify the wording of this definition.

RESPONSE AND EXPLANATION OF CHANGE: The Commission will adopt the changes proposed by staff and Public Counsel, except Public Counsel's proposal to delete "of a DSIM" from the description of the various components and "recovery" from "program cost recovery component" as those phrases are a part of the definition of each component.

COMMENT #9: Subsection 20.092(1)(O) defines "demand savings target." Staff advises the Commission to modify the definition to explicitly reference the demand savings level approved by the commission under Chapter 20.094, the commission's rule regarding demand-side programs. Public Counsel does not address Staff's proposed change, but advises the Commission to remove the word "annual" from the definition because savings targets are determined through a three-year MEEIA cycle rather than annually.

RESPONSE AND EXPLANATION OF CHANGE: The comments and changes offered by staff and Public Counsel are reasonable: the additional specificity proposed by staff will be helpful as savings target are not determined on an annual basis. The commission will adopt the proposed changes.

COMMENT #10: Subsection 20.092(1)(P) defines "DSIM amount." Public Counsel advises the commission to add the word "program" to cost recovery amount.

RESPONSE AND EXPLANATION OF CHANGE: Public Counsel's proposed change will clarify the definition and will be adopted.

COMMENT #11: Ameren Missouri urges the commission to add a definition of "distributed generation" as a new subsection.

RESPONSE: The additional definition proposed by Ameren Missouri is unnecessary and will not be incorporated into the rule. While distributed generation is a useful tool, it does not always decrease the customer's total electric consumption and thus may not always be a MEEIA-eligible measure. The fact that it is not defined in this rule does not, however, preclude the

inclusion of a distributed generation measure as a MEEIA measure if it is shown to be appropriate to do so.

COMMENT #12: Subsection 20.092(1)(R) defines “earnings opportunity amount.” Staff advises the commission to insert “case” into the definition to be consistent with a later usage within that definition. Public Counsel advises modification of the last part of the definition to require the earnings opportunity to be consistent with “specific future supply-side investment deferral” rather than with an “amount based on the approved earnings opportunity component of a DSIM.”

RESPONSE: Staff’s insertion of “case” into the definition is unnecessary and inconsistent with the rest of the sentence. That modification will not be made. Public Counsel’s only explanation of its proposed change is “adjusted for clarity and statute.” It appears the modification proposed by Public Counsel is intended to reach the same result as the currently proposed language, but without an explanation of why the alternative language improves the definition, the commission will not make the proposed modification.

COMMENT #13: Subsection 20.092(1)(S) defines “earnings opportunity component of a DSM. Ameren Missouri and KCP&L and GMO ask the commission to delete the last sentence of this definition because it limits the commission to implementing that component on a retrospective basis after savings are verified through the EM&V process. Ameren Missouri and KCP&L would prefer the commission leave open the possibility of using the deemed savings values established in the state-wide TRM.

RESPONSE: The commission firmly believes that the use of the EM&V process to verify and document energy and demand savings is essential. The commission will not delete the last sentence of the definition.

COMMENT #14: Subsection 20.092(1)(T) defines “economic potential.” The Division of Energy asks the commission to delete its proposed definition and to substitute the definition used by the U.S. Environmental Protection Agency in its “Guide for Conducting Energy Efficiency Potential Studies.”

RESPONSE: The commission believes the definition it has proposed is most appropriate for use in the context of these Missouri rules. The commission will not adopt the definition proposed by the Division of Energy.

COMMENT #15: Subsection 20.092(1)(W) defines “energy efficiency.” Public Counsel asks the commission to change that definition to recognize that an energy efficiency measure may result in a better end-use. The NRDC asks the Commission to modify the definition to recognize that an energy efficiency measure may reduce the use of fuels other than electricity.

RESPONSE: Public Counsel's proposed revision is not intended to change the meaning of the definition, but it does create potential confusion about what is meant by a "better" given end-use. The commission will not adopt the change proposed by Public Counsel. The NRDC's proposed change would also confuse the meaning of the definition by introducing issues about other fuel sources into a definition applicable only to electric utilities. The commission will not adopt the change proposed by the NRDC.

