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

In the Matter of the Application of Evergy )  
Missouri West, Inc. d/b/a Evergy Missouri ) **File No. EO-2026-0129**  
West for Approval of an Amendment to )  
Nucor Steel Sedalia, LLC Agreement )

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**STAFF'S INITIAL BRIEF**

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## Executive Summary

Staff's brief follows a simple arc. It begins with yes; yes to Nucor providing real demand-response value; yes to Evergy Missouri West receiving verified resource-adequacy value; and yes to a lawful pathway by which that value may be recognized. But the arc cannot end with unconditional approval. The arc must move from permission, to measurement, to customer benefit, to cost protection. Unless the Commission's order completes that arc, the approval will not be administrable, enforceable, or reviewable.

Staff is not asking the Commission to reject demand response. Staff is asking the Commission to require the proposed conditions necessary to make demand response lawful in this case. Nucor's ordinary electric load is highly volatile. A later demand-response event will produce an observed load number, but that number alone will not show what Nucor would have used absent the event. If the order does not establish a predetermined baseline, firm load cap, firm-service-level standard, or other objective metric now, later proceedings will be forced to reconstruct the missing standard after the fact. That is not compliance review. It is conjecture.

Staff therefore proposes the firm load cap as a practical measurement solution. The cap would be set before the applicable trial period, season, or measurement period begins. Nucor's actual interval-metered performance would then be compared to the approved cap during each compliance hour. The compliance question becomes simple, did Nucor's actual compliance-hour load remain at or below the applicable cap? That answer can be determined from meter data and arithmetic, not from post hoc estimates of what Nucor might have done.

Issue A.2 sharpens the point. EMW has not demonstrated, with reliable data, that Nucor's MEEIA BDR participation would produce benefits to all EMW customers. EMW and Nucor identify possible benefits such as SPP resource-adequacy value, reduced capacity obligations, avoided capacity costs, incentives for Nucor, and an earnings opportunity for EMW. But possible benefits are not the same thing as proven, customer-realized net benefits. MEEIA requires customer benefit, not merely customer participation. It is not enough to label Nucor's curtailment as demand response and then assume that all customers benefit.

Nor has EMW shown that the quantified benefits exceed the quantified costs. The claimed benefits depend on assumed or stale avoided-cost values, historical curtailments, modeled resource-adequacy effects, and an unreliable baseline. EMW has not identified an actual avoided capacity purchase, an avoided generation project, or a specific cost reduction realized by non-Nucor customers. By contrast, the costs are concrete: incentive payments to Nucor, administrative costs, EM&V costs, carrying costs, bill impacts, and a potential earnings opportunity for EMW. The record therefore supports Staff's position that the proposed MEEIA BDR path, as it stands, has not been shown to produce net benefits for all affected customers.

The verification problem is equally central. EMW's MEEIA BDR program does not provide a sufficient verification process for Nucor's volatile load. If the baseline is unreliable, the claimed savings are unreliable. If the claimed savings are unreliable, then the benefit-cost analysis is unreliable. And if the benefit-cost analysis is unreliable, the Commission cannot lawfully approve ratepayer-funded incentives, DSIM recovery, or an earnings opportunity on the unproven theory that customers received measurable and verifiable benefits.

Staff is not wedded to the precise wording of every condition it proposes. Staff's conditions are the means Staff has identified to make the order lawful, measurable, enforceable, and reviewable. The Commission may adopt Staff's proposed conditions, modify them, or substitute different conditions. But whatever conditions the Commission imposes must accomplish the same essential objectives: reliable measurement, verified performance, actual customer-realized benefits, full accounting of all customer-borne costs, proper treatment of any earnings opportunity, and complete Schedule SIL hold-harmless protection.

An order that approves the Application or Non-Unanimous Stipulation without conditions satisfying that conceptual framework would not merely choose a different policy path. Commission approval would leave the Application and Non-Unanimous Stipulation without the objective standards necessary for administration, enforcement, and judicial review, thus inviting reversal on appeal.

Measurement is only the first half of the case. The second half is cost protection. If Nucor participates inside EMW's MEEIA BDR program, all customer-borne costs associated with that participation must be identified, tracked, and subjected to a full hold-harmless true-up. The Commission should limit recoverable customer-borne

costs to the lesser of two amounts: first, total customer-borne costs multiplied by a Verified Performance Ratio; or second, actual, measurable, customer-realized benefits produced by Nucor's verified demand-response performance. That structure prevents all-or-nothing treatment, but also prevents the Verified Performance Ratio from becoming a new deemed-savings device.

