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 Demand-Side Programs Investment Mechanism	**))))**	**File No. EO-2015-0240**
In the Matter of KCP&L Greater Missouri Operations Company's Notice of Intent to File an Application for Authority to Establish a Demand-Side Programs Investment Mechanism	**))))**	**File No. EO-2015-0241**

STAFF'S INITIAL BRIEF

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STAFF'S INITIAL BRIEF

COMES NOW the Staff of the Missouri Public Service Commission, by and through undersigned counsel, and files its initial brief supporting Commission approval of the jointly proposed MEEIA Cycle 2 portfolio of demand-side energy efficiency programs and demand-side investment mechanism sought to be implemented by Kansas City Power & Light Company ("KCP&L") and KCP&L Greater Missouri Operations Company ("GMO")(collectively the "Company").

I. Overview of Proposed MEEIA Cycle 2 Plan

The MEEIA Cycle 2 demand-side programs and demand-side programs investment mechanism ("DSIM") agreed to by the Signatories[1] to the Stipulation should be approved because the joint position articulated in the Stipulation meets the requirements of the Missouri Energy Efficiency Investment Act[2] ("MEEIA") and the Commission's MEEIA rules. Importantly, the Stipulation reasonably meets all three

[1] The Non-Unanimous Stipulation and Agreement Resolving MEEIA Filings (" Stipulation") Signatories include Staff of the Missouri Public Service Commission, KCPL, GMO, the Office of the Public Counsel, National Housing Trust, West Side Housing Organization, Natural Resources Defense Council, Earth Island Institute d/b/a Renew Missouri, Missouri Department of Economic Development – Division of Energy, and United for Missouri, Inc.
[2] Section 393.1075 RSMo 2013 as supplemented. The Stipulation was filed Nov. 23, 2015.

MEEIA plan objectives identified by the Commission in its October 22, 2015 Report and Order in the Ameren Missouri MEEIA Cycle 2 application case (Case No. EO-2015-0055).

The joint proposed MEEIA Cycle 2 Plan portfolio consists of nine (9) residential and eight (8) non-residential demand-side programs for KCP&L and GMO.[3] The Cycle 2 Plan ("Plan") period will conclude 36 months from the initial implementation date of the Plan. The Plan's program budget for KCP&L is $50.4 million and $52.6 million for GMO. Overall benefits expected from the Plan are $137 million for KCP&L and $139 million for GMO. The Plan's expected incremental cumulative annual energy and demand savings are:[4]

	Energy Savings (kWh)	**Demand Savings (kW)**
KCP&L	198,097,872	66,328
GMO	184,549,652	105,855
Company total	382,647,524	172,183

The Stipulation includes retrospective evaluation, measurement and verification ("EM&V") that will be used to reasonably determine actual energy savings for the true-up of the throughput disincentive[5] ("TD"). The Stipulation also provides an earnings opportunity[6] ("EO") to Company shareholders that is comparable to the earnings opportunity shareholders would have had from future supply-side investments that are no longer necessary or are delayed as a result of the MEEIA Cycle 2 Plan. Finally, the

[3] Ex. 101, Direct Testimony In Support of Stipulation of Tim Rush, KCP&L and GMO, p. 3, lns 9-19.
[4] Ex. 101, Rush Direct, p. 4, lns 7-16.
[5] Section 393.1075.3(2) Ensure that utility financial incentives are aligned with helping customers use energy more efficiently and in a manner that sustains or enhances utility customers' incentives to use energy more efficiently.
[6] Section 393.1075.3 It shall be the policy of the state to value demand-side investments equal to traditional investments in supply and delivery infrastructure and allow recovery of all reasonable and prudent costs of delivering cost-effective demand-side programs. In support of this policy, the commission shall: … (3) Provide timely earnings opportunities associated with cost-effective measurable and verifiable efficiency savings.

Stipulation provides a benefit to customers who do not participate in MEEIA programs,[7] because the cost to non-participants of energy efficiency and demand response programs which will help other participating customers reduce their usage is lower than the cost to non-participants of constructing a new power plant that would be necessary without the reduction in usage.

A. <u>DSIM</u>

The Commission's MEEIA rules[8] identify the following three DSIM components: a cost recovery component, a utility lost revenues component, and a utility incentive component. These same components can be found in the Stipulation's DSIM, where the TD represents the lost revenues component and the EO represents the utility incentive component.[9] The cost recovery component allows contemporaneous recovery of all prudently incurred program expenditures; the TD provides the Company with compensation for electricity sales not made as a result of the installation of program measures and relies upon retrospective EM&V to true-up the differences between the Plan's estimated and actual energy savings; and the EO is designed to compensate the Company for lost opportunities to make supply-side investments.[10] While any TD true-up pursuant to EM&V is constrained by the award of an EO, mechanisms including real-time TD accrual, the use of a net-to-gross ("NTG") factor related to anticipated performance of the specific utility portfolio, and the updating of specific measure savings

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[7] Section 393.1075.4 The Commission shall permit electric corporations to implement commission-approved demand-side programs proposed pursuant to this section with a goal of achieving all cost-effective demand-side savings. Recovery for such programs shall not be permitted unless the programs are approved by the commission, result in energy or demand savings and 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.
[8] 4 CSR 240-3.163, 3.164, 20.093, and 20.094.
[9] Ex 203, Stahlman Direct, p. 2.
[10] *Id*. at p. 2-3.

