

**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 SECOND 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 Amended 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 is the third in a series of demand-side program cycles offered by Evergy. The Commission’s Amended Report and Order approved 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 Evergy Missouri West during the pendency of this case.

2. The OPC timely filed an Application for Rehearing on December 31, 2019.

3. The Commission did not rule on the OPC's Application, and instead issued an Amended Report and Order on March 11, 2020, in noticeably the same form as the original Report and Order.

4. The OPC attaches its first Application for Rehearing to this second Application, and incorporates all of the arguments therein.

5. Additionally, the OPC will address the still remaining legal failings and arbitrary nature of the Amended Report and Order.

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

6. Commission Orders must act within the bounds of laws passed by Missouri's Legislature.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

7. 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 requires three components: 1) providing "timely cost recovery," 2) aligning utility incentives to encourage energy efficiency, and 3) approving applications with "cost-effective measurable and verifiable efficiency savings."⁶

8. A DSIM surcharge satisfies the "timely cost recovery" component of cost recovery, and the Amended Report and Order claims to encourage energy efficiency, but it fails to meet the third prong. This failure makes the Commission's Amended Order unlawful and arbitrary.

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.*

9. Demand-side and supply-side 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.”⁷ If an earnings opportunity with a DSIM is not 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.”⁸

10. If a utility’s MEEIA application does not defer any cost, the earnings opportunity will reward the utility more than 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 investments with their own separate return. Investing in both simultaneously provides a DSIM earnings opportunity and the earnings on the new traditional 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.⁹ This double-recovery scenario does not equally value demand and supply-side or other traditional resources because the utility’s finances are positioned far greater with an approved MEEIA program than had it invested in a supply-side asset. An equal valuation would approve demand-side programs that place the utility in the same or similar financial situation as if it invested in traditional utility investments.

⁷ *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”).

⁸ *Id.* at 12.

⁹ *Report and Order*, EO-2015-0055 p.13.

11. The Commission’s original Report and Order acknowledged that Evergy is not deferring the cost of any identifiable traditional investment, supply-side or otherwise.¹⁰ The Amended Report and Order likewise admits that Evergy’s “capacity exceeds the needs of its customers and the resource adequacy of SPP” and that it will not invest in a new combined cycle turbine until at least 2033.¹¹ Without the deferral of any investment, Evergy will be charging customers for two earnings opportunity: one for the authorized return on traditional investments, and the second on the MEEIA programs that are supposed to defer traditional utility costs. This is not equally valuing demand and supply-side infrastructure.

12. The Commission’s Amended Report and Order attempts to correct the prior Report and Order by now justifying the lack of avoided traditional investment costs with potentially reduced Southwest Power Pool (SPP) fees. The Amended Report and Order notes that “SPP member fees could be reduced through average monthly reductions in energy and demand” and that “additional savings from demand response reductions would increase SPP member fees savings.”¹² For these points the Amended Report and Order relies upon the Rebuttal Report from the Staff of the Public Service Commission (Staff) and Evergy’s Surrebuttal Report.

13. Of course “would” and “could” are the operative words in this justification. Sure, if SPP fees could be reduced then Staff acknowledges that may be an avoided cost, and the Commission’s Amended Report and Order cites to Staff’s Rebuttal Report on this point.¹³ However, what Staff actually told this Commission is that Evergy “has not designed the proposed programs to minimize SPP fees.”¹⁴ By not designing its MEEIA programs to reduce monthly zonal

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

¹¹ *Amended Report and Order*, EO-2019-0132 p. 11 (Mar. 11, 2020).

¹² *Id.* at 12-13.

¹³ *Id.*

¹⁴ Exhibit 101, *Staff Rebuttal Report*, EO-2019-0132 p. 24 (Aug. 19, 2019).

peaks, SPP fees will not be impacted by Evergy's demand-side measures. For whatever reason, the Commission's Amended Report and Order relies upon Staff's conclusions for the opposite proposition that what Staff offers. This behavior is arbitrary and results in unlawfully approving a MEEIA portfolio that does not equally value demand-side and traditional utility investments.

