

**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 INITIAL
POST-HEARING BRIEF**

Respectfully submitted,

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PUBLIC COUNSEL’S INITIAL POST-HEARING BRIEF

I. Introduction

After significant delay, the Kansas City Power & Light Company (KCPL) and KCP&L Greater Missouri Operations Company (GMO) (Collectively KCP&L or the Company) expect the Public Service Commission (Commission) and other parties to support an energy efficiency program proposal with no avoided costs or other benefits for its customers.

The Company initially signaled its joint application for a third cycle of demand-side management programs per the Missouri Energy Efficiency Investment Act (MEEIA), Section 393.1075, RSMo, on April 20, 2018 in the EO-2018-0298 and EO-2018-0299 dockets.¹ However, when the Staff of the Public Service Commission (Staff) and the Office of the Public Counsel (OPC) noted several deficiencies with Union Electric d/b/a Ameren Missouri’s (Ameren Missouri) MEEIA Cycle 3 application, KCP&L publically announced that it decided to “hit the pause button on the filing of our MEEIA Cycle 3 application.”² KCP&L then bided its time until the

¹ *Notice of Intendent Case Filing*, EO-2018-0298 & EO-2018-0299 (Apr. 20, 2018).

² *Surrebuttal Testimony of Charles A. Caisley*, EO-2018-0211 p. 6 (Sep. 17, 2018).

Commission approved a Stipulation and Agreement authorizing Ameren Missouri's MEEIA Cycle 3 as modified.

KCP&L returned to the Commission on November 29, 2018 with a joint application facially similar to Ameren Missouri's MEEIA Cycle 3. KCP&L noted in its application that its MEEIA Cycle 2 programs were set to expire by March, 2019, and thus justifying an expedited schedule. KCP&L got its expedited schedule, but the prospects of support for the Company's Application soured as made apparent by the many scheduling adjustments that followed. Staff first requested for shortened response times for data requests in order to facilitate discovery.³ Several parties later filed a motion to amend the procedural schedule.⁴ The Commission granted the motion and pushed the date for rebuttal testimony back twenty days. As the deadline for rebuttal testimony neared, and OPC and Staff's critiques would become public, KCP&L moved to amend the procedural schedule to enable further settlement discussions.⁵ After the Commission granted that motion, the parties entered into a preliminary settlement with Staff and Company arranging to find a way to agree on how to determine avoided costs.⁶ More settlement discussions were had, but ultimately the procedural schedule resumed its path towards rebuttal testimony in the late summer of 2019.⁷ Resuming the procedural schedule also involved GMO delaying the filing of its 2019 integrated resource plan annual update.⁸ The case then progressed to hearing with KCP&L maintaining that its application filed nearly a year prior be approved with no revisions based on discussions throughout the pendency of this case.

³ *Staff Motion for Commission Order Shortening Response Times for Data Requests*, EA-2019-0132 (Dec. 4, 2018).

⁴ *Joint Motion to Amend Procedural Schedule and Consolidate Cases*, EO-2019-0132 (Dec. 12, 2018).

⁵ *Motion to Suspend Procedural Schedule*, EO-2019-0132 (Jan. 28, 2019).

⁶ *Stipulation and Agreement Regarding Extension of MEEIA 2 Programs During Pendency of MEEIA 3 Case*, EA-2019-0132 (Feb. 15, 2019).

⁷ *Joint Motion to Re-Establish Procedural Schedule and Grant Variance From Requirement to File 2019 Integrated Resource Plan Annual Update*, EO-2019-0132 (July 24, 2019).

⁸ *Id.*

As the repeated procedural delays imply, KCP&L premises its arguments for approval of its application not on its merits, but rather on the fact that Ameren Missouri got a third cycle of MEEIA. Resting on other peoples' laurels, KCP&L now expects that it get what another company under other circumstances received.

However, MEEIA programs are not a company entitlement. Rather, they are to promote demand-side energy efficiency programs that are beneficial to all customers, regardless of participation, and cost effective. Each MEEIA proposal should be judged on its own weight, and the Company's Application simply falls short. KCP&L's proposal avoids no costs, defers no investments, relies on un-verifiable efficiency savings, and does not benefit all customers.

II. The Commission Should Reject or Modify the Company's MEEIA Cycle 3 Plans (MEEIA 3) and Associated Waivers.

The Commission should reject the Company's MEEIA 3 Application because it fails to meet the requisite statutory and regulatory burdens of proof. Particularly, KCP&L fails to equally value demand and supply-side resources by proposing a MEEIA portfolio that will result in avoided utility costs by deferring supply-side investments. Other than an outright rejection, this Commission could also reject the Application with specific recommendations as to how the Company may modify its Application in order to meet the Commission's standard.

A. Applicable Legal Standard

The burden of proof always falls upon the applicant supporting a proposition.⁹ Since KCP&L brought its MEEIA Application before the Commission, the Company accordingly bears the burden to demonstrate that its Application meets the requisite standards.

⁹ *Clapper v. Lakin*, 123 S.W.2d 27, 33 (Mo. banc 1938).