values mid-cycle based on EM&V, all work together to reasonably balance the risks of program success or failure between the utility and its customers for this portfolio. The EO is subject to full EM&V, without constraint, and is related to the impact the portfolio has been estimated to have on reducing future supply-side investments.[11] As a whole, the DSIM proposed in the Stipulation provides timely cost recovery for the Company, aligns the Company's incentives to help customers use energy more efficiently, and provides an earnings opportunity on cost-effective demand-side programs, as verified by EM&V, commensurate to the investment opportunity of a traditional supply-side investment.[12]

B. <u>Benefits to All Customers</u>

MEEIA requires that programs 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."[13] Staff witness John Rogers performed an analysis of customers' costs (including costs for programs, TD and EO) and benefits which clearly shows that the Stipulation is expected to provide benefits to all customers, including those not participating in the programs.[14] Schedule JAR-D-2 indicates benefit-to-cost ratios for customers who do not participate in programs are between 1.58 and 1.98 for various classes of KCPL and GMO customers.[15] Benefit-to-cost ratios greater than 1.00 indicate an expectation that benefits will exceed costs, but there is still some uncertainty and risk associated with those expected customer benefits. Despite the projections, there are no guarantees for the realization of net benefits, while there is a guarantee

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[11] *Id*. at p. 4-5.
[12] *Id.* at p. 4.
[13] Section 393.1075.4 RSMo.
[14] Rogers Direct, p. 2-6.
[15] These values are represented by the fourth bar in each chart.

that customers will pay all program costs and throughput disincentive costs contemporaneously in years 1, 2, and 3 and will pay any Company earnings opportunity in years 5 and 6.[16] The higher the benefits-to-costs ratios, the less risky the programs are expected to be for customers. The ratios contained in Schedule JAR-D-2 demonstrate a material improvement from the Company's original application in the demand-side programs and DSIMs as a result of the agreements reached in the Stipulation. This Stipulation serves the public interest and should be approved.

C. MEEIA is Voluntary

MEEIA, by its definition, is a permissive statute because MEEIA programs are voluntary on the part of the utility.[17] Consequently, the Commission noted that it would not approve a MEEIA plan that a utility does not support.[18]

The Company testified at hearing that it would not be willing to do a MEEIA Cycle 2 without a regulatory flexibility provision.[19] The protections built into the provision ensure it closely mirrors the Commission's Rule 4 CSR 240-20.094(5) on terminating MEEIA programs. Under the regulatory flexibility provision, the Company cannot terminate individual programs within the plan in order to further enhance its revenue stream.[20] Rather, it will only be excused from portions of the Commission's rules and

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[16] Rogers Direct, p. 4.

[17] 393.1075.4, RSMo states, "The commission shall permit electric corporations to implement commission-approved demand side programs proposed pursuant to this section with a goal of achieving all cost-effective demand-side savings."

[18] At the 22 October, 2015 agenda meeting during the discussion of Ameren's MEEIA Cycle 2 application in Case No. EO-2015-0055, Chairman Hall stated, "…we don't have the authority to write a plan. Under Missouri law, the Commission only has the authority to approve a plan presented by the utility. So if we don't approve that plan, then the utility has the choice of either not doing a plan…or coming back to us with a revised program."
Further, on pages 6 and 16 in its Report and Order in the same case, the Commission addressed the fact that MEEIA is permissive and that energy efficiency is optional.

[19] Tr. p. 144 ln. 23 – p. 145 ln. 2.

[20] If the Company wishes to terminate individual programs, it will still be required to abide by all Commission rules.

allowed to terminate all programs under this provision if its economic situation is so bad that it would be more beneficial to terminate all of its MEEIA programs rather than to continue. In the unlikely event that KCPL and GMO are in this position, customers would not be harmed because they would not be required to continue paying a MEEIA charge on their bills, except to the extent that it is required to cover the remaining program costs and TD associated with measures that are already agreed to and/or installed. Likewise, if the Company invokes this provision, it will give up its EO, even for the measures installed prior to termination. If the Commission approves a plan for MEEIA Cycle 2, the Company requires the regulatory flexibility provision in order for the Company to implement it.[21] Without this provision, the Company will back out of the MEEIA proposal contained in the Stipulation.

That MEEIA is a permissive statute also applies to Brightergy's suggestion that the Company use for Cycle 2 the same Custom Rebate Program incentive structure as it had in Cycle 1. As with the regulatory flexibility issue, the Company has only agreed to the program as set forth in the Stipulation. It has rejected Brightergy's request to continue using the Cycle 1 Custom Rebate Program's customer incentives. Because MEEIA is voluntary on the part of the utility, the Commission has indicated that it will not approve anything to which the Company does not agree. Brightergy's proposed revision to the Custom Rebate Program, previously rejected by the Company, should also be rejected by the Commission.

[21] *Id.* See also Stipulation Appendix H, p. 3.