14. The Amended Report and Order's reliance upon Evergy's Surrebuttal Report is also misplaced. Evergy's Surrebuttal Report claims avoided costs can be presumed based on reduced SPP fee savings being compounded by demand-response reductions.¹⁵ However, there is no evidence of any actual demand-response reductions. Demand-response reductions occur when the energy on the demand side of the meter (i.e. the customer) is curtailed to reduce usage and provide a secondary energy resource. Evergy's experience with its Residential Demand Response program though is to continually spend more customer money on demand-response infrastructure, while calling fewer and fewer curtailment events.¹⁶ Evergy's earnings opportunity is not tied to actually calling curtailment events, but rather simply spending program money, and nothing in Evergy's MEEIA application or the record demonstrates that this pattern will change. There is therefore no rational basis to conclude that any actual demand-response response reductions will occur, and that those reductions will intensify any SPP fee savings.

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

15. Cost-effectiveness is another factor underpinning the statutory requirement of equally valuing demand-side and traditional utility investments.¹⁷

¹⁵ Exhibit 4, *Surrebuttal Report*, EO-2019-0132 p. 24 (Sep. 16, 2019).

¹⁶ Transcript of Proceedings, Evidentiary Hearing, EO-2019-0132 p. 146 (Sep. 23-24, 2019).

¹⁷ Mo. Rev. Stat. §393.1075.3.

16. The total resource cost (TRC) test is the statutorily preferred test to determine cost-effectiveness.¹⁸ Although other Missouri statutes may request cost-effectiveness, only the MEEIA statute also specifically instructs on the best way to verify cost-effectiveness. 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. Therefore, avoided costs are necessary for the TRC, which in turn underlies the foundation of cost-effectiveness, which is itself a key requirement of equally valuing demand-side and supply-side resources per the MEEIA statute.¹⁹

17. By Commission definition, avoided costs are “the cost savings obtained by substituting demand-side programs for existing and new supply-side resources.”²⁰ Commission rules determine benefits and cost-effectiveness of demand-side programs by measuring a company’s avoided costs as a result of a MEEIA portfolio.²¹

18. The first Report and Order noted that Evergy’s avoided cost calculations overstated any actual savings and that they relied upon “outdated data from 2015” used for Evergy’s 2018 Integrated Resource Plan (IRP).²² The Amended Report and Order repeats those observations, and notes that Evergy’s reliance on the hypothetical cost of a combined-cycle turbine (CT) is an inappropriate benchmark for avoided costs “because Evergy is not avoiding the cost of building a CT” with its MEEIA application or otherwise.²³

¹⁸ Mo. Rev. Stat. § 393.1075.4.

¹⁹ See Mo. Rev. Stat. §393.1075.3

²⁰ 20 CSR 4240-20.092(1)(C).

²¹ See *id.*

²² *Report and Order*, p. 10-11.

²³ *Amended Report and Order*, p. 11-12.

19. The Amended Report and Order also notes that Evergy’s “demand-side programs do not defer the construction, or hasten the retirement of any specific identifiable supply-side resource.”²⁴ Quite the opposite, rather than deferring any resource expense, Evergy is spending upwards of a billion dollars in capital investment through plant-in-service accounting.²⁵ In fact, while its MEEIA 3 application was still pending, **_____

_____ **

20. By not deferring any traditional cost, Evergy’s MEEIA application fails the TRC test, and is thus not cost-effective. The Amended Report and Order points to potentially avoided SPP fees, but, as discussed previously, those are not substantiated by the evidentiary record.

21. However, after acknowledging that Evergy’s MEEIA 3 is not deferring any traditional investments, and hence will not create any avoided costs, the Amended Report and Order then admonishes its Staff for concluding that Evergy’s avoided costs are zero.²⁷ 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.”²⁸ With Evergy substituting no supply-side resources for demand-side programs, and

²⁴ *Id.*

²⁵ See Exhibit 200, *Rebuttal Testimony of Geoff Marke*, EO-2019-0132 p. 12 (Aug. 19, 2019); see also Transcript of Proceedings, p. 398.