The MEEIA statute provides that it is State policy to “value demand-side investments equal to traditional investments in supply and delivery infrastructure.”¹⁰ In furtherance of that policy, the Commission is to support Applications with “cost-effective measurable and verifiable efficiency savings.”¹¹ The total resource cost (TRC) test is the preferred test to determine cost-effectiveness.¹² The TRC test requires a comparison of avoided utility costs to the costs of the energy efficiency measures.¹³ Therefore, deferrals of supply-side investments or some other avoided costs are necessary in order for a MEEIA portfolio to be cost effective. MEEIA programs must also be “beneficial to all customers in the customer class in which the programs are proposed, regardless of whether the programs are utilized by all customers.”¹⁴ Statute authorizes the Commission to adopt rules to implement MEEIA.¹⁵ Commission rules determine benefits and cost-effectiveness by measuring a company’s avoided costs as a result of a MEEIA portfolio.¹⁶

B. The Company’s Application Fails to Generate any Avoided Costs and the Proposed Portfolio is Not Cost-Effective

KCP&L’s Application is fundamentally flawed because it does not value demand-side investments equal to traditional supply-side and delivery infrastructure investments. Not treating demand-side programs as equal with supply-side investments makes the Application conflict with statute.

The MEEIA statute is clear that State policy is to “value demand-side investments equal to traditional investments in supply and delivery infrastructure.”¹⁷ Demand-side and supply-side

¹⁰ Mo. Rev. Stat. § 393.1075.3 (2017).

¹¹ *Id.*

¹² Mo. Rev. Stat. § 393.1075.4

¹³ Mo. Rev. Stat. § 393.1075.1(6).

¹⁴ Mo. Rev. Stat. § 393.1075.4.

¹⁵ Mo. Rev. Stat. § 393.1075.11.

¹⁶ *See* 20 CSR 4240-20.092(1)(C).

¹⁷ Mo. Rev. Stat. § 393.1075.3.

investments are equally valued when MEEIA programs place “shareholders in a financial position comparable to the earnings opportunity they would have had if those shareholders made a future supply-side investment.”¹⁸ If an earnings opportunity is coupled with a deferral of a supply-side or other identifiable investment then “such a performance incentive would compensate [KCP&L] for foregone earnings opportunity that are not actually foregone.”¹⁹ Restated, a MEEIA application with no avoided costs produces a “double-recovery windfall” for the applicant utility, and does not equally value demand-side and supply-side measures.

Commission rules define “avoided costs” as the “cost savings obtained by substituting demand-side programs for existing and new supply-side resources.”²⁰ “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.”²¹ However, KCP&L has delayed its latest integrated resource planning (IRP) filing, and relies instead upon data from 2015 to show avoided costs. The OPC and Staff rely instead on the reality of today showing that KCP&L is deferring no supply-side, transmission, or other investment. In fact the Company has actively undermined its argument that there are any avoided costs by electing plant-in-service-accounting treatment, and thus has begun investing ever more into supply-side and distribution resources.²²

The Company seemingly agrees that the updated avoided cost numbers are far more accurate. When Company witness Darrin Ives was asked by the hearing officer to identify the Company’s avoided costs, he responded that:

“So avoided costs . . . has to do with the avoidance of some of the operations of existing facilities. In that regard, it is true that – that those existing facilities kind of as they were

¹⁸ *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”).

¹⁹ *Id.* at 12.

²⁰ 20 CSR 4240-20.092(1)(C)

²¹ 20 CSR 4240-20.092(1)(C).

²² *See* Transcript of Proceedings, Evidentiary Hearing, EO-2019-0132 p. 398 (Sep. 23-24, 2019).

invested in the last time we were in for a rate case are in rates and are being recovered from customers with a return.”²³

Restated, the Company admits that the Company is not avoiding any supply-side investments with its MEEIA Application, and that its customers will continue to pay a return on and of its investments as of its 2018 rate case. The Company’s failure to defer any investment treats supply-side and demand-side investments unequally.

OPC and Staff’s focus on real avoided costs should not come as a surprise. Staff publicly explained its preliminary concerns with KCP&L’s Application at the November 15, 2018, Commission Agenda.²⁴ Since KCP&L is not avoiding an identifiable supply side investment, is operating in a regional transmission operator without a capacity market, Staff witness John Rogers openly explained that Staff “would start at zero” when determining the Application’s avoided costs.²⁵ KCP&L has changed nothing since Staff publically explained the Company’s predicament, and so the Company has continued to unequally value demand-side and supply-side programs. By not equally valuing those investments, the Company’s customers will pay for continued supply-side investments and pay again for demand-side programs that defer nothing; effectively enabling the Company to double-collect.

The failure to not equally value demand-side and supply side resources is compounded by KCP&L proposing programs that are not cost effective because they are redundant and wasteful. OPC witness Dr. Geoff Marke identifies numerous examples of those failings. KCP&L’s proposed Online Home and Business Energy Audit is nothing more than a software application duplicating what is “already available on the internet for free.”²⁶ This Audit would also be duplicative for

²³ *Id.* at 228.