D. Brightergy Objections

Parties to the present case discovered the difficulty of reaching a mutually agreeable plan for a MEEIA Cycle 2. In the numerous settlement discussions between the parties, there was much give and take by all parties. The fact that all parties but one were able to reach agreement on the entirety of a plan speaks volumes about the stipulated proposal. Even Brightergy, the sole dissenting party, raised only two objections to the stipulated agreement. Although Brightergy argued for the rejection of this Cycle 2 plan, its CEO, Adam Blake, testified that Brightergy would still participate in the Custom Rebate program if the Commission were to approve the Cycle 2 plan presented in the Stipulation.[22]

Brightergy is a trade ally that installs and sells energy efficiency products to customers. It has an incentive to make money by selling and installing more products. There are over 200 trade allies in KCPL's service territory,[23] but Brightergy is the only trade ally that raised an objection to the Stipulation. The two issues Brightergy raised with the Stipulation were the regulatory flexibility provision and the incentive levels for the Custom Rebate Program. Both issues appear to have little to do with benefits to the customers or utility and instead appear to be self-serving issues for Brightergy.

Mr. Blake testified that the regulatory flexibility provision provides uncertainty, which in his opinion is a negative aspect for Brightergy.[24] It is clear that Brightergy wants to guarantee a continual stream of easy-sell customers, which, according to Mr. Blake, is further solidified if customers receive higher rebates and if the Company is not given a regulatory flexibility provision. The "nuclear, scorched earth option," as

[22] Tr. p. 252, lns 4-10.
[23] Kim Winslow Surrebuttal Testimony in Support of Stipulation, p. 6, ln. 18.
[24] Tr. p. 233, lns 4-8.

Mr. Blake puts it,[25] while not very different from the termination provisions in the rules, gives Brightergy greater uncertainty regarding its revenue stream from customers who would not purchase energy efficiency but for the rebates they receive from a MEEIA plan. Nonetheless, even with these objections, Brightergy would participate in the Cycle 2 Custom Rebate program if the Stipulation Plan is approved. Brightergy recognizes that any amount of customer incentive for the Custom Rebate program will increase its customer base relative to no program at all.

As to Brightergy's concern about lower incentives for customers, this concern also appears to be self-serving in that Brightergy makes its money from customers who want to implement Custom Rebate programs in their businesses. Brightergy benefits directly from the incentives customers receive under MEEIA programs. Although customers, whether they participate or not, pay for these incentives through the MEEIA charges in their monthly bills, Brightergy does not pay for the incentives it ultimately receives.[26] In fact, Brightergy's proposal to continue using the incentives from the Cycle 1 Custom Rebate program would result in an additional $11 million expense that would be paid by utility customers.[27] Brightergy is less concerned with the increased cost and more concerned that lower incentives will result in fewer customers who will be willing to implement these programs, equating to less profit overall for Brightergy.

Brightergy suggests that the problem with a lower incentive level is free ridership, but Brightergy's proposal to increase incentives does nothing to address the free ridership problem. The same customers who would have participated in the program without any MEEIA programs will continue to be free riders, regardless of the incentive

[25] Tr. p. 233, lns 7-8.
[26] Tr. p. 242 ln. 14 – p. 243 ln. 17.
[27] Tr. p. 120 ln. 5.

level.[28] A higher incentive level might bring additional customers into the fold, but it will also serve to provide an even greater incentive to those who wouldn't have needed an incentive to participate in the first place. The additional cost of increasing incentives gets shared by all customers, most notably those who do not participate in the programs. While the Cycle 2 plan as proposed in the Stipulation provides benefits to all customers, these benefits would necessarily decrease with every incremental increase in incentives and therefore increase the cost of the programs. Brightergy has provided no evidence to support that its alternate proposal for incentives would continue to meet the statutory requirement of providing benefits to all customers.[29]

- *Marcella L. Mueth*

II. <u>Regulatory Flexibility Issue</u>

Should the Commission approve the regulatory flexibility provisions in the Stipulation over the objection of Brightergy, LLC?

Staff supports the regulatory flexibility provisions (hereafter "flexibility provisions") contained in section 13, paragraphs a. through f., on pages 18 through 20 of the Stipulation.

The Commission should approve the flexibility provisions and grant the necessary rule variances to allow these provisions to take effect because (1) they contain protections for program participants, (2) company-run demand-side programs are voluntary under the MEEIA statute, and (3) because they are a necessary requirement for KCP&L/GMO to commit to implementing the stipulated MEEIA Cycle 2 Plan portfolio of demand-side programs and DSIM. For the reasons discussed below Staff supports approval of the flexibility provisions and required variances because

[28] Tr. p. 190 lns 3-12.
[29] Tr. p. 228 ln. 23 – p. 229 ln. 11; p. 247 lns 3-18.

doing so reaches a reasonable settlement of the issues in this case and because granting the variances is a necessary condition for the Company to implement the joint proposed MEEIA Cycle 2 Plan.[30]

With its requested variances, the Company seeks to be excused from only the Commission's rule requirements that it (1) file a formal application for discontinuance of all programs, (2) obtain commission approval of discontinuance, and (3) face delay from any opportunity for a hearing on the application[31]. These rule requirements are not required under the MEEIA statute.

The rule requirements from which the signatories seek excusal do not of themselves provide protections to program participants. On the other hand, the regulatory flexibility provisions offer protections in the form of additional requirements, as summarized below.