²⁶ *Evergy Missouri West Integrated Resource Plan 2020 Annual Update*, EO-2020-0281 p. 82 (Mar. 10, 2020).

²⁷ *Amended Report and Order*, p. 12.

²⁸ 20 CSR 4240-20.092(1)(C).

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

22. The Amended Report and Order ignores this logical trail, and instead concludes instead that “using capacity bids from late 2017 yields more current data to calculate avoided costs.”²⁹ The 2017 data referred to is the so-called “market-based approach” offered in Evergy’s Surrebuttal Report. This approach is not truly based on markets though.

23. 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.³⁰

24. Both the original and Amended Report and Order decide to “consolidate Evergy Missouri Metro’s and Evergy Missouri West’s applications, because the SPP treats Evergy Missouri Metro and Evergy Missouri West as a single load serving entity.”³¹ It is arbitrary to evaluate Evergy’s MEEIA 3 application as if it is one entity, but also approve that application using a number premised on a legal fiction that Evergy is actually two separate companies.

25. Beyond the inherent flaw with the average-of-the-bids approach, simply supplanting the number generated therefrom to produce a satisfactory avoided cost number is not the TRC. The Amended Report and Order does not even describe what cost-effectiveness test it is utilizing.

²⁹ *Amended Report and Order*, p. 26.

³⁰ *See Exhibit 4*, p. 18.

³¹ *Amended Report and Order*, p. 25; *Report and Order*, p. 18.

26. Instead, the Amended Report and Order departs from the TRC without justification seemingly only because under the TRC Evergy’s proposal fails. As the original one did, the Amended Report and Order claims that the Commission’s IRP rules “permit the use of a market-based equivalent for calculating avoided costs” for modeling purposes.³² From this assertion the Amended Order then cites solely to an in-camera 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.³³ The pertinent quote is as follows:

** _____

_____ **³⁴

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.

27. Furthermore, Staff witness Brad Fortson went on to say in another exchange during that same in-camera session:

** _____

³² *Amended Report and Order*, p. 14; *Report and Order*, p. 12.

³³ *Id.*

³⁴ Transcript of Proceedings, p. 424-25.

This is to say that Fortson clearly stated that he **

** and yet the Commission’s Amended Report and Order relies directly upon Fortson for the conclusion that Evergy’s MEEIA 3 application is cost-effective under a different metric. It is worth mentioning that neither Evergy’s Counsel nor any Commissioner followed up those questions with Staff witness J Luebbert who did testify on avoided costs.

28. Relying on the average-of-the-bids to find cost-effectiveness 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 for avoided costs.³⁶ A TRC result less than one means that at least three, not one as the Amended Report and Order claims, are not cost-effective even with the Evergy’s “market” approach.

29. Consider also that Evergy did not use this “market-based approach” in its last IRP, but the Amended Report and Order jumps to IRP rules to satisfy avoided cost requirements within MEEIA rules.³⁷ Evergy did not find a market-based approach sufficient for its own resource

³⁵ *Id.*

³⁶ *Staff’s Amended Recommendation Regarding Approval of Compliance Tariff Sheets and Revised Technical Resource Manual*, EO-2019-0132 (Dec. 20, 2019).

³⁷ Although the OPC did not offer Evergy’s IRP filings into evidence as separate exhibits, it notes that the Commission retains the ability to take notice of its own records *sua sponte*. See *Kansas City Power & Light Company (KCP&L) Integrated Resource Plan*, EO-2018-0268 Volume 5 Demand-Side Resource Analysis p. 54-55 & 112-16 (Apr. 2, 2018) (recounting Evergy’s methodology for determining avoided demand and energy costs); see also *KCP&L Greater Missouri Operations Company Integrated Resource Plan*, EO-2018-0269 Volume 5

planning or as a basis for its MEEIA 3 when it initially filed its application. To rely upon an average of capacity bids now based on IRP rules is inconsistent and arbitrary.