Issue B and Issue C follow from the same principle. The costs of Nucor's participation cannot be removed from the Schedule SIL hold-harmless framework merely by labeling them DSIM costs. If Nucor's participation creates incentives, administrative costs, EM&V costs, or earnings-opportunity effects, those costs arise because the Schedule SIL customer is being allowed to participate. They must therefore be included in the Schedule SIL hold-harmless and cost-tracking process. Likewise, EMW should not receive an earnings opportunity from Nucor's participation unless the underlying savings are cost-effective, measurable, verifiable, customer-realized, and fairly apportioned.

Issue A.2.c confirms that Staff's position is not anti-curtailement. There are other pathways. Nucor may provide demand-response value outside MEEIA through market-based or non-MEEIA mechanisms, including SPP demand response or EMW's Market Based Demand Response tariff. Those alternatives may still allow Nucor to curtail load, EMW to obtain resource-adequacy value, and Nucor to receive compensation for verified performance. But they avoid the central defect of the proposed MEEIA path: ratepayer-funded incentives and earnings opportunity based on inadequately verified savings.

The Commission therefore has two lawful paths. First, the Commission may approve a limited MEEIA BDR pathway, but only with conditions satisfying Staff's conceptual framework: measurement, verification, customer-realized net benefit, cost tracking, true-up, earnings-opportunity limits, and full hold-harmless protections. Second, if EMW and Nucor cannot satisfy MEEIA's requirements, the Commission may approve a narrower non-MEEIA pathway, allowing Nucor to provide curtailment value through market-based or other non-MEEIA mechanisms. But even outside MEEIA, all costs attributable to Nucor's participation must still be captured through the Schedule SIL hold-harmless framework.

The arc of Staff's position is therefore not from proposal to rejection. It is from proposal to lawful completion. Staff does not contend that the Commission must adopt

**Staff's exact words. Staff contends that the Commission must adopt conditions that do the work Staff's conceptual framework requires. Without conditions achieving those objectives, the order will lack the ascertainable standards necessary to survive review.**

## **I. Introduction**

As Staff explains in this brief, the Commission should not approve EMW's Application or the Non-Unanimous Stipulation and Agreement as offered. The question is not whether Nucor should ever reduce load when the grid is strained. It should. The question is whether the Commission can approve a ratepayer-funded Missouri Energy Efficiency Investment Act ("MEEIA") Business Demand Response ("BDR") pathway unless the order first makes performance measurable, benefits customer-realized, costs fully counted, and non-Schedule Special Incremental Load ("SIL") customers held harmless.<sup>1</sup> EMW's Application and the Non-Unanimous Stipulation, as offered, do not do that. Therefore, the Application and Non-Unanimous Stipulation cannot be approved in its present form.

That is the proper conceptual framework through which to view the Application and Non-unanimous Stipulation filed by EMW and Nucor. Staff acknowledges that the Non-Unanimous Stipulation is a constructive step forward because it recognizes a limited 2027 approval, ties continuation to a later financial analysis, refers to SPP-accredited kW, provides for final Evaluation, Measurement, & Verification ("EM&V") values, limits the amount of Nucor kW credited to EMW's BDR goals for earnings-opportunity purposes, and excludes Nucor kW from the 65% earnings-opportunity

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<sup>1</sup> Staff Position Statement at 1; Ex. 100C, Rebuttal Testimony of Jordan Hull, pp. 2, line 13.

vesting threshold. Those provisions show that the parties recognize the need for a controlled trial rather than an open-ended authorization.

But the stipulation stops two steps short of the order the Commission needs. The Non-Unanimous Stipulation says Nucor will be paid for measured performance, but does not establish an objective compliance standard capable of determining whether Nucor actually curtailed from an ascertainable level. It calls for financial analysis, but it does not require an all-cost, customer-realized net-benefit showing before customers bear the cost. It preserves existing SIL protections in general terms, but it does not expressly include all MEEIA BDR participation costs in the SIL hold-harmless mechanism. Staff does not ask the Commission simply to say no because of these deficiencies and then stop. Staff goes around the “no” and offers a pathway to cure those deficiencies and then asks the Commission to say “yes”-- to a lawful, measurable, reviewable, customer-protective version of the proposal.

Staff suggests two steps or pathways to approval: The first suggestion is a Firm Load Cap as an objective performance standard. The second suggestion, to be discussed later, is a cost recovery mechanism, i.e., implementation of the hold harmless provisions.