A. Summary of Regulatory Flexibility Provision Requirements and Customer Protections in Stipulation Section 13, Paragraphs a through f

- In event of discontinuance, KCP&L/GMO shall provide notice no less than thirty (30) days prior to discontinuing the Cycle 2 portfolio.

  Comment: Because the rule gives the Commission 30 days to act on an application, 30 days for notice of effective date of discontinuance is reasonable and comports with the rule's requirement that the Commission act within 30 days.

- Written notice to Stipulation signatories will be provided no less than 30 days prior to discontinuance.

[30] The Commission's Demand-Side Programs rule 4 CSR 240-20.094(9) allows the Commission to grant a variance from any provision of its rule for good cause shown. Staff considers all requests for variances on a case-by-case basis.

[31] 4 CSR 240-20.094(5) "…an electric utility may file an application with the commission to discontinue demand-side programs by filing information and documentation required by 4 CSR 240-3.164(5). The commission shall approve or reject, such applications for discontinuation of utility demand-side programs within thirty (30) days of the filing of an application under this section only after providing an opportunity for a hearing."

- KCP&L/GMO will advise customers of discontinuance by publication in newspaper(s) of general circulation in the Company's service territory no less than 30 days prior to the effective date of discontinuance.

- KCP&L/GMO shall honor commitments made to MEEIA Cycle 2 program participants prior to the effective date of the discontinuance.

- In its notice, KCP&L/GMO shall explain the changed circumstances that have *materially negatively impacted* the economic viability of its MEEIA programs and that justify the discontinuance of all MEEIA Cycle 2 programs in the portfolio; <u>and</u> provide detailed workpapers that support its determination that continued implementation of the MEEIA Cycle 2 portfolio is unreasonable.

  <u>Comment:</u> The Stipulation requirement of providing workpapers that demonstrate changed circumstances that have *materially negatively impacted the economic viability of the programs* requires the Company to provide more supporting information than what the rule it seeks to be excused from requires. 4 CSR 240-3.164(5)(A) only requires that an application for discontinuance provide a "Complete explanation for the utility's decision to request to discontinue a demand-side program." Unlike the rule's requirement for only an explanation, the Stipulation imposes on the Company a higher "changed circumstances" standard that must be met for it to issue its notice of discontinuance.

- KCPL/GMO will file new tariff sheets concurrent with its notice filing.

- If KCP&L/GMO terminates all MEEIA Cycle 2 programs the Company forfeits any recovery of its Earnings Opportunity in connection with such programs but will continue to collect through its DSIM its (1) program costs of delivering programs to participants for commitments made by the Company to participants prior to the effective date of discontinuance and (2) throughput disincentive (TD) related to energy saving delivered through the discontinued MEEIA Cycle 2 programs through the date such savings are rebased in a general rate case proceeding.

- In event of discontinuance the independent evaluator will perform a final EM&V to be reviewed by the Commission's Auditor and approved by the Commission.

- If any party has concerns regarding the discontinuance of all Cycle 2 programs it shall file a responsive pleading in the case file within fifteen (15) days of the Company's written notification.

- Upon receipt of such responsive pleading the Company will promptly schedule a meeting with reasonable advance notice to all signatories whereby the Company will attempt to answer all questions regarding discontinuance of all MEEIA Cycle 2 programs.

- KCP&L/GMO agrees to appear at a hearing or Agenda to address any Commission questions or concerns.

  Comment: Though the Company has agreed to appear at hearing or agenda to answer questions about its notice of discontinuance, the variance sought by the Company only allows it to be excused from a hearing on an application for discontinuance.

- In the event the Cycle 2 programs are discontinued, Staff will continue to conduct prudence reviews of costs subject to the KCP&L/GMO DSIM.

- KCP&L/GMO will take action to adjust rates consistent with the discontinuance of the portfolio to prevent any over- or under-recovery of costs incurred in connection with the Cycle 2 program portfolio.

- To the extent the Company has over-recovered, the amount of such over-recovery shall be returned to customers with interest at KCP&L/GMO's short-term borrowing rate.

- To the extent the Company has under-recovered, the amount of such under-recovery shall be recovered from customers with interest at KCP&L/GMO's short-term borrowing rate.

Even under a scenario with the rule requirements the Company seeks excusal from in place, the Commission is required to act on a utility's application for discontinuance of its MEEIA programs within 30 days.[32] This requirement simply

[32] Commission rule 4 CSR 240-20.094(5) states the Commission has 30 days to approve or reject applications for discontinuance of demand-side programs (even though such programs are voluntary under MEEIA).

recognizes that demand-side programs are voluntary under the MEEIA statute. Though demand-side programs and the DSIM must be approved by the Commission,[33] the programs themselves are not mandatory and cannot be compelled by an order rejecting a request for discontinuance. The Commission addressed these MEEIA statutory requirements in its Report and Order in the Ameren Missouri MEEIA Cycle 2 case:[34]

> *MEEIA is permissive in nature and, by its express language, does not require utilities to offer demand-side. MEEIA allows such demand-side programs only so long as those programs are approved by the Commission,…*.[and] …*That energy efficiency is optional is evidenced by the statute that says "The commission shall permit electric corporations to implement commission-approved demand-side programs proposed pursuant to this section…"*

B. KCP&L/GMO Seeks a Reservation of Rights Under the Stipulation

The Company seeks a provision in its Cycle 2 tariff sheets that:

