



**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

OFFICE OF PUBLIC COUNSEL,)
)
) **Appellant,**)
) **v.**) **WD83828**
)
) **MISSOURI PUBLIC SERVICE**) **ORDER FILED:**
) **COMMISSION,**)
) **March 2, 2021**
) **Respondent;**)
)
) **MIDWEST ENERGY CONSUMERS**)
) **GROUP,**)
)
) **Respondent;**)
)
) **EVERGY METRO INC. D/B/A**)
) **EVERGY MISSOURI METRO AND**)
) **EVERGY MISSOURI WEST INC.**)
) **D/B/A EVERGY MISSOURI WEST,**)
)
) **Respondents.**)

Appeal from the Public Service Commission

**Before Division One: Alok Ahuja, P.J.,
Thomas H. Newton, and Thomas N. Chapman, JJ.**

ORDER

Per Curiam:

The Office of Public Counsel (OPC) appeals a March 2020 Missouri Public Service Commission amended report and order approving two demand-side management program portfolios and their associated surcharges submitted by electric

utility corporations Evergy Missouri Metro and Evergy Missouri West under the Missouri Energy Efficiency Investment Act. § 393.1075. The OPC challenges the order as unlawful and unreasonable. For reasons stated in the memorandum provided to the parties, we affirm. Rule 84.16(b).



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**MEMORANDUM PROVIDING REASONS FOR ORDER
AFFIRMING JUDGMENT UNDER RULE 84.16(B)¹**

The Office of Public Counsel (OPC) appeals a March 2020 Missouri Public Service Commission (Commission) amended report and order approving two demand-

¹ This informal, unpublished memorandum is provided to the parties to explain the rationale for the order affirming judgment. This memorandum is not a formal opinion and is not uniformly available. It shall not be reported, cited, or used in unrelated cases before this court or any other court. A copy of this memorandum shall be attached to any motion filed for rehearing or for transfer to the Supreme Court.

side management program portfolios and their associated surcharges submitted by electric utility corporations Evergy Missouri Metro and Evergy Missouri West (collectively, Evergy) under the Missouri Energy Efficiency Investment Act (MEEIA), § 393.1075.² The OPC challenges the order as unlawful and unreasonable. We affirm.

Evergy (previously KCP&L entities) has proposed and implemented two, three-year cycles of demand-side energy-savings programs under MEEIA since 2013. Under these programs, customers were urged or given incentives to adopt energy-efficiency measures to reduce energy consumption with the utilities' oversight and guidance.³ In exchange, Evergy added a surcharge (Demand-Side Investment Mechanism, or DSIM) to customer bills to recoup the costs of implementing/administering the programs, to recover lost sales, and to receive an incentive representing what shareholders would have gained from investments in foregone energy generation (supply-side). MEEIA permits the recovery of such costs to motivate utility companies to engage in demand-side energy-efficiency programs, which would otherwise reduce the revenue stream derived from providing electricity in the absence of energy-efficiency measures and would provide no return on investment to investors who supply capital for new generation, transmission, and distribution facilities.⁴ § 393.1075. Evergy claimed that

² Statutory references are to RSMo. (2016 & 2019 Supp.), unless otherwise indicated.

³ Such programs range from rebates for qualifying products, online energy audits, and the use of more energy-efficient heating, ventilating and air-conditioning (HVAC) equipment, to remote-controlled thermostats that allow Evergy to reduce or curtail usage during peak months and times of the day. This latter program can save Evergy money because the purchase of energy at peak times through the Southwest Power Pool (SPP), to which it is contractually bound, comes at a premium.

⁴ A Staff witness explained the components of MEEIA cost recovery and incentives as a three-legged stool. One leg permits utilities to timely recover the costs and customer incentives associated with the demand-side programs' implementation. One leg permits utilities to recover a "throughput disincentive," or a recovery of the marginal component of lost sales resulting from energy efficiencies. And the third leg permits utilities to recover an earnings opportunity, that is, a return for a supply-side investment that would otherwise have been made.

its first two MEEIA cycles affected more than 270,000 residents and 6,000 businesses and resulted in 769 million kilowatt hours (kWh) of energy savings, while creating 50 local jobs. According to the Commission, Evergy intended to invest \$96.3 million in programs similar to those in the first two cycles and anticipated achieving 185.9 megawatts of capacity reduction in the first year of the third cycle's implementation.