²⁴ Exhibit 200, *Rebuttal Testimony of Geoff Marke*, EO-2019-0132 p. 5-7 (Aug. 19, 2019).

²⁵ *Id.*

²⁶ *Id.* at 21.

KCP&L's customers given that they are already supporting the Company's One CIS; a \$100 million advanced metering infrastructure (AMI) hardware and billing software investment that is seemingly being left in the driveway while KCP&L proposes to spend money on another hotrod.

Dr. Marke also criticizes the Company's Home Energy Report (HER). The Company's HER is a mail insert that informs customers of their energy usage relative to "similar" households in order to "shame" people into more energy efficient behavior.²⁷ This program has also been made redundant by the Company's AMI investments, and has no verifiable savings.²⁸ The HER program suffers from a unique lack of persistent savings; that is "unlike an LED light bulb that literally uses less electricity than an incandescent across the same life-span, behavioral response programs are only good for a limited amount of time" and verifying whether the "shaming" actually resulted in sustained efficient behavior is difficult if not impossible.²⁹ Staff witness Brad Fortson echoed Dr. Marke's critiques at the evidentiary hearing.³⁰ Any added values of the HER and Online Energy Audit programs are also dubious due to the Company's simultaneous investment in customer portal information and time-of-use rate structures.³¹

When Dr. Marke turns to KCP&L's Residential Demand Response program, he finds that the benefits are certainly not justifying the costs because the Company is not utilizing the program to its intended potential. The Residential Demand Response program is designed to create a demand-side energy resource for the Company. Smart thermostats are subsidized with ratepayer money for individual residences along with financial incentives, and the Company is consequentially able to control the devices and lower residential temperatures during times of peak

²⁷ *Id.* at 22.

²⁸ *Id.* at 22-23.

²⁹ *Id.* at 23.

³⁰ Transcript, p. 417.

³¹ Exhibit 200, p. 23

energy need. This control period is colloquially referred to as a “curtailment event.” The curtailment events benefit customers by supplying their utility with an additional energy resource that defers the need for a future supply-side investment. As an energy resource, this program design then passes theoretical muster. However, the Company simply is not calling the curtailment events. “In 2016 there were eight events called. In 2017 there were three events called. In 2018 there were two events called.”³² OPC is not aware of any 2019 curtailment events. Not having the benefit of curtailment is problematic enough, but KCP&L has also magnified the issue by spending ratepayer money on even more thermostats despite not utilizing them as designed.³³ This downward trend of calling curtailment events with a simultaneous upward trend of increasing costs was confirmed by Company witness Brian File.³⁴ The Online Energy Audit, HER, and Residential Demand Response Programs are but a mere sampling of the cost-ineffectiveness exhibited by KCP&L’s application. For the aforementioned reasons, this Commission should reject them and consider better alternatives.

III. If Approved, the Commission Should Modify the Company’s MEEIA 3 with Public Counsel’s Suggested Revisions.

KCP&L’s proposed MEEIA 3 portfolio being not cost-effective is grounds enough for the Commission to reject the Application. However, the OPC also sees merit in the Commission endorsing what modifications the Company should pursue to have a successful MEEIA program with real energy efficiency results that benefit all customers, including non-participants. To that end, the OPC provides several suggested revisions for the Commission to consider.

³² *Id.* at 26.

³³ Transcript, p. 148.

³⁴ *Id.*

A. The Commission Should Modify the Company’s MEEIA 3 with a Default MEEIA Level.

Public Counsel’s first suggested revision to KCP&L’s Application is to taper KCP&L’s proposal to a default level of spending and operations. As Dr. Marke prescribes, a default MEEIA program “maintain[s] a degree of program activity and reasonable spending level that would recognize the historic sunk costs, the potential to increase MEEIA funding in the future, and explore alternative deliverables” in the future.³⁵ A default program then values those institutional investments the Company has already made in energy efficiency, while enabling stakeholders to readily respond with increased spending once actual avoided costs can be ascertained and attained.

A brief breakdown of the OPC’s proposed default spending earnings levels is provided below:

<u>Categories Annual</u>	<u>Costs Range Class</u>	<u>Allocation</u>
• Residential Programs	\$791,667 - \$875,000	Residential
• Business Programs	\$791,667 - \$875,000	Business
• Low-Income Programs	\$950,000 - \$1,050,000	Residential & Business
• Earnings Opportunity	\$333,333.33	Residential & Business ³⁶

The OPC additionally proposes a \$2 million research and development budget.

B. The Commission Should Modify the Company’s MEEIA 3 with an Equitable Energy Efficiency Baseline Study.

The benefits of energy efficiency are real and measurable. However, as with many environmental issues, benefits and detriments are not often equitably distributed. More affluent populations will tend to have more access to environmental amenities and benefits, whereas environmental public health concerns will often be localized around impoverished populations.³⁷

This environmental injustice pattern continues in the energy efficiency realm.

³⁵ Exhibit 200, p.34-35.

³⁶ *Id.* at 35.