> *…reserves the* [Company's] *right to discontinue the entire MEEIA Cycle 2 portfolio, if KCP&L/GMO determines that implementation of such programs is no longer reasonable due to changed factors or circumstances that have materially negatively impacted the economic viability of such programs as determined by KCP&L/GMO, upon no less than thirty (30) days' notice to the Commission.*[35] (*emphasis added*)

In return for the above provision the Company has agreed to explain (in its notice) how changed factors have materially negatively impacted the economic viability of such programs and provide detailed workpapers that support its determination that continued implementation of the Cycle 2 portfolio is unreasonable. Should the Company

[33] Sect. 393.1075.4 "The commission shall permit electric corporations to implement commission-approved demand-side programs proposed pursuant to this section with a goal of achieving all cost-effective demand-side savings. Recovery for such programs shall not be permitted unless the programs are approved by the commission…"
[34] See *Report and Order*, Case No. EO-2015-0055, In the Matter of Union Electric Company d/b/a Ameren Missouri's 2nd Filing to Implement Regulatory Changes in Furtherance of Energy Efficiency as Allowed by MEEIA, pp. 6 and 16.
[35] Stipulation, para. 13 a.

fail to comply with any of the ordered terms of the Stipulation or its tariff, the Company could be susceptible to a complaint filing.

In effect, the flexibility provisions allow the Company to forego any opportunity for a formal hearing and a Commission order approving the discontinuance of the Cycle 2 Plan portfolio of programs.[36] Also, the Company would not be required to make an application for discontinuance of programs as required by Commission rule.

To approve the regulatory flexibility provisions sought by the Company, the Stipulation signatories have agreed to requested variances from Commission rules 4 CSR 240-20.094(5) and 240-3.164(5) as stated in Appendix H page 3 of the Stipulation:

> *4 CSR 240-20.094(5) requires a utility wishing to discontinue demand-side programs to file an application with the Commission and grants the Commission the authority to approve or reject such applications for discontinuation. 4 CSR 240-3.164(5) provides requirements the Utility must follow when it files to discontinue a demand-side program. The Signatories respectfully request a variance from these provisions in light of future uncertainties and in recognition of the fact that offering MEEIA programs is voluntary at the election of the Utility. The Utility will not commit to implement a MEEIA Cycle 2 portfolio for a three-year period without the ability to discontinue all programs in the MEEIA Cycle 2 portfolio under appropriate conditions as defined by the Utility. Any discontinuance of individual programs within the portfolio would still be required to comply with the Commission's rules. Therefore, the Signatories respectfully request a variance from the requirement that the Utility must file an application with the Commission for approval or rejection in the event it wishes to discontinue its entire MEEIA Cycle 2 portfolio. If such variance* [240-20.094(5)] *is granted, the requirements that apply to the filing* [240-3.164(5)] *would no longer apply.*

[36] Ex 201, Rogers Direct, p 9, lns 6-25.

C. Justification for Good Cause for Granting Variances

The Commission's Demand-Side Programs rule, 4 CSR 240-20.094, contains a variance provision in section (9) which allows the Commission to grant a variance from any provision of its rule for good cause shown.[37] Therefore, the Commission may grant the Company a variance to 4 CSR 240-20.094(5) and 3.164(5) if it believes good cause has been shown.

Although the term "good cause" is often used in the law,[38] the rule allowing variances does not define it. Therefore, it is appropriate to resort to the dictionary to determine the term's ordinary meaning.[39] Good cause "…generally means a substantial reason amounting in law to a legal excuse for failing to perform an act required by law."[40]

Similarly, "good cause" has also been judicially defined as a "…substantial reason or cause which would cause or justify the ordinary person to neglect one of his [legal] duties."[41] As well "good cause" can refer "…to a remedial purpose and is to be applied with discretion to prevent a manifest injustice or to avoid a threatened one."[42]

Of course, not just any cause or excuse will do. To constitute good cause, the reason or legal excuse given "…must be real not imaginary, substantial not trifling, and

[37] 4 CSR 240-20.094(9) Variances. Upon request and for good cause shown, the commission may grant a variance from any provision of this rule.
[38] *State v. Davis*, 469 S.W.2d 1, 5 (Mo. 1971).
[39] See *State ex. Rel. Hall v. Wolf*, 710 S.W.2d 302, 303 (Mo. App. E.D. 1986) (in absence of legislative definition, court used dictionary to ascertain the ordinary meaning of the term "good cause" as used in a Missouri statute); *Davis*, 469 S.W.2d at 4-5.
[40] Black's Law Dictionary, p. 692 (6th ed. 1990).
[41] *Graham v. State*, 134 N.W. 249, 250 (Neb. 1912). Missouri appellate courts have also recognized and applied an objective "ordinary person" standard. See *Central. Mo. Paving Co. v. Labor & Indus. Relations Comm'n*, 575 S.W.2d 889, 892 (Mo. App. W.D. 1978) ("…[T]he standard by which good cause is measured is one of reasonableness as applied to the average man or woman.")
[42] *Bennett v. Bennett*, 938 S.W.2d 952 (Mo. App. S.D. 1997).

reasonable not whimsical…"[43] Likewise, some legitimate factual showing is required, not just the mere conclusion of a party or his attorney.[44]

Company witness Tim Rush testified that KCP&L/GMO must have the regulatory flexibility provisions in the Stipulation approved by the Commission for the Company to commit to implementing its stipulated MEEIA Cycle 2 Plan demand-side programs and DSIM.[45]

Because the rule variances are needed to approve the regulatory flexibility provisions, Commission approval of those variances is necessary for KCP&L/GMO to commit to implementing a MEEIA Cycle 2 Plan portfolio. Without approval of the variances, there is no MEEIA Cycle 2 Plan.