Commission Staff and the OPC opposed the Cycle 3 application. One major point of contention involved Staff's insistence, in light of 2017 changes to MEEIA's implementing regulations, the combined corporate applications, and changes in the energy industry, that Evergy use an avoided-costs value of zero in calculating the programs' cost effectiveness, given that the companies together have excess capacity and no plans to take any generating facilities offline or to build any new facilities until at least 2033.⁵ According to Evergy, using an avoided-costs value of zero in calculating cost effectiveness would render the Cycle 3 programs ineffective, and thus the companies could not continue the programs in Missouri. The MEEIA application relied on the estimated 2015 cost of a combustion turbine as the avoided-costs value. According to Staff, this cost would neither be avoided nor deferred through the implementation of the proposed demand-side programs, which Staff viewed as required under MEEIA, and this cost inflated the utilities' avoided-capacity cost, rendering it unequal to the value of demand-side investments. In a surrebuttal, Evergy later proposed using the average of more recent capacity bids as a market-based approach

⁵ The two companies had submitted separate Cycle 3 applications, and only one of the companies would have been able, according to Staff, to show cost-effective programs because its need for additional capacity was more immediate than that of the other company. Because the companies have a joint network integrated transmission service agreement with SPP, SPP treats them as a single load-serving entity. The MEEIA applications were accordingly combined, resulting in combined capacity and extending the need for new capacity for both companies to 2033.

to value avoided costs, and the Commission adopted this proposal, rejecting Staff's position that avoided costs under the statute are limited to those associated with the deferral of capacity or that require deferral of capacity.

Another major point of contention was the earnings opportunity for Evergy's proposal. The earnings opportunity allowed under MEEIA is the opportunity for a utility to earn a return for an investment that would otherwise have been made had the energy-efficiency programs not been in place. Evergy sought a percentage of program costs to calculate the earnings opportunity, or \$18 million to \$25.7 million, while Staff recommended a zero-earnings opportunity given its determination that the programs as proposed are not cost effective. During the Commission's September 2019 hearing on Evergy's application, it was noted in the questioning of an Evergy witness that the earlier cycles had likely achieved maximum available energy efficiencies (the "low-hanging fruit"), and further energy savings would be harder to come by with the same programs. Evergy contended that, if it cannot use an avoided cost higher than zero in calculating the cost effectiveness of the Cycle 3 programs and thus cannot recover an earnings opportunity, it will not be able to offer energy-efficiency programs under MEEIA in Missouri.

As to the earnings opportunity, Staff opined that the companies could recover their costs without it. The Cycle 3 application allowed Evergy to recover the \$96.3 million allotted to the program budgets on a timely basis through a charge on customer bills, and this amount would be trued up over the cycle's three years. Evergy would also receive \$42 million for projected lost sales by means of the throughput disincentive, an amount that would be recovered even if customers do not ultimately

save as much energy as estimated. The earnings opportunity is simply an additional incentive and can be set higher than zero if the applicant can show, in Staff's view, that the utilities would have foregone earnings from building or investing in generation or distribution facilities with targeted energy-efficiency programs.

A third issue for Staff with Evergy's proposal was that not all customers would receive benefits. According to Staff, customers that do not participate in the programs do not receive any benefits, while all residential customers will have to pay the surcharge regardless of whether they participate. In Staff's view, if a utility has "strong robust energy efficiency programs," sufficient long-term benefits will accrue to non-participating customers that would benefit "just by the existence of the programs," but this was not the case with Evergy's Cycle 3 MEEIA application.