The first problem to be solved? Nucor's load is highly volatile. When a demand-response event occurs, Nucor's observed load alone does not prove curtailment if what is called “performance” remains within the range of a customer's ordinary demand. If Nucor uses 80 MW during an event, the Commission still must know whether Nucor would otherwise have used 82 MW, 100 MW, or 65 MW. Without a predetermined baseline or other objective metric, no one can determine with reasonable certainty whether curtailment

occurred, how much curtailment occurred, or whether the observed load simply reflects the level at which the facility would have operated anyway. This defect is structural: Any order ignoring this defect will lack an objective and ascertainable compliance standard.<sup>2</sup>

The proposed Firm Load Cap supplies that standard. It does not ask EMW, Nucor, Staff, or the Commission to reconstruct a hypothetical "but-for" load after the event. It requires a firm MW level, approved before the applicable trial period, season, or measurement period begins, against which Nucor's actual interval-metered compliance-hour load can be compared. The future compliance question then becomes administrable and reviewable: during the compliance hour, did Nucor's Actual Compliance-Hour Load remain at or below the Commission-approved Firm Load Cap?<sup>3</sup>

This approach makes Staff's position a proposed solution, not a rejection of demand response. The Commission can approve a path for Nucor to participate in demand response if the order contains the pathway by which compliance will later be confirmed. Without that pathway, the Commission invites reversal on appeal by approving future cost recovery and future compliance determinations that no future record can establish with reasonable certainty. With that pathway, the Commission can authorize a limited, objectively measurable trial tied to verified performance, customer-realized benefits, proper capacity valuation, and full SIL hold-harmless protection.

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<sup>2</sup> Staff Position Statement at 1-3; see *also* Ex. 105, Memorandum Attached to Staff Suggestions in Opposition, pp. 7-8.

<sup>3</sup> Ex. 103, Measurement and Verification for Demand Response FERC and DOE Report to Congress, pp. x-xi, 19, 28, 49; Ex. 104, SPP Planning Criteria 7.1.10, Section 7.1.10; Ex. 105, pp. 5-8.

## **II. Issues in Staff's Position Statement and Staff's Answers**

With the foregoing introduction endeavoring to provide a global view of the case before the Commission, Staff's brief will now address the pre-filed issues and positions of the parties as well as other issues that arose in the course of the hearing.

### **Issue A**

Should the Commission approve an amendment to the Special Rate for Incremental Load Service ("SIL") dated July 11, 2019 (the "Nucor Agreement") between EMW and Nucor Steel Sedalia, LLC ("Nucor"), which would allow Nucor to participate in "any" demand response programs offered by EMW, subject to the availability and terms of each specific program?

### **Staff's Answer to Issue A**

No, not as proposed and agreed to between EMW and Nucor. The Commission should not approve an open-ended amendment allowing Nucor to participate in "any" demand response program. Staff Witness Hull's testimony makes the point directly: Schedule SIL presently bars Nucor from MEEIA programs, demand-response programs, and off-peak discounts, unless the Commission orders otherwise when approving a contract for service under the tariff. The amendment is therefore not housekeeping. It is the Commission's gatekeeping decision about whether, and under what conditions, a Schedule SIL customer may move into programs that can create costs for other customers.<sup>4</sup>

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<sup>4</sup> Ex. 100C, p. 2, lines 10-21.

Hull is not anti-curtailement; he is critical of using ratepayer-funded MEEIA as the path. Hull explains that MEEIA BDR is funded through Demand-Side Investment Mechanism (“DSIM”), that Nucor is the only Schedule SIL customer, and that non-Nucor ratepayers would pay the incentives, earnings opportunity, and administrative costs.<sup>5</sup> He also identifies practical alternatives: SPP demand response, EMW’s Market Based Demand Response tariff, and aggregator-based options that could let Nucor reduce load, give EMW accreditation value, and compensate Nucor without putting unsupported MEEIA costs on other customers.<sup>6</sup>

Staff witness Mark Kiesling adds the ratepayer-benefit criticism. His testimony is that EMW’s proposal is not beneficial to EMW ratepayers because it creates additional earnings opportunity for EMW, additional incentives for Nucor, and only claimed - not proven - avoided capacity benefits.<sup>7</sup> Nucor was not eligible when the Cycle 4 BDR targets were set. Yet EMW now seeks to use Nucor’s forecasted curtailment to help reach targets that may otherwise be missed, producing approximately \$200,000 in additional earnings opportunity for EMW shareholders and approximately \$1.14 million in annual incentives for Nucor.<sup>8</sup> Kiesling also rejects EMW’s avoided-capacity showing because there were no supporting workpapers, no Commission-approved Cycle 4 avoided capacity cost, and no showing that EMW will actually avoid capacity purchases or new generation because of Nucor participation.<sup>9</sup>

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<sup>5</sup> *Id.*, 100C, p. 5, lines 4-19.