By granting the requested variances and approving the stipulated MEEIA Cycle 2 Plan, all KCP&L /GMO customers would be able to reap the energy-savings benefits of MEEIA, whether customers participate in the demand-side programs or not. And more than 200 associated trade allies, including Brightergy, LLC, would have the opportunity to provide services to program participants.

D. <u>Conclusion</u>

The MEEIA statute requires only Commission approval of the demand-side programs and DSIM. There is no statutory requirement that the Commission approve discontinuance of the programs. Only the Commission's rule requires it to act on discontinuance within 30 days of application.

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[43] *Belle State Bank v. Indus. Comm'n*, 547 S.W.2d 841, 846 (Mo. App. S.D. 1977) See also *Barclay White Co. v. Unemployment Compensation Bd.*, 50 A.2d 336, 339 (Pa. 1947) (to show good cause, reason given must be real, substantial, and reasonable).
[44] See generally *Haynes v. Williams*, 522 S.W.2d 623, 627 (Mo. App. E.D. 1975).
[45] Tr p 144 ln19 to p 145 ln 2.

Also by rule the Commission may waive any part of its rule requirements for good cause shown. The 30 day notice requirements and other protections proposed in the stipulated regulatory flexibility provisions mirror the rule's customer protections. Whether the utility files a formal application for discontinuance under the rule or whether the utility issues a 30 day notice of discontinuance as proposed in the Stipulation, the end result will necessarily be the same. MEEIA is a permissive statute that allows the utility to discontinue its demand-side programs. In the end the Commission must recognize, as it did in the Ameren MEEIA 2 case, that MEEIA demand-side programs are voluntary. The big difference is whether the Company commits to implementing MEEIA Cycle 2 or not. Thus good cause has been shown because the roll-out of MEEIA demand-side programs and the substantial energy savings benefits to be gained by all customers rests squarely on Commission approval of these variances and the stipulated flexibility provisions.

Finally, the possibility that the Company would decide to terminate all of its demand-side programs is remote. Company witness Tim Rush testified that the risk of KCP&L/GMO terminating its programs is "…very, very, very slim…"[46] At hearing, Mr. Rush pointed out that the Company has the potential to make up to $35 million from its demand-side programs, so any decision to terminate these programs would not be made lightly.[47] In the unlikely event this decision should be made, the regulatory flexibility provisions discussed above would provide sufficient notice to customers and would protect program participants from economic harm.

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[46] Tr p 151 lns16 – 19,

[47] Tr p 153 ln 23 to p154 ln 14. Mr. Rush stated that the potential income from its demand-side programs breaks down in the order of $20 million for GMo and $15 million for KCP&L.

Therefore, because of the many demonstrated energy-savings benefits the proposed Cycle 2 Plan brings to all customers in KCP&L/GMO's service territory and because the Stipulation's flexibility provisions provide customer protections in the unlikely event of discontinuance, more than ample good cause exists for the Commission to approve variances to Commission rules 4 CSR 240-20.094(5) and 240-3.164(5). The Commission should grant the requested variances and approve the stipulated MEEIA Cycle 2 Plan portfolio of programs and DSIM.

- *Robert S. Berlin*

III. Proposed MEEIA Cycle 2 Plan: Business Energy Efficiency Rebate-Custom Program

After months of settlement discussions and negotiations, the Company offered 17 programs accepted by nearly all of the negotiating parties as part of the Company's MEEIA Cycle 2 Plan, reflected in the Stipulation.[48] Brightergy, the sole dissenter of all the parties, objects to only one offered program, the Business Energy Efficiency Rebate-Custom ("Custom Rebate") program. The Company offers this program to commercial and industrial customers who have not opted out of MEEIA. The Custom Rebate program offers rebates to customers who install energy efficiency measures that are not available through in the Business Energy Efficiency Rebate-Standard ("Standard Rebate") program. The goal of the Custom Rebate program is to allow customers to install more energy efficiency measures for further energy savings beyond the Standard Rebate program and to customize measures to a commercial or industrial business's particular needs.[49] Program measures include high efficiency HVAC systems, motors,

[48] *See* Direct Testimony of John A. Rogers, Schedule JAR-D-3
[49] *See* Stipulation and Agreement, Appendix D, page 10.

lighting, pumps or other qualifying high efficiency equipment or systems.[50] The Company proposes a flat incentive rate of $0.10 for each kWh saved during the first year, with the flexibility to increase to as much as $0.40 per kWh first year savings in response to market demands, with a cap of $500,000 per customer per year.[51] This is a change from the Company's prior Custom Rebate program for Cycle 1, which the incentive was the lesser of the buy down to a two-year payback or 50 percent of the incremental cost of the higher efficiency equipment, system, or energy saving measures.[52] The cap in Cycle 1 was the greater of $250,000 per customer or up to twice the customer's projected annual DSIM charge.[53]