The Commission issued a report and order in December 2019, but, following applications for clarification and rehearing, an amended report and order issued in March 2020 with an effective date of April 2020.⁶ The Commission approved the application with a few changes, including requiring that Evergy add to the portfolios a pilot program (Pay As You Save, or PAYS), recommended by Staff, that would create energy savings by means of the utilities investing in energy-efficient upgrades for customers, with costs recouped through a charge tied to customer meters. According to the Commission's order, the proposed program portfolios were cost effective, and the statute allows those commercial customers opting out of MEEIA (and thus not paying the DSIM) to, nevertheless, participate in "interruptible" and "curtailable" programs, i.e., those demand-response programs that pay an incentive for customers to

⁶ The order also waived the requirements of a number of regulations associated with the programs.

curtail their energy loads during times of peak demand. The OPC timely filed this appeal.

Legal Analysis

At issue is whether the Commission, in evaluating and approving the Cycle 3 programs Evergy proposed in 2018, unlawfully and/or unreasonably (1) valued demand-side and traditional utility investments unequally, (2) departed from the preferred statutory cost-effectiveness test (the total resource cost test) without a sufficient basis, (3) approved programs that do not benefit all customers in their class regardless of whether the customers participate in the programs, and (4) allowed commercial and industrial customers to opt out of the surcharge but to participate in the interruptible and curtailable programs while not allowing residential customers to do the same.

We review a Commission order under a two-prong test established by section 386.510. First, we “must determine whether the [Commission’s] order is lawful; and second, [we] must determine whether the order is reasonable.” *In re Kansas City Power & Light Co.’s Request for Auth.*, 557 S.W.3d 460, 466 (Mo. App. W.D. 2018) (citation omitted). The order “is prima facie lawful and reasonable. The burden of proof is upon the party attacking the order to show by clear and satisfactory evidence that the order or determination . . . is unlawful or unreasonable.” *Id.* (citation omitted). “The lawfulness of an order is determined by whether statutory authority for its issuance exists, and all legal issues are reviewed *de novo*.” *Id.* (citation omitted). Where purely legal issues are before this Court, we “exercise independent judgment to correct erroneous interpretations.” *Id.* (citation omitted).

The decision “is reasonable where [it] is supported by substantial, competent evidence on the whole record, the decision is not arbitrary or capricious or where the [Commission] has not abused its discretion.” *Id.* (citation omitted). “‘Substantial evidence’ is competent evidence which, if true, has a probative force on the issues. . . . [The Commission’s] factual findings are presumptively correct, and if substantial evidence supports either of two conflicting factual conclusions, we are bound by the findings of the administrative tribunal.” *Id.* (citation omitted).

We start with the 2009 statute itself, which states the following, in relevant part:

1. This section shall be known as the “Missouri Energy Efficiency Investment Act”.

2. As used in this section, the following terms shall mean:

. . . .

(2) “**Demand response**”, measures that decrease peak demand or shift demand to off-peak periods;

(3) “**Demand-side program**”, any program conducted by the utility to modify the net consumption of electricity on the retail customer's side of the electric meter, including but not limited to energy efficiency measures, rate management, demand response, and interruptible or curtailable load;

(4) “**Energy efficiency**”, measures that reduce the amount of electricity required to achieve a given end use;

(5) “**Interruptible or curtailable rate**”, 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;

(6) “**Total resource cost test**”, a test that compares the sum of avoided utility costs and avoided probable environmental compliance costs to the sum of all incremental costs of end-use measures that are implemented due to the program, as defined by the commission in rules.

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:

(1) Provide timely cost recovery for utilities;

(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; and

(3) Provide timely earnings opportunities associated with cost-effective measurable and verifiable efficiency savings.

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. The commission shall consider the total resource cost test a preferred cost-effectiveness test. Programs targeted to low-income customers or general education campaigns do not need to meet a cost-effectiveness test, so long as the commission determines that the program or campaign is in the public interest. Nothing herein shall preclude the approval of demand-side programs that do not meet the test if the costs of the program above the level determined to be cost-effective are funded by the customers participating in the program or through tax or other governmental credits or incentives specifically designed for that purpose.

5. To comply with this section the commission may develop cost recovery mechanisms to further encourage investments in demand-side programs including, in combination and without limitation: capitalization of investments in and expenditures for demand-side programs, rate design modifications, accelerated depreciation on demand-side investments, and allowing the utility to retain a portion of the net benefits of a demand-side program for its shareholders. In setting rates the commission shall fairly apportion the costs and benefits of demand-side programs to each customer class except as provided for in subsection 6 of this section. Prior to approving a rate design modification associated with demand-side cost recovery, the commission shall conclude a docket studying the effects thereof and promulgate an appropriate rule.