³⁷ *See id.* at GM-7.

Public Counsel offers that an equitable energy efficiency baseline study can be key to addressing these equities while increasing what limited benefits KCP&L’s Application provides. A baseline study would involve KCP&L collecting demographic data on “estimated energy use intensity, energy efficiency equitable baseline investment, and energy savings in the KCPL and GMO service territories.”³⁸ This data collection would then foster a more holistic understanding of what energy efficiency potentials exist in KCP&L, and how those can be pursued more equitably. This research would build upon previous fuel poverty studies on the Kansas City, Missouri region.³⁹

C. The Commission Should Modify the Company’s MEEIA 3 with Automated Emissions Reduction Software.

The OPC also offers automated emissions reduction (AER) software as another avenue for the Commission to direct KCP&L to obtain currently unrealized energy efficiency benefits. AER technology, with proper customer information safeguards, would complement other energy efficiency programs by incentivizing energy use at times when emissions are lower. Dr. Marke explains that such a change “should help minimize grid intensity, cut emissions and reduce peak usage.”⁴⁰ AER software is already available through the private WattTime group, and should then be readily deliverable now in a revised MEEIA Application.

D. The Commission Should Modify the Company’s MEEIA 3 with the Pay As You Save® Program.

The Pay as You Save (PAYS) program would serve as a key enhancing component to KCP&L’s MEEIA programs by connecting energy efficiency program offerings to underserved

³⁸ *Id.* at 37.

³⁹ *Id.* at 39.

⁴⁰ *Id.* at 42.

populations. “Underserved” includes low-income groups, but also the majority of KCP&L’s residential customers who lack several thousands of dollars of disposal income to spend on immediately impactful energy efficiency.⁴¹ KCP&L’s independent third party evaluator has already determined PAYS to be feasible for KCP&L.⁴² Although PAYS may be better implemented in a subsequent MEEIA application, the OPC believes that a one-year proof of concept period can be added to MEEIA 3 to tap into unrecovered savings. As the Commission asked the parties to specifically brief on the benefits of PAYS, OPC saves further commentary on this matter until that section.

E. The Commission Should Modify the Company’s MEEIA 3 with Urban Heat Island Mitigation.

This Commission is uniquely positioned to direct KCP&L to pursue an urban heat island (UHI) mitigation through a MEEIA portfolio. UHI refers to the environmental phenomena of the albedo of the built environment increasing surface temperatures. As Dr. Marke explains, “Think about a parking lot in the hot sun . . . Now scale that up across a city.”⁴³ Kansas City, MO exhibits one of the worst UHIs, ranking in as the “fifth most impacted city in the future.”⁴⁴ The UHI results in real environmental harms from more energy use due to cooling at peak times to the exacerbation of existing public health concerns like heat stroke.

However, from adversity springs opportunity. Addressing an environmental phenomenon caused by a multitude of intervening factors may seem daunting, and inapplicable to ratepayer supported rebate programs. However, as Dr. Marke relates, most of the groundwork has already been laid by several stakeholders:

⁴¹ *Id.* at 45.

⁴² *Id.* at 43.

⁴³ *Id.* at 46.

⁴⁴ *Id.* at 47.

“In late 2014, the Kansas City region was named a Climate Action Champion by the White House and the Department of Energy. Area Partners included 1,999 local governments in the bi-state (Missouri and Kansas) area including over 4,423 square miles committed to developing a regional climate resilience strategy that would assess climate change trends for the Kansas City region, identify potential risks and vulnerabilities, and include alternative mitigation, adaptation and resilience options”

“Championed and coordinated by the Mid-American Regional Council (“MARC”) two separate independent research studies were conducted on the urban heat island phenomenon for the Kansas City area. The first study was conducted by a third-party research firm, Leidos, and completed in September of 2015. Titled, “Energy Savings of Heat-Island Reduction Strategies for the Kansas City Area” focused solely on the city of Kansas City. A second study was undertaken by Lawrence Berkeley National Laboratory for the greater Kansas City Region (both Missouri and Kansas).”⁴⁵

The U.S. Environmental Protection Agency, American Council for Energy Efficient Economy, Bridging the Gap, the U.S. Green Building Council, the University of Missouri – Kansas City, the City of Kansas City, Global Cool City Alliance, Sobolt, Kansas City Water, and the Metropolitan Energy Center have also engaged in the UHI conversation.⁴⁶ This diverse set of stakeholders and widespread UHI problem provides the potential for an actual beneficial MEEIA for KCP&L.

With KCP&L deferring no supply-side investments over the next twenty-years, the existence of Kansas City’s UHI poses as a prime opportunity to seek participant and non-participant benefits in a MEEIA portfolio that moves beyond the low-hanging benefits of Cycle 1 and 2. Rather than simply rebating light bulbs, KCP&L is positioned to make a far grander impact by incentivizing rooftop conversions, increasing vegetation, and other coordinated efforts to combat the UHI.⁴⁷ OPC proposes a program in the following form:

“[A] specific time period (no more than 18 months) where [KCP&L] would actively seek out alternative funding streams and donations to address Kansas City’s Urban Heat Island problem. Ratepayers would fund that R&D and future earnings opportunities could be tied to the amount of money/donations generated from the solicitations. For example, I think it would be more than generous to provide a 10% return on any dollar generated after a certain threshold was met. So, if KCPL were to

⁴⁵ *Id.* at 48; Exhibit 202.