30. Furthermore, the “market-based equivalent” is not used to calculate “avoided” costs” per the IRP rules as the Amended Order asserts. Rather, the market-based equivalent may be used when determining “utility avoided *demand* cost” and “utility avoided *energy* cost.”³⁸ 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 investments.

31. The Amended Order’s tangent into the IRP rules is additionally inconsistent because the Commission’s Amended Order explains earlier that relying on Evergy’s prior IRP data from 2018 is “outdated,” but then turns immediately back to the IRP rules to justify this average-of-the-bids alternative because data from 2017 is supposedly “more current.”³⁹ This reasoning simply does not make sense. The Commission’s Amended Order is consequentially counter to statute in that it approves programs that are not proven to be cost-effective based on arbitrary reasoning, and selective readings of regulatory language to find a more convenient definition of “avoided cost.”

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

32. 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

Demand-Side Resource Analysis p. 54-55 & 102-07 (Apr. 2, 2018); *Reply Brief of Staff*, EO-2019-0132 p. 15 (Oct. 21, 2019) (detailing Staff’s objections to Evergy’s avoided cost calculations in Evergy’s 2018 IRP).

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

³⁹ *Amended Report and Order*, p. 11 & 26.

by all customers.”⁴⁰ 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.⁴¹

33. However, as previously discussed, the Amended Report and Order abandons the TRC test, and substitutes the average-of-the-bids approach for an actual showing of avoided costs or cost effectiveness. Because the formula did not produce the numbers Evergy liked, it simply inserted a new value, and the Amended Report and Order accepts that exchange.

34. The Amended Report and Order postulates that by using the average-of-the-bids approach, all but one of Evergy’s MEEIA 3 programs are cost effective, and therefore there are necessarily benefits to all customers because of this supposed cost-effectiveness.⁴² The Amended Report and Order also points to “indirect societal benefits” as an ancillary reason why all customer classes benefit from Evergy’s MEEIA 3.⁴³ Neither consideration rehabilitates Evergy’s application.

35. As previously discussed, Evergy’s MEEIA 3’s cost-effectiveness is not substantiated with the average-of-the-bids approach. That approach is not actually showing any benefits, but rather theorizing that some might occur based on a theoretical cost for capacity. This approach violates MEEIA law by approving a MEEIA application without proven benefits for all customer classes with “measurable and verifiable” accuracy.⁴⁴ This approach is also arbitrary in that the Amended Report and Order acknowledges that using a “hypothetical CT to value avoided costs in this instance is not appropriate because Evergy is not avoiding the cost of building a CT,”

⁴⁰ Mo. Rev. Stat. § 393.1075.4.

⁴¹ *See id.*

⁴² *Amended Report and Order*, p. 15.

⁴³ *Id.*

⁴⁴ Mo. Rev. Stat. § 393.1075.3.

but accepts a hypothetical capacity cost without evidence that Evergy is deferring any actual capacity costs.⁴⁵

36. The Amended Report and Order's citation to indirect societal benefits is misplaced because the Staff Rebuttal Report the Order relies upon for those benefits does not actually show that Evergy's MEEIA 3 produces any particular indirect societal benefits. Staff's Rebuttal Report only speaks to the benefits of energy efficiency in the abstract, noting that "studies recognize there are societal benefits to energy efficiency."⁴⁶ The studies Staff refers to do not evaluate Evergy's MEEIA 3 proposal. Abstract benefits alone are not enough to verify that Evergy's MEEIA 3 produces those benefits. In the abstract, dieting is beneficial. That does not mean that starvation is healthy. In the abstract, energy efficiency is beneficial. That does not mean that everything under the guise of energy efficiency then produces the same benefits.