6. The commission may reduce or exempt allocation of demand-side expenditures to low-income classes, as defined in an appropriate rate proceeding, as a subclass of residential service.

7. Provided that the customer has notified the electric corporation that the customer elects not to participate in demand-side measures offered by an electrical corporation, none of the costs of demand-side measures of an electric corporation offered under this section or by any other authority, and no other charges implemented in accordance with this section, shall be assigned to any account of any customer, including its affiliates and subsidiaries, meeting one or more of the following criteria: [pertaining to high-energy consumption customers, such as commercial and industrial]

. . .

8. Customers that have notified the electrical corporation that they do not wish to participate in demand-side programs under this section shall not subsequently be eligible to participate in demand-side programs except under guidelines established by the commission in rulemaking.

. . .

10. Customers electing not to participate in an electric corporation's demand-side programs under this section shall still be allowed to participate in interruptible or curtailable rate schedules or tariffs offered by the electric corporation.

§ 393.1075.1-.10.

Equal Valuation of Demand-Side and Supply-Side Investments

MEEIA subsections 3 and 4, which require an equal valuation of demand-side and traditional utility supply-side investments, are at issue in the OPC's first point, which challenges this aspect of the Commission's order on both lawfulness and reasonability grounds. According to the OPC, Evergy failed to show that the demand-side programs in the portfolios are cost effective and have verifiable energy savings, and thus the Commission violated MEEIA in approving them. The focus of this challenge is on the avoided costs used to calculate whether a particular MEEIA program

is cost effective and the test used to conduct that calculation. OPC also contends that the Commission has arbitrarily decreed that demand-side programs always produce avoided-cost savings. The statute's implementing regulations define avoided costs as follows:

Avoided costs or avoided utility costs means the cost savings obtained by substituting demand-side programs for existing and new supply-side resources. Avoided costs include avoided utility costs resulting from demand-side programs' energy savings and demand savings associated with generation, transmission, and distribution facilities including avoided probable environmental costs. The utility shall use the integrated resource plan and risk analysis used in its most recently adopted preferred resource plan to calculate its avoided costs; . . .

MO. CODE REGS. ANN. tit. 20, § 4240-20.092(1)(C) (2019).⁷ MEEIA requires that the Commission give preference to the use of a total resource cost (TRC) test in considering whether a demand-side program is cost effective.⁸ § 393.1075.4. If the net benefit provided by a demand-side program under this test is greater than one, then the program is considered cost effective. According to the Commission,

⁷ The Commission granted Evergy a variance as to this rule, in light of the companies' expression of concern about complying with the requirement in the last sentence because they had relied on the hypothetical 2015 cost of a combustion turbine in the most recent integrated resource plan (IRP). In this regard, the Commission stated that a variance to the rule was "necessary to apply a different method of calculating avoided costs than the combustion turbine used . . . by Evergy in its most recent IRP filing."

⁸ The total resource cost test (TRC) is defined as:

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

MO. CODE REGS. ANN. tit. 20, § 4240-20.092(1)(WW) (2019). TRM is the acronym used for the technical resource manual which is "a document used to quantify energy savings and demand savings attributable to energy efficiency and demand response programs within an electric utility's service territory." MO. CODE REGS. ANN. tit. 20, § 4240-20.092(1)(SS) (2019). Evergy submitted TRMs with the Cycle 3 MEEIA application.

The TRC test compares the costs to deliver the program (including incentives paid to customers, administrative costs, the costs to do the evaluation, measurement and verification, and any out of pocket expenses paid by the customer) to the value of the program benefits (calculated as any energy savings in kWh, times the avoided cost of energy plus any capacity savings times the avoided costs of capacity equals the present value of the benefits). If the TRC results for a program are greater than one, the benefits are greater than the costs and the program is determined to be cost-effective.