⁴⁶ Exhibit 200, p. 50.

⁴⁷ *Id.* at 50-51.

generate \$100 million in grant money to implement cool roofs across Kansas City, then the Company could earn a \$10 million earnings opportunity.”

After delivering on financing, KCP&L can then work with the aforementioned interested stakeholders to design obtainable goals with measureable reductions in Kansas City’s UHI effects. OPC’s research budget proposal is noticeably less than half of what KCP&L proposes to spend on its HER program.⁴⁸ Instead of the HER program though, UHI mitigation is not redundant. Instead, using MEEIA to address the UHI would mark an unprecedented step towards coordinating ratepayer dollars towards an actionable deliverable with widespread benefits.

IV. The Proposed MEEIA 3 is not Expected to Provide Benefits to All Customers in the Customer Class in Which the Programs are Proposed, Regardless of Whether the Programs are Utilized by All Customers.

Along with being cost-effective, avoiding identifiable costs, and equally valuing demand and supply-side resources, a MEEIA applicant must also propose programs that “are beneficial to all customers in the customer class in which the programs are proposed, regardless of whether the programs are utilized by all customers.”⁴⁹ To benefit all customers within a class, an energy efficiency measure must be cost-effective and have avoided costs for the utility. This limitation is because avoided costs are the only way for an energy efficiency measure to benefit all customers, and being cost-effective helps assure the existence of avoided costs.

Consider the example explained by Staff witness Dana Eaves. At the evidentiary hearing, Mr. Eaves was given the example of two neighbors, one being a participant in a utility’s energy efficiency program and one not.⁵⁰ The participant neighbor puts in an energy efficient heating and

⁴⁸ *Id.* at 53.

⁴⁹ Mo. Rev. Stat. § 393.1075.4.

⁵⁰ Transcript, p. 453-54.

cooling system, and thus directly benefits from the energy efficiency program. However, the neighbor literally receives no direct heating or cooling benefits. Instead, Mr. Eaves confirmed that the nonparticipant benefits by the participant's energy efficiency measure being cost-effective to the point that the demand savings enable the utility to defer investments elsewhere that the nonparticipant neighbor would otherwise have to support.⁵¹ However KCP&L's application does not comport with Mr. Eaves' example.

As Staff's Rebuttal Report concludes, KCP&L's failure to meet the TRC leads Staff to believe that the programs will not be "beneficial to all customers."⁵² By failing to meet the TRC, KCP&L's portfolio is not cost-effective, and therefore there is no assurance of benefits to all customers. The only surety is that KCP&L is avoiding no costs, and that nonparticipant customers will subsidize participants and KCP&L's excessive earnings opportunity.

V. If Approved or Modified, the Commission Should Approve the DSIM Provisions Outlined in OPC Testimony as the Default MEEIA Level and Proposed Alternatives.

The parties' issues list asks the question, "If the Commission approves or modifies MEEIA 3, what DSIM provisions should be approved to align recovery with the MEEIA statute"? The OPC answers that the Commission should approve a modified MEEIA 3 with the default funding and program levels being explained in this brief prior. Alternatively, OPC proposes several different programs that can help a KCP&L MEEIA 3 have actual benefits for all customers regardless of program participation. OPC refers back to what it has already discussed in its brief and the testimony of Dr. Marke, and will not belabor the points made further.

⁵¹ *Id.*

⁵² Exhibit 101, p. 43.

VI. Opt-Out Customers Should not be Eligible to Participate in Business Demand Response Programs.

Customers who have elected to not financially support a utility's energy efficiency programs may not then participate in those programs. The MEEIA statute provides that certain customers are eligible to "not participate in demand-side measures offered by an electrical corporation" and that after providing timely notice of their desire to not participate "none of the costs of demand-side measures . . . shall be assigned to any account of any [such] customer, including its affiliates and subsidiaries."⁵³ Generally speaking, customers that qualify for this privilege are larger, industrial energy consumers, while residential customers may not opt out of supporting MEEIA programs. There is no dispute then that industrial customers are free to not pay for MEEIA programs, but the OPC takes issue with those customers then desiring to retain the benefits of the Company's Business Demand Response program.

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."⁵⁴ This means that rather than an entitlement, the Legislature decided that any benefit for opt-out customers was but a mere privilege depending on the Commission's rules. No Commission rule entitles opt-out customers to the benefits of the MEEIA programs they have elected to not support. Instead, the Commission's rules simply repeat the statutory guarantee that opt-out customers "shall still be allowed to participate in interruptible or curtailable rate schedules or tariffs offered by the electric utility."⁵⁵ This phrasing is nearly identical to the MEEIA statute, only differing as to the use of the phrase "electric utility" as opposed to "electrical

⁵³ Mo. Rev. Stat. § 393.1075.7.