The Company decided to change the incentive structure after extensive research with CLEAResult, an experienced nationwide implementer, and Applied Energy Group ("AEG"), a consultant.[54] CLEAResult analyzed a group of Midwestern utilities and provided two recommendations. First, CLEAResult recommended that a rebate program tie the rebate amount to the savings realized by the project.[55] Tying the rebate amount to the first year energy savings also results in equity among projects, where similar projects receive similar rebates, which are not influenced by contractor costs from third parties such as Brightergy.[56] Then, CLEAResult suggested the Company move the flat kWH rate so that it aligns with other midwestern utilities, such as Union Electric

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[50] Id.
[51] *See* Direct Testimony of Kimberly Winslow, page 7, lines 3-5.
[52] *See* Id. Page 3, lines 2-4.
[53] *See* Id., lines 5-7. The DSIM charge may also be referred to as the MEEIA charge.
[54] *See* Id. Page 7, lines 13-17
[55] *See* Id. Page 8, lines 3-5
[56] *See* Direct Testimony of Kimberly Winslow, page 8, line 7-9.

Company d/b/a Ameren Missouri ("Ameren Missouri"), the only other Missouri investor owned utility currently operating or seeking to operate under MEEIA.[57]

After receiving the recommendation from CLEAResult, the Company and AEG discussed and analyzed the change in designing Company's MEEIA Cycle 2 Plan. AEG evaluated the programs in comparison with nationwide utility best practice, incorporated market feedback from the Company's service territories, conducted a potential study, and did a rigorous benefit/cost analysis to arrive at the portfolio of programs the Company is proposing to implement.[58]

In contrast, Brightergy filed no work papers, modeling, program analyses, cost benefit analyses or any empirical evidence as part of its case.[59] Mr. Blake testified that he did not perform any program analyses, cost benefit analyses, modeling, or have any empirical evidence or work papers to support his claim.[60] In fact, Mr. Blake's pre-filed testimony and his responses at hearing consisted of speculation as to what other parties might do, proffering "triple hearsay" of what these supposed customers said to Brightergy salesmen who then reported back to Mr. Blake.[61] Brightergy submitted no attached emails or correspondence from concerned customers; while the Company submitted a letter from a client in support of the new proposed programs.[62] Even with Brightergy's dire predictions of job losses and declining customer energy efficiency investments,[63] it should be noted that not one of the other over 200 participating trade

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[57] *See* Direct Testimony of Kimberly Winslow, page 10, table 2.
[58] *See* Id., pages 12-13, lines 22-2.
[59] *See* TR. Vol. 3, page 247, line 6.
[60] *See* Id., line 11.
[61] *See* Id., page 289, line 22.
[62] *See* Surrebuttal Testimony of Kimberly Winslow, Schedule KHW-1
[63] *See* Rebuttal Testimony of Adam Blake, page 10, lines 11-13.

allies or their countless “sophisticated”[64] customers intervened in this proceeding. In fact, none of the other trade allies submitted negative feedback about the proposed changes or testified that the proposed Custom Rebate program would be detrimental to businesses, customers, the economy, or the furtherance of energy efficiency.[65]

While Brightergy failed to produce any empirical evidence or analyses regarding the proposed change in Custom Rebate program, Staff witness John Rogers performed benefit cost analyses of the entire MEEIA portfolio and the Business Custom Programs.[66] In particular, Mr. Rogers performed a rigorous analysis of the Company’s Cycle 2 Custom Rebate program, KCPL/GMO’s Cycle 1 Custom Rebate programs, and Ameren Missouri’s Cycle 1 Custom Rebate program.[67]

Despite separate issues with Ameren Missouri’s overall MEEIA Cycle 1 addressed by Staff in Case No. EO-2015-0055, Ameren Missouri’s Cycle 1 Custom Rebate program was a resounding success in terms of customers receiving actual net benefits per dollar of program costs. Ameren Missouri’s Cycle 1 Custom Rebate program operated on an 8.6% less than budgeted program cost amount of $23,488,357 and achieved $151,275,503 in net benefits, which is $64,991,580 (or 75.3%) higher than planned.[68] Ameren Missouri also achieved 224,328 MWh in energy savings, 42.1% higher than projected.[69] All of these savings were achieved with a flat incentive of $0.06 per first year kWh savings for lighting measures and $0.07 per first year kWh savings

[64] Id., page 7, line 3.
[65] *See* Surrebuttal Testimony of Kimberly Winlsow, page 7, lines 3-4.
[66] *See* Direct Testimony of John A. Rogers, Schedule JAR-D-2 and JAR-D-3, Surrebuttal Testimony of John A. Rogers, Schedule JAR-SR-2.
[67] *See* Surrebuttal Testimony of John A. Rogers, Schedule JAR-SR-2.
[68] Id.
[69] Id.

for non-lighting measures, which Mr. Blake admitted is lower than the $0.10 per first year kWh savings the Company proposed for Cycle 2.[70]

In contrast, KCPL/GMO spent a combined $24,601,687 in actual Custom Rebate programs' costs in Cycle 1, which Mr. Blake admitted is nearly double the planned cost.[71] These doubled program costs benefited Brightergy because incentive rebates made up a ** _______ ** portion of Brightergy's revenue.[72] Further, while the Company's Cycle 1 Custom Rebate programs' actual costs doubled compared to planned costs, the programs' actual net benefits to customers was only $44,456,170, which is 10.3% less than the planned net benefits of $49,538,487.