COMMENT #16: Subsection 20.092(1)(X) defines "energy savings target." Staff advises the Commission to modify the definition to explicitly reference the demand savings level approved by the commission under the commission's rules regarding demand-side programs, 4 CSR 240-20.094. Public Counsel does not address Staff's proposed change, but advises the Commission to remove the word "annual" from the definition because savings targets are determined through a three-year MEEIA cycle rather than annually.

RESPONSE AND EXPLANATION OF CHANGE: The comments and changes offered by staff and Public Counsel are reasonable: the additional specificity proposed by staff will be helpful and savings target are not determined on an annual basis. The commission will adopt the proposed changes.

COMMENT #17: Subsection 20.092(1)(Y) defines "evaluation, measurement, and verification" (EM&V). The Division of Energy asks the commission to add a sentence to require EM&V studies to use a commission-approved statewide TRM. KCP&L and GMO urge the commission to delete "benefits" from the definition because EM&V studies do not calculate the benefits associated with demand-side programs; that is done by the utilities using the EM&V results. Ameren Missouri offers two comments on this definition. First, it would remove "actual" from the definition in recognition that the result of any EM&V study is an estimate rather than a determination of "actual" numbers. Second, it would modify the final sentence of the definition to recognize that an EM&V study will report on benefits, cost-effectiveness and other effects from demand-side programs based on its estimate or verification of energy and demand savings.

RESPONSE AND EXPLANATION OF CHANGE: The Commission will not amend the definition to mandate use of the statewide TRM as proposed by the Division of Energy. Ameren Missouri's revised definition is an improvement that does a better job of defining the term EM&V, and will be adopted. The use of the revised definition also eliminates the concerns about calculation of benefits expressed by KCP&L and GMO.

COMMENT #18: Subsection 20.092(1)(Z) defines “filing for demand-side program approval.” Staff advises the commission to substitute “establishment” for “approval” in the definition.

RESPONSE AND EXPLANATION OF CHANGE: Staff’s proposed modification is appropriate and will be adopted.

COMMENT #19: Subsection 20.092(1)(BB) defines “interruptible or curtailable rate.” Public Counsel asks the commission to specify that such rates are “tariff” rates that serve a commission-approved rate class to distinguish them from rates that might be offered as part of a MEEIA activity.

RESPONSE AND EXPLANATION OF CHANGE: Public Counsel’s proposed modification is appropriate and will be adopted, except that the correct term is “tariffed” rates rather than “tariff” rates.

COMMENT #20: Public Counsel would add a definition of “load control” to define activities that place the operation of electricity-consuming equipment under the control of an electricity provider or system operator to produce energy or savings demand.

RESPONSE: Load control is an interesting concept, but the term is not used in the commission’s regulations, so it does not need to be defined in this rule.

COMMENT #21: Public Counsel would add a definition of “load management” to describe the use of “load control” activities.

RESPONSE: Load management is an interesting concept, but the term is not used in the commission’s regulations, so it does not need to be defined in this rule.

COMMENT #22: Subsection 20.092(1)(CC) defines “market potential study.” Staff advises the commission to substitute “demand-side” for “energy-efficiency” in the definition. The Division of Energy supports the definition’s clarification that market potential studies should be used to guide decision making rather than limiting program planning. Public Counsel would make two changes. First, Public Counsel would add rate design to the list of items that might be considered as the result of a market potential study. Second Public Counsel proposes to add a sentence explaining that a market potential study is to be used primarily to inform a utilities integrated resource planning, and secondarily to inform its MEEIA application. Public Counsel explains that this addition is needed to emphasize that the utility should primarily recover the costs of performing its market potential study through a rate case as a general cost of doing business rather than as a special cost to be recovered through a MEEIA-related DSIM.

RESPONSE AND EXPLANATION OF CHANGE: Staff's substitution of the broader "demand-side" for the narrower "energy-efficiency" in the definition is appropriate and will be adopted. Public Counsel's addition of "rate design" is appropriate and will be adopted. However, Public Counsel's addition of a sentence regarding the recovery of the cost of a market potential study is not properly a part of the definition and will not be adopted.

COMMENT #23: Subsection 20.092(1)(DD) defines "market transformation." Staff would substitute "demand-side savings" for "energy efficiency" in the definition. The Division of Energy suggests the definition be deleted because the concept of market transformation is very difficult to describe, and defining it may limit how programs accomplish energy efficiency goals. Public Counsel also would delete the definition as unnecessary, as all MEEIA programs are meant to be market transformation programs.