⁵⁴ Mo. Rev. Stat. § 393.1075.8.

⁵⁵ 20 CSR 4240-20.094(7)(M).

corporation.”⁵⁶ Therefore, whether opt-out customers may enjoy the benefits of the business demand response programs they no longer pay for turns upon the statute’s language as opposed to rule.

The Commission is obliged to “give effect to legislative intent as reflected in the plain language of the statute at issue” when implementing statute.⁵⁷ To the extent possible, legislative intent is effectuated by using the plain and ordinary meaning of statutory text.⁵⁸ Every word in the text must be presumed to have meaning, and it should be understood that the “legislature did not insert superfluous language.”⁵⁹

The statutory language at issue states that “customers electing not to participate in an electric corporation’s demand-side programs under [Section 393.1075] shall still be allowed to participate in *interruptible or curtailable rate schedules or tariffs* offered by the electric corporation.”⁶⁰ The MEEIA statute defines “interruptible or curtailable rate” as “a 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.”⁶¹

The MEEIA statute’s definition of “interruptible or curtailable rate” noticeably does not constrain the rate to one offered through a MEEIA program, but rather uses broad terms for rates or program offerings not necessarily tied to a MEEIA program. We must read the MEEIA statute as written, and it plainly does not restrict or otherwise reference “interruptible or curtailable rate” back to MEEIA programs. This broad treatment challenges presumptions that the MEEIA statute’s

⁵⁶ See Mo. Rev. Stat. § 393.1075.10.

⁵⁷ *Ivie v. Smith*, 439 S.W.3d 189, 202 (Mo. banc 2014) (quoting *Parktown Imports, Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672 (Mo. banc 2009).

⁵⁸ *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 19 (Mo. banc 1995).

⁵⁹ *Verified Application & Petition of Liberty Energy (Midstates) Corp. v. Office of Pub. Counsel*, 464 S.W.3d 520, 524-25 (Mo. banc 2015).

⁶⁰ *Id.* (emphasis added).

⁶¹ Mo. Rev. Stat. § 393.1075.1(5).

“interruptible or curtailable rate schedules or tariffs” language refers specifically to MEEIA curtailment programs. Instead, the general use of the phrase supports the conclusion that the Legislature included the language merely to avoid the conclusion that opting-out of MEEIA disqualifies a customer from other curtailment tariffs or schedules. Such a conclusion is also bolstered by curtailment programs existing before MEEIA as standalone tariffs. The Legislature’s use of the phrase “schedules or tariffs” indicates its knowledge of those pre-existing offerings, and therefore we can reasonable infer that the language at issue simply protects industrial customers’ existing ability to otherwise participate in demand response tariffs outside of MEEIA.

Concluding that opt-out customers have truly opted-out and cannot retain the benefits of participating in the Company’s Demand Response Program also protects the integrity of the MEEIA statute. If industrial customers are free to not support MEEIA, while continuing to receive its benefits, then there is no reason why industrials would not opt-out. That incentive will lead to residential and other customers continuing to pay an ever growing share of the MEEIA programs as industrial customers continue to leave. That trend will inevitably lead to customer dissatisfaction and program instability threatening state supported energy efficiency as a policy itself.

As the OPC desires to preserve the integrity of MEEIA and energy efficiency, it asks that the Commission follow the plain reading of the statute barring opt-out customers from retaining MEEIA privileges. Opt-out customers will still be able to utilize KCP&L’s existing curtailment tariff, and they have no entitlement to be supported by customers who cannot elect to not support MEEIA charges.

VII. Commission Raised Issues

At the end of the evidentiary hearing, the Commission requested several additional areas of briefing. OPC responds now to each requested topic area in turn.

A. Avoided Costs are Necessary for a Successful MEEIA Program.

Avoided costs are necessary for a successful MEEIA program because they provide an objective, calculable measurement by which stakeholders can determine if a MEEIA proposal is cost-effective and beneficial to all customers. Since cost-effectiveness and benefits to all customers are statutory mandates, compliance thereof must be verified by some objective measure.⁶² If an applicant utility demonstrates avoided costs due to its MEEIA proposal, there are then numbers by which parties and the Commission may judge cost-effectiveness and evaluate the extent of any benefits. Relying on other measures beyond avoided costs invites speculation and uncertainty.

B. Earnings Opportunities are Appropriate if they Produce an Approximate Level of Benefits.

Earnings opportunities are not necessary for a utility to pursue energy efficiency programs, but they nonetheless may be appropriately approved for a utility in order to equally value demand and supply-side resources. As the Commission has described, the “sole purpose of a “performance incentive” under MEEIA is to give the company an earnings opportunity to place shareholders in a financial position comparable to the earnings opportunity they would have had if shareholders made a future supply-side investment.”⁶³ Therefore, if the benefits to the utility of an energy efficiency measure’s avoided costs do not match the return that a utility would have made on a supply-side investment, the earnings opportunity makes up the differential.