The Commission departed from this test in calculating the cost effectiveness of Evergy's proposed Cycle 3 programs, after finding that the avoided costs that Evergy proposed overstate the benefits as calculated using this TRC test. The Commission is not required by MEEIA to apply the TRC test as the preferred test for cost effectiveness, as the TRC test is not mandated.

Evergy has excess capacity and will not defer any costs to generate electricity until at least 2033, so it proposed the 2015 cost of a combustion turbine as the avoided costs for the TRC calculations. The Commission found that the cost of a combustion turbine "overstates the avoided costs of generation transmission and distribution facilities" and that Evergy will need a turbine in 2033 "regardless of the implementation of its proposed MEEIA Cycle 3." Thus, the Commission agreed with Staff and the OPC that "Evergy's demand-side programs do not defer the construction, or hasten the retirement of any specific identifiable supply-side resource." But the Commission determined that using zero for avoided costs was inappropriate as the statute does not limit avoided costs to deferral of capacity.

MEEIA does not expressly link avoided costs to deferred capacity. The OPC's suggestion that only deferrals of expenditures can constitute avoided costs is too narrow an interpretation. The Commission supported its rejection of a zero avoided-

costs value by finding the following potential benefits: (1) “SPP member fees could be reduced through average monthly reductions in energy and demand. Staff calculated a dollar amount per year that SPP fees would be affected by Evergy’s proposed energy efficiency programs”⁹; (2) “Evergy has the ability to create additional revenue by selling its excess capacity through bi-lateral contracts or requests for proposals. The ability to sell excess capacity only increases as Evergy’s demand-side programs are substituted for its customers[’] needs for its supply-side resources”; and (3) “The substitution of a demand-side program for an existing supply-side resource occurs automatically when a demand-side program is implemented. Every kWh of energy saved offsets a kWh that would have otherwise been generated by a supply-side resource.”¹⁰ Staff’s rebuttal report explains that Evergy has entered just one contract with a non-affiliate in the past five years to sell capacity and that selling capacity attributed to peak demand savings from MEEIA Cycle 3 programs would generate revenue “drastically less than the assumed value for avoided capacity cost” that Evergy proposed. Nevertheless, the Commission determined that “[v]aluing avoided costs at

⁹ The Commission cited Staff’s rebuttal report regarding the calculation. The record citation indeed states, “As a member of SPP, [Evergy] could avoid some SPP member costs.” Staff cautioned, however, that Evergy “has not designed the proposed programs to minimize SPP fees. In general, [Evergy] has designed the programs to potentially reduce overall peak load in MWs [megawatts], but has not targeted the programs to reduce system peak during monthly zonal peaks, which drives the SPP fees.” Nothing to the contrary appears in the Commission order, and a company witness testified that Evergy has a lot of programs that are not peak based. Staff’s quantification of potential regional transmission organization fees that could be avoided from the MEEIA Cycle 3 programs was calculated in a confidential schedule, which the Commission cited. Without revealing the amounts, annual savings came nowhere near the claimed costs of implementing the proposed programs.

¹⁰ In this respect, the Commission’s position varies to some extent from a report and order issued in another utility company’s MEEIA filing in 2015 where the Commission found that not every kWh saved is of equal value. In the context of addressing the performance incentive of the utility’s application, the Commission observed that programs which do not reduce summer peak demands would not allow the utility to forego a future supply-side investment opportunity, because capacity is based on peak demand. Thus, the Commission noted that a nighttime lighting program would not have the same supply-side impact as a kWh saved under an air-conditioner recycling program.

zero, as Staff suggests, would unreasonably block the implementation of otherwise cost-effective demand-side programs. This would reduce the number of cost-effective programs offered by companies that have excess capacity.”

The Commission therefore decided to use an alternative market-based equivalent to value avoided-capacity costs and took the average price of bids that Evergy received in a 2017 request for proposal to supply capacity, “with terms ranging from four to ten years” to compare to the costs of the proposed demand-side programs to determine whether the programs were cost effective. Under this approach to value avoided costs, the Commission found that the only program required under MEEIA to be cost effective that would not be cost effective was the business smart thermostat program. Evergy was willing to adjust the program to make it cost effective. The OPC does not separately argue that the market-based approach that Evergy proposed does not accurately reflect the savings benefits that customers would reap if Evergy deploys its Cycle 3 demand-side programs.