RESPONSE AND EXPLANATION OF CHANGE: Staff's substitution of the broader "demand-side savings" for the narrower "energy-efficiency" in the definition is appropriate and will be adopted. The term "market transformation" is used in the Commission's MEEIA regulations and is appropriately defined. The suggestion to delete the definition offered by Public Counsel and the Division of Energy will not be adopted.

COMMENT #24: Subsection 20.092(1)(EE) defines "maximum achievable potential." The NRDC and Renew Missouri ask the commission to revise that definition to remove the idea that a maximum achievable potential study should represent a hypothetical maximum of achievable demand-side savings that can only be achieved under ideal conditions. Instead, they believe the maximum achievable potential should be defined as a best estimate of the maximum target for all cost-effective demand-side savings a utility can expect to achieve. They argue that is the standard established in the MEEIA statute and should be included in the rule. The Division of Energy is also dissatisfied with the proposed definition and would instead utilize the definition used by the U.S. Environmental Protection Agency.

RESPONSE: The commission believes the definition it has proposed is most appropriate for use in the context of these Missouri rules. The commission will not adopt the definition proposed by the NRDC, Renew Missouri, or the Division of Energy.

COMMENT #25: Subsection 20.092(1)(FF) defines "measure." Staff recommends that "energy" in paragraph 1 of that subsection be replaced by "electricity." Staff would also add words to that paragraph to clarify the purpose of that provision. Further, Staff would alter paragraph 2 of that subsection to clarify that a measure is to decrease peak demand or shift demand to off-peak periods. Public Counsel would remove "behavioral

response mechanism from the definition, and would replace “adequate level and quality” of energy service with “the same or better levels” of energy service.

RESPONSE AND EXPLANATION OF CHANGE: The changes proposed by Staff help to clarify the definition and will be adopted. Public Counsel’s proposal to replace adequate level and quality of service with same or better levels of service also helps to clarify the provision and will be adopted. Public Counsel does not explain why “behavioral response mechanism” should be removed from the definition and the commission will not do so.

COMMENT #26: Subsection 20.092(1)(HH) defines “net shared benefits.” Staff recommends multiple changes to the subsection, beginning with changing the term to be defined to “net benefits.” Further, Staff would add a reference to statewide TRM and TRM to acknowledge that utilities might choose to use their own TRM rather than the statewide TRM. The Division of Energy would change the reference to a “technical resource manual” to a “technical reference manual.” KCP&L and GMO recommend a completely revised definition of the term. Public Counsel and Ameren Missouri assert that “net shared benefits” is not used in the new rule and for that reason should not be defined.

RESPONSE AND EXPLANATION OF CHANGE: The commission believes the proposed definition, as revised by staff is appropriate. The changes proposed by staff will be adopted.

COMMENT #27: Subsection 20.092(1)(II) and paragraphs 1-4 define “non-energy benefits.” Non-energy benefits represent the concept that increasing energy efficiency has additional benefits for society in general that are not directly related to energy consumption. For example, a decrease in the burning of coal to produce electricity may result in better health for people living downwind of the smoke stack. The National Housing Trust, Renew Missouri, and the Division of Energy strongly support the inclusion of non-energy benefits in the calculation of cost-effectiveness testing, including the total resource cost test (TRC), which is a preferred test in MEEIA matters. They point out that inclusion of non-energy benefits in the definition does not mean that the commission must approve their use in a particular case. Instead, their possible use in an appropriate case would be made possible. Public Counsel contends the entire subsection should be deleted. According to Public Counsel, the quantification of non-energy benefits is subjective and will result in greater uncertainty and risk for the utility and for non-participating ratepayers. Staff would not eliminate the concept of “non-energy benefits” entirely, but would restrict their use to the “societal cost test” and require that they have a quantifiable economic value. KCP&L and GMO agree that non-energy benefits should not be included in the TRC.

RESPONSE AND EXPLANATION OF CHANGE: The commission believes that non-energy benefits may be appropriately considered in the TRC, but only if they are quantifiable and result in avoided electric utility costs. An example mentioned at the hearing would be a reduction in the utility's bad debt expenses resulting from an efficiency measure. The commission will modify the definition accordingly.