Fortunately Missouri’s experience does not substantiate a high likelihood of this differential occurring. All gas utilities operating in Missouri have energy efficiency programs without added earnings opportunities, as does The Empire District Electric Company.⁶⁴ Dr. Marke

⁶² See Mo. Rev. Stat. § 393.1075.

⁶³ *Report and Order*, EO-2015-0055 p. 11.

⁶⁴ Transcript, p. 454-56.

testified at the evidentiary hearing that Ameren Missouri engaged in energy efficiency for years without a performance incentive before MEEIA was enacted.⁶⁵ Staff witness Mr. Eaves confirms that “there are financial benefits to MEEIA absent an [earnings opportunity]” and so there is no reason to conclude that utilities would not engage in energy efficiency without an added incentive.⁶⁶

Staff proposes no earnings opportunity because KCP&L will experience no foregone supply-side revenues through its MEEIA Application, and because Staff is only proposing to continue low-income multi-family and education programs.⁶⁷ OPC’s default MEEIA program alternative provides an earnings opportunity that is commiserate with a smaller program budget in order to provide a blueprint of actions the Company could undertake in a future refiling to provide sufficient benefits to nonparticipants to warrant future earnings opportunities.⁶⁸

C. Whether the Company’s Business Demand Response Program is an “Interruptible or Curtailable Program” is Largely a Debate of Semantics.

The confusion as to whether the Company’s Business Demand Response Program is an “interruptible or curtailable program” appears to be an example of two ships passing in the night whereby semantic forms cloud the issue beyond notice. Debate as to whether the Company’s Business Demand Response Program is interruptible or curtailable came about because of Staff’s uncertainty as to whether the Program qualifies as an “interruptible or curtailable rate schedule or tariff” per the MEEIA statute.⁶⁹ Staff took issue with the Company subjecting Program participants

⁶⁵ Transcript, p. 481.

⁶⁶ Transcript, p. 431.

⁶⁷ Exhibit 101, p. 86.

⁶⁸ Exhibit 200, p. 34-37.

⁶⁹ Exhibit 101, p. 71.

to curtailment events on a voluntary basis because the permissive nature “does not clearly establish itself as an interruptible or curtailable rate schedule or tariff.”⁷⁰

Bear in mind that the Program may literally be an interruptible or curtailable program because KCP&L would interrupt or curtail electric service to a participating customer. This literal understanding is different from any legal use of those terms within the MEEIA statute though. The prior section of this brief addresses OPC’s argument as to “interruptible or curtailable rate schedule or tariff” not referring to MEEIA schedules or tariffs, but instead other existing curtailment schedules and tariffs. This distinction means that even if KCP&L’s Business Demand Response Program qualifies as a curtailment or interruptible program for definitional purposes that does not mean that customers who have decided to not financially support MEEIA programs are free to participate in the Business Demand Response Program.

This dispute as to whether opt-out customers are able to still receive MEEIA benefits is the actual crux of this confusion. If the Commission sides with OPC’s argument, then characterizing the Business Demand Response Program as “interruptible or curtailable” is a tangential language exercise. If the Commission disagrees with the OPC, then the Company still bears the burden of demonstrating that its Program proposal meets the definition. Staff’s uncertainty as to how to define the Business Demand Response Program demonstrates that the Company has not met its burden of proof. Consequentially, following Staff’s Report, “only those customers that have not opted-out of MEEIA programs [are] eligible to receive the incentives.”⁷¹

⁷⁰ *Id.* at 72.

⁷¹ *Id.*

D. PAYS Should be an Additional Program to Create a Beneficial MEEIA Portfolio.

The Commission should direct the Company to modify a future MEEIA proposal to include a PAYS component in order to create a MEEIA portfolio that is beneficial for both the utility and its customers. Although the Commission lacks the ability to compel the Company to operate under a modified MEEIA application, the Commission does have the authority to disapprove the current filing with guidelines on how a future filing may be approved. The OPC recommends that the Commission accordingly recommend PAYS as part of a future application.

Whatever benefits KCP&L's MEEIA Cycle 1 and 2 had, there are diminishing returns at this point to continue to invest in the same programs as before. Rebating the same light bulbs will not produce meaningful savings and administering programs in the same manner as previous MEEIA iterations does nothing to expand energy efficiency into untapped market potentials. Something has to change. As Dr. Marke exclaimed at the evidentiary hearing, "If the Company is serious, really serious about energy efficiency or we are as a state, you've got to figure out a way to go ahead and tap into the market of really just about everybody that doesn't have that capital."⁷²

PAYS addresses this need for better outreach by presenting an on-tariff financing program for individuals who would otherwise not be likely to participate in MEEIA programs. The PAYS program operates by having the utility itself invest in an energy efficiency measure on the customer side of the meter.⁷³ Although it may appear to be a loan, it is not a true loan or lien because the energy efficiency upgrade is owned outright by the utility. The upgrade is bought by the customer by paying for the value of the measurable energy savings each billing period. This arrangement ensures that only cost-effective measures are employed through PAYS because the program will only work if the energy efficiency measures produce concrete, measurable savings.