Brightergy's argument is self-serving at best when it asks the Commission to either approve its more costly, less effective Custom Rebate Program from Cycle 1 or reject the entire MEEIA Plan if it does not get its way.[73] And yet, even if Brightergy does not get its way, Mr. Blake testified that his company will still participate in a Commission-approved Custom Rebate program with a flat $0.10 per kWh incentive. Brightergy ignores, at the peril of ratepayers who pay program costs through the DSIM charge, the advice of the Company's consultants and the proven results of Ameren Missouri's similar lower cost Cycle 1 Custom Rebate Program. Brightergy has failed to demonstrate a justification for the Commission to order the Company to implement the old Cycle 1 Custom Rebate program, which the Company has rejected.

[70] Transcript Vol. 3, page 226, line 3.
[71] Id. page 223 lines 20-21.
[72] Transcript Vol. 4, page 240, lines 13-14.
[73] Transcript Vol. 3, page 280, lines 11-12

A. Free Ridership Issue is Inapplicable to Approval of the Proposed Cycle 2 Plan Portfolio of Programs

Brightergy suggests another problem resulting from the lower incentive level for the Custom Rebate program is increased free ridership. However, Brightergy's proposal to increase the Plan's Custom Rebate incentives does nothing to address free ridership. Data from Ameren Missouri's EM&V, which has been performed by an independent contractor for program years 2013 and 2014, shows that free ridership issues under Ameren Missouri's Custom Rebate program's lower incentive structure are null, as data suggests only an 10% free ridership effect.[74] The Company's Earning Opportunity is also based upon full EM&V, which accounts for free ridership by lowering the EO, thus giving the Company incentive to combat free ridership and increase incentive awards to the most economical level that encourages participation.[75]

B. Other Unsupported Brightergy Claims

Brightergy also makes the claim that the savings goals for Cycle 2 are too low.[76] As Chairman Hall correctly notes, if this was Brightergy's real concern then Brightergy would have objected to the overall numbers and portfolio.[77] Instead, Brightergy makes a self-serving argument to increase rebate amounts without ties to actual achieved savings. Brightergy would have all customers, even those who do not participate in the programs, share the additional $11 million cost of increasing incentives under the Cycle 1 Custom Rebate incentive structure.

Despite these facts, Mr. Blake still disagrees with moving forward with a more cost-effective program model and suggests continuing with the older model that did not

[74] Id., page 171, line 16.
[75] Id., page 121, lines 11-22.
[76] Id., page 300, line 25.
[77] Id., pages 69-70, lines 23-9.

attain the success the Company had planned.[78] Mr. Blake demands the Company stick with the older model, although he admits he did not study the Cycle 1 numbers for either Company in preparing his testimony.[79] Mr. Blake mostly focuses on the buy-back time frame as being a dissuasion for customers, citing to one page of an over 230 page study of a small (40) customer group in Massachusetts, which was brought up for the first time in re-direct, preventing opposing counsel from being able to question Mr. Blake on his knowledge of the document.[80] Mr. Blake also cites third-hand hearsay as to what clients may have said to sales representatives and a portion of the Company's Initial MEEIA Cycle 2 Application that lists, among other items, internal return on investment hurdles.[81] What he failed to mention is that both AEG and CLEAResult recommended that the Company adopt the approach in the proposed Cycle 2 Custom Rebate program. Mr. Blake later admitted that Brightergy itself *chooses not* to pursue projects with buy-back periods longer than 2 years.[82] Mr. Blake also admitted that in none of the customer projects specified in Exhibit 505 did the customer give specific information that the customer would not undertake a project with new incentive rates or with a longer buy-back period.[83]

C. Conclusion

Brightergy's self-serving assertion that the Custom Rebate program for businesses should not be changed from Cycle 1 is unsupported. Further, Brightergy does not provide any support for a drastic rejection of the stipulated MEEIA Cycle 2

[78] *See* Transcript Vol. 3, page 249, line 2.
[79] Id. page 301, lines 4-7.
[80] Id. page 313, lines 5-25.
[81] *See* Exhibit 504
[82] *See* Transcript Vol. 3, page 290, line 11-12.
[83] Id., line 25.

Plan. Brightergy failed to make a showing that the Custom Rebate program or the proposed MEEIA Cycle 2 Plan in its entirety does not meet the statutory obligations under the MEEIA statute. On the other hand, testimonies of Staff and the Company have made a substantial showing that the Stipulation will provide benefits for all customers and further the goals of energy efficiency in Missouri.

- *Nicole Mers*

WHEREFORE, Staff respectfully requests the Commission issue an order approving the joint proposed MEEIA Cycle 2 Plan portfolio of programs and DSIM and grant the requested variances for good cause shown for the reasons stated above and supported by competent and substantial evidence of record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been electronically mailed this 29th day of January, 2016, to all counsel of record in this proceeding.

/s/ Robert S. Berlin