The Commission cited a regulation applicable to utilities’ triennial compliance filing—integrated resource planning, or IRP—to conclude that its IRP rules “permit the use of a market-based equivalent for calculating avoided demand costs.” The rule describes the calculation for the cost effectiveness of a potential demand-side program for each year of the utility’s 20-year planning horizon and states in part, “The utility avoided demand cost [which is part of the calculation] shall include the capacity cost of generation, transmission, and distribution facilities, adjusted to reflect reliability reserve margins and capacity losses on the transmission and distribution systems, or

the corresponding market-based equivalents of those costs.” 20 MO. CODE REGS. ANN. tit. 20, § 4240.22.050(5)(A)1.

The Commission disagreed that the proposed programs were not cost effective, accepting the utilities’ assertion and evidence that they were. It concluded that “a market-based approach is the most appropriate way to calculate avoided costs for this MEEIA application and that a market-based approach best values demand-side investments equal to traditional investments in supply and delivery infrastructure.” Because MEEIA has not been amended and does not limit avoided utility costs to deferred capacity, we cannot conclude that the Commission acted unlawfully in using the average of bids Evergy received to supply capacity in 2017 to calculate avoided costs. Under our standard of review, we must affirm its determination.

As for the OPC’s claim that the Commission arbitrarily determined that demand-side programs always produce avoided-costs savings, we do not find that the OPC can show that a conclusion of this nature is unreasonable. When utility customers take advantage of a utility’s demand-side programs and adopt practices resulting in the use of less energy, it goes without saying that less energy needs to be generated and transmitted, thus producing avoided-cost savings in the form of either excess capacity that can be sold, or less wear and tear on equipment and lowered environmental-compliance costs. We emphasize that, in finding Evergy’s proposed demand-side programs to be cost effective, the Commission did not rely solely on the conclusion that the programs would produce *some* avoided costs, but instead relied on the recent capacity bids Evergy had received to quantify its capacity-related avoided costs. As Evergy has noted, the demand-side program savings are verified through retrospective

evaluation, measurement, and verification, so they are ultimately measurable and verifiable. This point is denied.

Rejection of Total Resource Cost Test (TRC)

In the second point, the OPC challenges the Commission’s approval of the MEEIA application as unlawful and unreasonable “in that it departs from the total resource cost test without sufficient basis.” Evergy argues that the Commission used the TRC test, but simply substituted a market-based approach to value avoided costs. The parties dispute whether the Commission in fact applied the TRC test, or instead applied a different test developed simply for purposes of this proceeding. What is clear is that the Commission used a market-based equivalent under its IRP regulations as a surrogate for the value of avoided-capacity costs that would be used to compare with the costs of the proposed demand-side programs.¹¹

While the OPC rightly recognizes that the TRC is merely a preferred test under MEEIA, it contends that the Commission “diverged from the TRC for seemingly no reason other than to approve Evergy’s applications.” The OPC further argues that the Commission’s amended order “does not demonstrate what metric is being applied, or what good cause exists to depart from the TRC.” Because the MEEIA statute permits the use of a cost-effectiveness evaluation test other than the TRC, we disagree that the Commission was required to show good cause in departing from that test or that its adoption of a market-based equivalency was unlawful. The Commission is not precluded by statute from determining that the price that the utility companies could

¹¹ The IRP regulations exclude from the demand-side program-costs side of the TRC comparison the lost revenues or utility incentive payments to customers. MO. CODE REGS. ANN. tit. 20, § 4240-22.050(5)(B)3 (2019). As indicated above, the Commission specifically described the TRC test in its order as a test that *includes* incentive payments to customers.

charge buyers for excess capacity that will be created by demand-side efficiency programs is an appropriate metric to use in calculating whether those programs are cost effective.