COMMENT #28: Paragraph 20.092(1)(II)4, within the definition of "non-energy benefits", allows for the inclusion of such benefits within cost-effectiveness test "unless they cannot be calculated with a reasonable degree of confidence." Division of Energy would require the inclusion of such non-energy benefits unless they are shown to be non-calculable. KCP&L and GMO would limit the use of non-energy benefits to the "societal cost test." Ameren Missouri would reverse the presumption by allowing non-energy benefits to be included in cost-effectiveness tests only if they are shown to be calculable.

RESPONSE AND EXPLANATION OF CHANGE: The commission has modified this paragraph in response to comment #27. The presumption has been reversed to allow such benefits to be included in cost-effectiveness tests only if they are shown to be calculable.

COMMENT #29: Subsection 20.092(1)(JJ) defines the "non-participant" test, also known as the "ratepayer impact measure" (RIM). Staff advises the commission to make "avoided cost" plural, and to add a clause recognizing the costs of statewide TRM and TRM as utility costs to be considered in the test. KCPL and Public Counsel suggest the test be recognized at the ratepayer impact measure (RIM) since that it is how it is referred to by most experts. Public Counsel would also recognize the utility's lost earnings opportunity resulting from the implementation of demand-side programs.

RESPONSE AND EXPLANATION OF CHANGE: The commission agrees that this test is more properly described as "ratepayer impact measure (RIM). The other modifications proposed by staff and Public Counsel are appropriate and will be adopted. Since these definitions are arranged in alphabetical order, this subsection, and the following subsections, will be renumbered accordingly.

COMMENT #30: Subsection 20.092(1)(KK) defines "participant test". Public Counsel comments that the proper term to be defined is "participant costs test (PCT).

RESPONSE AND EXPLANATION OF CHANGE: Public Counsel is correct. The Commission will adopt that change.

COMMENT #31: Subsection 20.092(1)(LL) defines “preferred resource plan” as the utility’s resource plan adopted in accordance with the commission’s integrated resource plan (IRP) rules. The Division of Energy urges the commission to delete this definition because it opposes any connection between these MEEIA rules and the IRP process.

RESPONSE: The commission believes the reference and linkage to the integrated resource plan is necessary to provide a benchmark for comparison. The commission will not delete the definition.

COMMENT #32: Subsection 20.092(1)(MM) defines “probable environmental compliance costs.” Staff proposes several modifications to this definition. First, it would make cost plural. Second, it would eliminate a list of environmental regulations to be considered and would replace it with a direction to the utility to consider the environmental considerations included in its current preferred resource plan under the IRP rules. Public Counsel also suggests that the list of environmental regulations be deleted. KCP&L and GMO, as well as Ameren Missouri, ask the commission to revise this definition to mirror the definition of probable environmental cost established in the commission’s IRP rules at 4 CSR 240-22.020(47).

RESPONSE AND EXPLANATION OF CHANGE: Staff’s proposed changes are appropriate and bring the definition in line with the parallel definition in the IRP rules. The commission will adopt the changes proposed by staff.

COMMENT #33: Subsection 20.092(1)(OO) defines “realistic achievable potential.” The NRDC and Renew Missouri urge the Commission to entirely delete this definition and any reference to “realistic achievable potential” in these rules. They argue that “maximum achievable potential” is the equivalent of the MEEIA statute’s stated goal of achieving maximum cost-effective efficiency savings, and, as a result, “realistic achievable potential” simply allows for achieving less than “maximum achievable potential. The Division of Energy is also dissatisfied with this definition and would instead use the definition used by the U.S. Environmental Protection Agency.

RESPONSE: The commission believes the definition it has proposed is most appropriate for use in the context of these Missouri rules. The commission will not adopt the changes proposed by the NRDC, Renew Missouri, or the Division of Energy.

COMMENT #34: Subsection 20.092(1)(PP) defines “societal cost test.” Staff would explicitly add non-energy benefits to the externalities that may be considered as part of the societal cost test. KCP&L and GMO note that the word “externalities” is not defined in the proposed rules. Ameren Missouri proposes a revised definition described as the total resource cost test plus

non-energy benefits. Public Counsel also suggests alternate wording for the definition.

RESPONSE AND EXPLANATION OF CHANGE: Ameren Missouri's simplified definition accomplishes the definition of societal cost test as including non-energy benefits in the same way as proposed by Staff and Public Counsel, but does so more clearly. The commission will adopt the change proposed by Ameren Missouri.