37. Consider also that the Commission may evaluate indirect societal benefits of MEEIA programs per the societal cost test (SCT). The SCT is the TRC plus additional substantiated societal benefits.⁴⁷ Since this Amended Report and Order rejects the TRC, it should not then be able to turn back to societal benefits, especially without concrete numbers, to redeem a MEEIA 3 portfolio that is otherwise not cost-effective. If this benefit determination stands, then all future MEEIA applications will assert cost-effectiveness simply by likewise gesturing to theory and meta-analysis. Allowing MEEIA applications to be approved in this manner robs the MEEIA statute's prescription for economic and cost-effective measures, with benefits for all customers, of

⁴⁵ *Amended Report and Order*, p. 12.

⁴⁶ Exhibit 101, p. 10.

⁴⁷ 20 CSR 4240-20.092(1)(PP).

any meaning. This treatment devalues all meaning from the MEEIA statutes' language of requiring "cost-effective measurable and verifiable efficiency savings."⁴⁸

38. The Amended Report and Order's reliance on theoretical cost-effectiveness is also contrary to prior Commission practice without sufficient basis. 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."⁴⁹ The Commission continued:

"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."

39. This logic 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. By contrast, the Commission's Amended Order approving Evergy's MEEIA 3 adopts a new cost-effective test using an average-of-the-bids approach to 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.

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

⁴⁸ *Contra* Mo. Rev. Stat. § 393.1075.

⁴⁹ *Report and Order*, EO-2015-0055, p. 12.

40. The Amended Report and Order is additionally arbitrary and capricious by declaring that demand-side programs avoid utility costs even when a utility is long on capacity, and that demand-side programs categorically replace supply-side resources merely by existing.

41. The Commission may enjoy an “indulgence of deference” for evidentiary decisions, but that is not license to make conclusory opinions without backing.⁵⁰

42. The Amended Report and Order 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.”⁵¹ 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.

43. Nonetheless, the Commission relies on Evergy witness Charles Caisely for its statement. 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.”⁵² “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,” 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 a situation without those demand-side programs. This is the same logic that the Commission rejected as speculative when Evergy presented its CT valuation proposal. To accept this “present value” logic here when it is simply rephrased with an average-of-the-bids approach is inconsistent.

⁵⁰ *State ex rel. Marco Sales, Inc. v. Pub. Serv. Comm’n*, 685 S.W.2d 216, 220 (Mo. App. W.D. 1984).

⁵¹ *Amended Report and Order*, p. 13.

⁵² Exhibit 5, *Surrebuttal Testimony of Charles Caisely*, EO-2019-0132 p. 6 (Sept. 16, 2019).

44. Nothing in 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-bids approach for the cost of capacity. 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.”⁵³

45. The Amended Report and Order also relies upon Evergy’s Surrebuttal Report for the supposed fact that demand-side program automatically substitute supply-side resources.⁵⁴ Evergy may claim such automatic avoided costs, but it apparently cannot point to a single supply-side resource that is actually be replaced. If Evergy’s assertion is true, it should be able to quantify and demonstrate those replacements, but it has not.

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

46. The Commission’s Amended Report and Order is also arbitrary in that it reconstructed a new conceit for avoided costs in order to justify a MEEIA proposal that does not benefit all of Evergy’s customers.

47. As previously noted, the Amended Report and Order agrees that Evergy’s avoided cost methodology is out of date and overstated.⁵⁵ The Commission’s Amended Order still grants “the fifth variance even though the Commission is not approving Evergy Missouri’s avoided costs”

⁵³ 20 CSR 4204-20.092(1)(C).

⁵⁴ *Amended Report and Order*, p. 13.

⁵⁵ *Amended Report and Order*, p. 11.

in order to utilize the average-of-the-bids approach.⁵⁶ 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.

48. Rule variances may be necessary for particular, discrete fact circumstances. In this instance though, the Amended Report and Order does not vary Commission rules for one instance or based on any particular good cause. Although called a variance, rewriting a definition because it is inconvenient for a utility 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.