As to whether the Commission's ruling was unreasonable, the OPC questions the appropriateness of the market-based approach the Commission chose, because the bids Evergy received "were for varying time durations and amounts, making comparability of the bids dubious" and one of the Evergy companies "itself was the winning bid," an indication that such a bid is not necessarily "demonstrative of market conditions due to the inherent conflict of interest."¹² According to the OPC, the Commission replaced the combustion-turbine cost assumptions with a confidential number from Evergy's surrebuttal and inserted it "into an unidentified cost-effectiveness test."¹³

To support its finding that use of the market-based approach made Evergy's demand-side programs cost effective, the Commission cited a Staff witness's confidential testimony that referenced Evergy's surrebuttal report. This witness, asked by Evergy's counsel to agree to whether certain information about the market-based approach and the cost effectiveness of the proposed MEEIA programs appeared in the utility's surrebuttal report, agreed that the information was in the report and that he had "no reason to disagree" with the numbers in that report. This represents evidence

¹² In this regard, the OPC also claims that "[t]he Commission's use of the 'market-based' value is also contradictory to the Commission's decision to treat the Evergy companies as combined entities for MEEIA approval purposes given that the 'market-based approach' is premised on Evergy Missouri West purchasing capacity from Evergy Missouri Metro as if they are separate."

¹³ Because the Commission waived compliance with the rule requiring the use of the TRC test, we cannot be certain that it applied the rule.

that we presume to be correct supporting the Commission’s determination that using a market-based equivalent in calculating the cost effectiveness of Evergy’s proposed demand-side programs made Evergy’s MEEIA Cycle 3 proposal cost effective. We cannot say that the Commission’s decision was arbitrary and capricious. This point is denied.

Benefits for all Customers Regardless of Participation

In the third point, the OPC argues that the Commission’s approval of the demand-side management portfolio programs was unlawful and unreasonable in that these portfolios “do not benefit all customers in their class regardless of whether customers participate in those energy efficiency programs.” According to the OPC, the evidence was insufficient to show that all customers would benefit from the programs’ implementation as cost effectiveness was not shown and this is the “key for demonstrating benefits to all customers, because otherwise programs that are not cost-effective, result in non-participants subsidizing participants with no proven benefits to non-participants.” The focus of the OPC’s argument is that the Commission’s invocation of “indirect societal benefits” to justify the programs’ costs does not measure or quantify those benefits in terms of all of Evergy’s customers and likewise renders meaningless MEEIA’s requirement that the savings provided by demand-side programs be verifiable and measurable.¹⁴

As an example, the OPC discusses a hypothetical demand-side program “that uses ratepayer money to fund rebates for customers who purchase efficient heating and

¹⁴ The Commission specifically found, citing Staff’s surrebuttal report, that “[b]enefits from a reduction in a customer’s bill is not the only benefit to customers. There are also indirect societal benefits, such as improved health and safety, investment in local economies, and local job creation.” The surrebuttal report also remarks on the difficulty in quantifying such benefits.

air conditioning systems.” Those with the more energy-efficient systems benefit from the program by lowering their energy costs, and “[n]on-participants will benefit from subsidizing participants if the demand-side program produces enough savings to avoid other utility costs.” Thus, according to the OPC, “a cost-effective energy efficiency measure benefits both participants and non-participants because some other traditional utility cost is avoided, whether it be a generation, transmission, or other cost.” Given that this point relies for the most part on the OPC’s contention that the program portfolios are not cost effective, and we have rejected that contention under our deferential standard of review, we do not find that the programs will not benefit all customers in their class as required under MEEIA. This point is denied.

Discriminatory Treatment of Residential Customers

In the fourth and final point, the OPC argues that the approval of Evergy’s demand-side management program portfolios unlawfully and unreasonably permits the discriminatory treatment of customers by allowing industrial customers to opt out of paying Evergy’s DSIM charge, while still allowing the utilities to participate in demand-side management programs, but not giving residential customers the same opportunity.¹⁵

Under MEEIA, larger energy customers, such as commercial and industrial facilities, may opt out of the requirement that they pay the DSIM to support approved MEEIA programs. § 393.1075.7. Residential customers do not qualify to opt out under section 393.1075.7. Those customers that have exercised the opt-out right are,