⁷² Transcript, p. 499-500.

⁷³ Exhibit 200, GM-9.

Renew Missouri witness Mark Cayce testified to the program's success with his electrical cooperative. His utility has taken no losses to implement PAYS, and is even making a return of upwards of twelve percent on the energy efficiency measures that customers install.⁷⁴ In Mr. Cayce's case, most of the customers who have taken advantage of PAYS are low-income, and so would not likely invest in energy efficiency otherwise.⁷⁵ About ten percent of Ouachita Electric Cooperative's customer base has enrolled in PAYS.⁷⁶ Based on that ten percent figure, if KCP&L replicated this success, and the OPC has the upmost faith that it can in this regard, PAYS could improve the lives of approximately 65,000 people.⁷⁷

E. The Commission Cannot Simply Approve a MEEIA Application for GMO While Denying KCP&L's Because the Two Companies have Inextricably Linked Both Proposals.

Following the model of King Solomon, the Commission may be tempted to split the proverbial baby and approve a MEEIA application for GMO but not KCPL in order to find a compromise. However, this avenue is no longer available. There is technically no more application for GMO as a stand-alone entity. GMO's Application in Case No: EO-2019-0133 was closed when the Commission consolidated that file with KCPL's docket.

And that consolidation was proper. As Dr. Marke observes, "Effectively, KCPL and GMO are being treated as one MEEIA application in an attempt to make the combined MEEIA applications "better" and to recognize that the Southwest Power Pool ("SPP") looks at KCPL and GMO as one entity for resource planning purposes as of 2018."⁷⁸ The Commission's rules on MEEIA applications require the applicant to "use the integrated resource plan and risk analysis

⁷⁴ Transcript, p. 187.

⁷⁵ *Id.*

⁷⁶ *Id.* at 192.

⁷⁷ *Id.* at 499.

⁷⁸ Exhibit 200, p. 2.

used in its most recently adopted preferred resource plan to calculate its avoided costs.”⁷⁹ The Company’s most recent IRP is premised on KCPL and GMO being one combined utility, just as how SPP views them. The MEEIA Applications of KCPL and GMO cannot be separated out then because the avoided costs necessary to support approval are to be calculated by looking at both companies. Approving GMO’s Application while disapproving KCPL’s, or vice-versa, would defeat any meaning within the IRP planning process. Future applicants could craft their IRP in response to actual market conditions, only to then abandon it when reality becomes inconvenient to a MEEIA earnings opportunity. The Commission’s rules and consistent regulatory treatment demand that the Companies’ MEEIA Applications be approved or denied in tandem.

F. The Commission should Deny the Company’s Fifth Requested Variance

KCP&L requests various variances from scheduling and technical matters.⁸⁰ The scheduling variances are largely moot by this point due to the repeated delays in this proceeding. As for the technical variances, the OPC only takes issue with KCP&L’s fifth requested variance. KCP&L’s fifth variance request is for the Company to be exempted from the following language:

“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.”

This request hits at the heart of the defect with KCP&L’s Application - the Company cannot show avoided costs. The Company is essentially asking for an exemption proving the key justification for MEEIA programs. Because avoided costs are foundational for a statutorily compliant MEEIA program, and for all of the reasons state above, the Commission should not grant this variance. Admittedly, the OPC did agree to a waiver of this provision as part of postponing KCP&L’s most

⁷⁹ 20 CSR 4240-20.092(1)(C).

⁸⁰ *Application to Approve DSIM Filing, Request for Variances and Motion to Adopt Procedural Schedule*, EO-2019-0132 (Nov. 29, 2018); *MEEIA Cycle 3 2019-2022 Filing*, EO-2019-0132 p. 80 (Nov. 29, 2018).

recent IRP filing.⁸¹ The OPC only did so with the understanding that a settlement could be reached resulting in cost-effective measures that benefit all customers. Since KCP&L was unable to reach an agreement with the parties, there is no reason to exempt the Company from established avoided costs methodology. The Commission should accordingly deny KCP&L's fifth requested variance.

VIII. Conclusion

Valuing energy efficiency requires holding it up to the standard that it deserves. The Commission should deny the Company's Application because it does not produce any avoided costs, fails to equally value demand and supply-side resources, does not benefit all customers, and utilizes redundant and wasteful programs. Although KCP&L's proposal warrants an out-right rejection, the OPC requests that the Commission direct the Company on how to proceed with a truly beneficial MEEIA program. OPC offers that this Commission consider a default MEEIA program, an equitable energy efficiency baseline study, AER software, PAYS, and UHI mitigation.

WHEREFORE, the OPC requests that the Commission deny KCP&L's Application and associated variances. In the alternative, the OPC asks that this Commission signal a path forward towards a truly beneficial MEEIA program by ordering recommendations as to how KCP&L should modify its Application.

⁸¹ *Joint Motion to Re-Establish Procedural Schedule and Grant Variance From Requirement to File 2019 Integrated Resource Plan Annual Update.*

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this 11th day of October, 2019, with notice of the same being sent to all counsel of record.

/s/ Caleb Hall