COMMENT #35: Ameren Missouri proposes a new definition of "stakeholder". Its intent is to limit participants in the collaborative process that occurs during an active MEEIA cycle. Ameren Missouri would limit such stakeholder to the parties to the case in which the commission approved the utility's demand side portfolio, and then only if such party affirmatively indicated a desire to continue as a stakeholder during the collaborative process.

RESPONSE: The commission does not believe that the term stakeholder needs to be defined within the rule. Certainly, participation in the collaborative process does not need to be as narrowly constrained as Ameren Missouri suggests. The definition proposed by Ameren Missouri will not be adopted.

COMMENT #36: Subsection 20.092(1)(RR) defines "statewide technical reference manual or statewide TRM." Staff proposes the definition be modified to indicate the statewide TRM will be developed by the utilities and stakeholders rather than by a statewide collaborative. Staff would also remove the language describing the commission's approval of the statewide TRM. The Division of Energy proposes a revised definition that explicitly references provisions of other commission regulations. Public Counsel suggests the definition be deleted as redundant to the definition of "technical resource manual." Ameren Missouri also suggests this subsection be deleted and the definition incorporated into the definition of technical resource manual.

RESPONSE AND EXPLANATION OF CHANGE: Public Counsel and Ameren Missouri are correct. The definition of statewide technical reference manual is best incorporated into the definition of technical reference manual, which is subsection 20.092(1)(TT) in the proposed rule. (subsection RR in the final rule). The remaining subsections are renumbered.

COMMENT #37: Subsection 20.092(1)(SS) defines "technical potential." The Division of Energy proposes that this definition be replaced with the definition used by the U.S. Environmental Protection Agency.

RESPONSE: The commission believes the definition it has proposed is most appropriate for use in the context of these Missouri rules. The commission will not adopt the changes proposed by the Division of Energy.

COMMENT #38: Subsection 20.092(1)(TT) defines “technical resource manual.” The Division of Energy proposes to delete the entire definition. Public Counsel and Ameren Missouri offer revised definitions. Public Counsel would add a reference to “estimated” energy and demand savings, and would delete a reference to “demand response” programs. Public Counsel explains that demand response programs will be time and place specific and do not lend themselves to the purpose of the TRM. Ameren Missouri would offer a simplified definition that also refers to the statewide TRM.

RESPONSE AND EXPLANATION OF CHANGE: The commission believes Ameren Missouri’s simplified definition best describes a TRM and also incorporates the use of a statewide TRM. The commission will adopt the change proposed by Ameren Missouri except that the clause in the proposed rule that describes programs “within an electric utility’s service territory” will be retained.

COMMENT #39: Subsection 20.092(1)(XX) defines “total resource cost test or TRC.” Staff, NRDC, Division of Energy, KCP&L and GMO, Ameren Missouri, and Public Counsel all propose that this definition be extensively revised. Staff, KCP&L and GMO, Ameren Missouri, and Public Counsel propose definitions that would not allow for consideration of non-energy benefits in the TRC. The NRDC and the Division of Energy propose definitions that would allow consideration of non-energy benefits in the TRC.

RESPONSE AND EXPLANATION OF CHANGE: As was discussed in Comment #26, related to the definition of non-energy benefits, the commission will allow the consideration of non-energy benefits in the TRC, but only if they are quantifiable and result in avoided electric utility costs. However, non-energy benefits do not need to be again specifically included in the definition of total resource cost test. The revised definition proposed by staff is a simplification of the proposed definition and best describes the term as it is used in these rules. The commission will adopt the change proposed by staff.

COMMENT #40: Subsection 20.092(1)(YY) defines “utility cost test.” Ameren Missouri proposes a simplified version of that definition that recognizes that “avoided utility cost” and “cost recovery amount” are defined elsewhere in the rule.

RESPONSE AND EXPLANATION OF CHANGE: The commission notes that the only difference between the total resource cost test and the utility cost

test is that the total cost test includes participant costs, while the utility cost cost does not. Therefore, the definition for utility cost test will be the same as for total resource cost test except that participant costs will be excluded from the definition of utility cost test.

COMMENT # 41: Ameren Missouri suggests that this rule should have a provision allowing the commission to grant a variance from any provision of the rule for good cause. Staff agrees with that suggestion.