¹⁵ Intervenor Midwest Energy Consumers Group participated in the hearing and filed a brief in this appeal to support the Commission’s interpretation of the statute as to this point.

nevertheless, “allowed to participate in interruptible or curtailable rate schedules or tariffs offered by the electric corporation.” § 393.1075.10. At issue during the hearing on Evergy’s application was whether the business demand-response program that was part of the portfolios was “interruptible or curtailable.”¹⁶ Under the business demand-response program, participants agree to reduce their energy loads particularly at peak times during the summer months in exchange for a financial incentive. When such an event is called, the customer has the option of not participating. The Commission concluded that the business demand-response program was interruptible or curtailable, and that if Evergy filed tariffs to implement the approved revised MEEIA Cycle 3, “those tariffs will appropriately represent the Commission’s determination that the programs are interruptible or curtailable within the meaning of the statute.” Accordingly, the Commission concluded that MEEIA permits industrial customers to opt out of the DSIM while still participating in the business demand-response program.

The OPC contends that the Legislature did not intend to allow industrial customers opting out of the DSIM to participate in a MEEIA interruptible and curtailable program, because the statutory text allows participation in “interruptible or curtailable rate schedules or tariffs.” According to the OPC, MEEIA distinguishes between interruptible or curtailable *loads* and interruptible or curtailable *rate schedules and tariffs*. The term “load” is found within the statute’s definition of “demand-side program,” i.e., “any program conducted by the utility to modify the net consumption

¹⁶ The OPC had argued during the hearing that MEEIA’s reference to interruptible and curtailable rate schedules and tariffs in which opt-out customers may nevertheless participate meant those rate schedules and tariffs existing outside of MEEIA. The OPC’s position was that opt outs “can still receive the benefits of other [interruptible and curtailable] tariffs that exist outside of MEEIA, but [they] can’t be carried on the backs of other customers who don’t have that luxury of opting out.”

of electricity on the retail customer's side of the electric meter, including but not limited to energy efficiency measures, rate management, demand response, and interruptible or curtailable load.” § 393.1075.2(3). This different usage was intentional, in the OPC’s view, and means that an industrial customer’s election to opt out of MEEIA would not prevent it from participating in the curtailable tariffs that exist outside of MEEIA. The OPC argues that this interpretation preserves “existing rights to participate in separate curtailment rate programs, but in no way relates to a right to be subsidized by residential customers paying MEEIA surcharges.” The Commission’s contrary interpretation, the OPC claims, is unlawful.

As the Commission observes, however, the statutory definition of interruptible or curtailable rate does not distinguish between reduced rates offered through MEEIA or outside of MEEIA. It further contends that differences among customers may reasonably be reflected by different treatment under the statute given “differences in power usage between residential and large commercial and industrial customers.” Large industrial and commercial customers that may opt out of MEEIA programs are “most likely to possess the economic and technical ability to achieve significant load curtailments” and actually “accounted for more than 35 percent of Evergy’s curtailable load in Cycle 2, so successful load curtailment depends upon opt-out customers.” According to the Commission, “the evidence showed that opt-out customers will not participate in curtailment programs if doing so forfeits their opt-out status,” as “[t]he monetary benefits of opting out exceed the curtailment incentives. Large customers will not curtail if doing so means losing the ability to opt out of MEEIA programs.”

The Commission contends that its amended report and order upholds MEEIA's policy objectives through its plain language. We agree.

While MEEIA addresses the ability of opt-out customers to nevertheless participate in interruptible and curtailable rate schedules and tariffs, because demand-response programs, such as the programs Evergy proposed and has used in past approved MEEIA cycles, necessarily involve rate schedules and tariffs that incentivize participation, the statute clearly allows opt outs to participate in these MEEIA programs. § 392.1075.10. This point is denied.

Conclusion

Finding the Commission's amended report and order lawful and reasonable in rejecting a zero value for the avoided costs of Evergy's proposed demand-side programs, using a demand-side program cost-effectiveness test involving market-based equivalents for avoided costs, approving programs that will benefit participants and non-participants, and permitting industrial energy opt-out customers to participate in Evergy's demand-response programs, we affirm.