49. 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."⁵⁷ 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."⁵⁸ Approving Evergy's MEEIA 3 requires disregarding that Evergy's application presents no avoided costs, and instead reinvents a new definition of "avoided costs."

50. Simply changing the rules when an applicant does not measure up is unlawful and arbitrary. If rules are to be varied, they can only be 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.

VI. 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.

⁵⁶ *Id.* at 28.

⁵⁷ *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).

⁵⁸ *Id.*

51. The Commission’s Amended Report and Order allows industrial customers to opt out of paying Evergy’s DSIM charge while still being able to participate in MEEIA programs just as the original Report and Order did.⁵⁹

52. Beyond being inequitable, this free-ridership upon the backs of residential customers is contrary to the MEEIA statute and hence unlawful.

53. 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.⁶⁰ 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 and discriminatory towards residential customers.

54. 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. To the contrary, evidence in the record shows that Evergy has not been calling curtailment events in the Residential Demand Response program despite spending ever more customer money on those demand-side measures.⁶¹ Nothing in the record dispels doubt that this is the opposite case with the Business Demand Response program.

⁵⁹ *Amended Report and Order* p. 24.

⁶⁰ Mo. Rev. Stat. § 393.1075.7.

⁶¹ Transcript of Proceedings, p. 146.

55. 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.”⁶² This Commission has drafted no rules on point, but the Commission’s Amended Order does not explore this oversight.

56. The Commission’s Amended 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.⁶³ 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” demonstrates its knowledge of those pre-existing offerings, and therefore the language at issue simply protects industrial customers’ existing ability to otherwise participate in demand response tariffs outside of MEEIA rather than codifies inequity discriminatory inequity whereby residential classes are forced to support industrial customers’ DSIM charges.

VII. Conclusion and Additional Considerations.

58. When Evergy filed its MEEIA 3 application nearly a year and a half ago, it did not identify any specific avoided costs associated with its demand-side programs to demonstrate cost-effectiveness and benefits. Evergy changed nothing in its application to pass muster, but did ask that the standard used to measure its application be changed to a theoretical average of capacity bids approach.

⁶² Mo. Rev. Stat. § 393.1075.8.

⁶³ See Mo. Rev. Stat. § 393.1075.10.

59. The Commission's Amended Order notes that avoided costs are necessary for the TRC, that Evergy's avoided cost calculations are not credible, and hence that 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 theoretical 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.

60. The Commission's Amended Order grants Evergy's MEEIA 3 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.

61. Further intensifying all of the aforementioned issues, Staff's later 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,⁶⁴ and yet the Commission still approved Evergy's tariffs implementing those programs without any rebuttal as to Staff's conclusions.⁶⁵ The

⁶⁴ *Staff's Amended Recommendation.*

⁶⁵ *Order Approving Tariff In Compliance with Commission Order, EO-2019-0132 (Dec. 20, 2019).*

MEEIA statute plainly, with few exceptions not at issue here, only permits the Commission to approve cost-effective energy efficiency programs.⁶⁶

62. Any cost savings benefits of MEEIA 3 are also being undermined as Evergy continues to invest a billion dollars in plant-in-service accounting and more **_____

rather than avoid any traditional utility cost.⁶⁷ Evergy notified the Commission of this latest development only after securing its MEEIA 3.

63. Even worse, as Evergy's 2018 MEEIA 3 application persists into 2020, Evergy's customers now face the fallout of unprecedented economic uncertainty due to a global coronavirus pandemic. If Evergy's customers are to pay for any demand-side programs and associated earnings opportunity in face of such hardship, those programs need to be cost-effective and produce actual benefits. Otherwise, we can only guarantee that non-participant customers will continue to face higher surcharges to subsidize participants.

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

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

Respectfully,

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⁶⁶ Mo. Rev. Stat. § 393.1075.4.

⁶⁷ *Notice of Determination of Change*, EO-2018-0268 (Dec. 16, 2019).

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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 8th Day of April, 2020, with notice of the same being sent to all counsel of record.

/s/ Caleb Hall