RESPONSE AND EXPLANATION OF CHANGE: The Commission will add a new section (2) to allow for the granting of a variance for good cause shown.

**Title 4—DEPARTMENT OF ECONOMIC
DEVELOPMENT
Division 240—Public Service Commission
Chapter 20—Electric Utilities**

4 CSR 240-20.092 Definitions for Demand-Side Programs and Demand-Side Programs Investment Mechanisms

(1) As used in 4 CSR 240-20.093 and 4 CSR 240-20.094, the following terms mean:

(A) Annual report means a report of information concerning a utility's demand-side programs having the content described in 4 CSR 240-20.093(9);

(B) Approved demand-side program means a demand-side program or program pilot which is approved by the commission in accordance with 4 CSR 240-20.094 Demand-Side Programs;

(C) Avoided costs or avoided utility costs means 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 integrated resource plan and risk analysis used in its most recently adopted preferred resource plan to calculate its avoided costs;

(D) Baseline demand forecast means a reference forecast of summer or winter peak demand at the customer class level and on the customer side of the meter, excluding the effects of any new demand-side programs but including the effects of naturally-occurring energy efficiency and any codes and standards that were in place and known to be enacted at the time the forecast is completed;

(E) Baseline energy forecast means a reference forecast of energy at the customer class level and on the customer side of the meter, excluding the effects of any new demand-side programs but including the effects of naturally-occurring energy efficiency and any codes and standards that were in place and known to be enacted at the time the forecast is completed;

(I) Deemed savings means the estimated measure-level annual energy savings and/or demand savings documented or calculated in the approved technical resource manual, technical reference manual (TRM), or statewide TRM, multiplied by the documented measure count. The demand-side program deemed savings is the sum of the deemed savings for all measures installed in a demand-side program. The demand-side portfolio deemed savings is the sum of all demand-side program deemed savings;

(M) Demand-side program means any program conducted by the utility to modify the net consumption of electricity on the retail customer's side of the electric meter, including, but not limited to, energy efficiency measures, load management, demand response, and interruptible or curtable load, but not including deprivation of service or low-income weatherization;

(N) Demand-side programs investment mechanism, or DSIM, means a mechanism approved by the commission in a utility's filing for demand-side program approval to encourage investments in demand-side programs. The DSIM may include: a program cost recovery component of a DSIM, a throughput disincentive component of a DSIM, and an earnings opportunity component of a DSIM;

(O) Demand savings target means the demand savings level approved by the commission under 4 CSR 240-20.094(4)(I) or 4 CSR 240-20.094(5)(A)5. Demand savings targets are the baseline for determining the utility's demand-side portfolio's demand savings performance levels for the earnings opportunity component of a DSIM;

(P) DSIM amount means the sum of the program cost recovery amount, throughput disincentive amount, and earnings opportunity amount;

(X) Energy savings target means the energy savings level approved by the commission under 4 CSR 240-20.094(4)(I) or 4 CSR 240-20.094(5)(A)6. Energy savings targets are the baseline for determining the utility's demand-side portfolio's energy savings performance levels for the earnings opportunity component of a DSIM;

(Y) 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 annual energy and demand savings, and to report on the benefits, cost effectiveness, and other effects from demand-side programs, based on those estimated and/or verified energy and demand savings;

(Z) Filing for demand-side programs approval means a utility's filing for establishment, modification, or discontinuance of demand-side program(s) which may also include a simultaneous request for the establishment, modification, or discontinuance of a DSIM;

(BB) Interruptible or curtailable rate means a tariffed rate under which a customer receives a reduced charge in exchange for agreeing to allow the utility to withdraw the supply of electricity under certain specified conditions;

(CC) Market potential study means a quantitative analysis of the amount of energy and demand savings that may exist, is cost-effective, and could be realized through the implementation of demand-side programs, policies and rate design;

(DD) Market transformation means the strategic process of intervening in a market to create lasting change in market behavior by removing identified barriers or exploiting opportunities to accelerate the adoption of all cost-effective demand-side savings as a matter of standard practice;

(FF) Measure means any device, technology, behavioral response mechanism, or operating procedure that makes it possible to deliver the same or better levels of energy service while—

1. Using less electricity than would otherwise be required to achieve a given end-use; or

2. Altering the time pattern of end-use electricity so as to decrease peak demand or shift demand to off-peak periods;

(HH) Net benefits means the program benefits measured and documented through EM&V reports, TRMs and statewide TRM, less the sum of the program costs including the design, administration, delivery, end-use measures, incentive payments to customers, EM&V, utility market potential studies, and statewide TRM or TRM and statewide TRM;(II) Non Energy Benefits means—

1. Direct benefits to participants in utility demand side programs, including, but not limited to, increased property values, increased productivity, decreased water and sewer bills, reduced operations and maintenance costs, improved tenant satisfaction, and increases to the comfort, health, and safety of participants and their families;

2. Direct benefits to utilities, including, but not limited to, reduced arrearage carrying costs, reduced customer collection calls/notices, reduced termination/reconnection costs, and reduced bad debt write-offs; or

3. Indirect benefits to society at large, including, but not limited to, job creation, economic development, energy security, public safety, reduced emissions and emission related health care costs, and other environmental benefits;

4. Non Energy Benefits may be included in the total resource cost test (TRC) only if they result in avoided utility costs that may be calculated with a reasonable degree of confidence. Non-energy benefits may always be considered in the societal cost test.;

(JJ) Participant costs test (PCT) means a test of the cost-effectiveness of demand-side programs that measures the economics of a demand-side program from the perspective of the customers participating in the program;

(KK) Preferred resource plan means the utility's resource plan that is contained in the resource acquisition strategy most recently adopted by the utility's decision-makers in accordance with 4 CSR 240-22;

(LL) Probable environmental compliance costs means the costs to the utility of complying with new or additional environmental legal mandates, taxes, or other requirements that, in the judgment of the utility's decision-makers, may be reasonably expected to be incurred by the utility and are included in the integrated resource plan and risk analysis used in its most recently-adopted preferred resource plan;

(MM) Program pilot means a demand-side program designed to operate on a limited basis for evaluation purposes before full implementation;

(NN) Ratepayer impact measure (RIM) test is a measure of the difference between the change in total revenues paid to a utility and the change in total cost incurred by the utility as a result of the implementation of demand-side programs. The benefits are the avoided costs as a result of implementation. The costs consist of incentives paid to participants, other costs incurred by the utility, and the loss in revenue as a result of diminished consumption, and the utility's earnings opportunity as a result of implementation of demand-side programs. Utility costs include the costs to administer, deliver, and evaluate each demand-side program and the costs of statewide TRM or TRM and statewide TRM;

(PP) Societal cost test means the total resource cost test with the addition of non-energy benefits;

(RR) Technical potential means energy savings and demand savings relative to a utility's baseline energy forecast and baseline demand forecast, respectively, resulting from a theoretical construct that assumes all feasible measures are adopted by customers of the utility regardless of cost or customer preference;

(SS) Technical resource manual, technical reference manual or TRM means a document used to quantify energy savings and demand savings attributable to energy efficiency and demand response programs within an electric utility's service territory. The TRM may be a statewide or utility-specific document that is approved by the commission;

(TT) Throughput disincentive means the electric utility's lost margin revenues that result from decreased retail sales volumes due to its demand-side programs;

(UU) Throughput disincentive amount means the amount approved by the commission in a utility's filing for demand-side program approval or a DSIM rate adjustment case to provide the utility with recovery of throughput disincentive based on the approved throughput disincentive component of a DSIM;

(VV) Throughput disincentive component of a DSIM means the methodology approved by the commission in a utility's filing for a demand-side program approval to allow the utility to receive recovery of throughput disincentive with interest;

(WW) Total resource cost test or TRC means a test that compares the sum of avoided utility costs, including avoided probable environmental costs to the sum of all incremental costs of end-use measures that are implemented due to the program (including both utility and participant contributions), plus utility costs to administer, deliver, and evaluate each demand-side program and costs of statewide TRM or TRM and statewide TRM. ; and

(XX) Utility cost test (UCT) means a test that compares the sum of avoided utility costs, including avoided probable environmental costs, to the sum of all incremental costs of end use measures that are implemented due to the program, excluding participant contributions, plus utility costs to administer, deliver, and evaluate each demand-side program and costs of statewide TRM or TRM and statewide TRM; and

(2) Upon request and for good cause shown, the commission may grant a variance from any provision of this rule.