<sup>6</sup> *Id.*, p. 8, lines 3-14; p. 9, lines 21-30; p. 10, lines 1-12; pg. 11, lines 3-22; and pg. 12, lines 1-4.

<sup>7</sup> Exhibit 101C, Rebuttal Testimony of Mark Kiesling, pg. 1, lines 17-23.

<sup>8</sup> *Id.*, pg. 3, lines 11-14 and pg. 4, line 3.

<sup>9</sup> *Id.*, pg. 5, lines 1-4.

### **Issue A.1**

In doing so, should the Commission approve an amendment permitting Nucor to participate in EMW's Business Demand Response ("BDR") program pursuant to the Missouri Energy Efficiency Investment Act, RSMo Section 393.1075 ("MEEIA")?

### **Staff's Answer to Issue A.1**

No, not as proposed and agreed to between EMW and Nucor. Staff supports a MEEIA BDR path only if the order imposes conditions that make performance measurable, benefits customer-realized, all costs counted, and non-Schedule SIL customers held harmless. The testimony of Staff witnesses Jordan Hull, Mark Kiesling, and Justin Tevie is not a set of minor reservations. Each witness identifies a different fatal gap in the Application as filed: Hull identifies the tariff and ratepayer-funding problem; Kiesling identifies the earnings-opportunity and unproven-benefit problem; and Tevie identifies the measurement, capacity-cost, and hold-harmless problem.

Tevie's criticism of EMW's Application and Non-Unanimous Stipulations is a measurement problem. EMW's 9-of-10 day-averaging baseline is not reliable for Nucor because Nucor's load fluctuates widely and unpredictably.<sup>10</sup> Tevie states that EMW cannot accurately forecast Nucor's peak demand reduction from a demand-response event, and that representing Nucor's load with a normalized straight-line baseline is inaccurate.<sup>11</sup> Because that baseline drives claimed savings, incentive payments, rate-impact analysis,

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<sup>10</sup> Ex. 102C, Rebuttal Testimony of Justin Tevie, p. 8, lines 11-21.

<sup>11</sup> *Id.*, pg. 9, lines 1-10.

and cost-effectiveness tests, overstated reductions can make customer benefits appear greater than they are.<sup>12</sup>

Tevie is equally direct on cost assignment. Nucor's MEEIA BDR participation would produce a discounted bill or incentive for Nucor, while the costs, program administration, participant incentives, and any EMW earnings opportunity, would be borne by non-Nucor ratepayers unless included in the hold-harmless mechanism.<sup>13</sup> Tevie therefore recommends no MEEIA BDR participation; alternatively, if the Commission permits participation, EMW must include Nucor participation costs and any earnings opportunity in the SIL hold-harmless provision, identify actual generation projects or capacity purchases that can reasonably be avoided, account for the full capacity cost of serving Nucor's peak demand, and make any true-up adjustment necessary to protect non-Schedule SIL customers.<sup>14</sup>

Kiesling's testimony gives the Commission the financial reason to be skeptical. EMW and Nucor would receive concrete benefits immediately: EMW could improve its BDR target performance and obtain additional earnings opportunity, while Nucor could receive substantial ratepayer-funded incentives.<sup>15</sup> But the asserted customer benefits are not equally concrete. Kiesling states that EMW's avoided capacity claim is unsupported, that no Cycle 4 avoided capacity cost was approved, and that non-Nucor ratepayers do not benefit unless EMW actually avoids capacity purchases or reduces the amount of new

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<sup>12</sup> *Id.*, pg. 11, lines 8-15.

<sup>13</sup> *Id.*, pg. 3, lines 2-6.

<sup>14</sup> *Id.*, pg. 12, lines 5-16; see also Ex. 105, pp. 7-8.

<sup>15</sup> Ex. 101, pg. 4, lines 8-20.

generation needed to serve customers.<sup>16</sup> In his words, Staff is not opposed to demand response; Staff is opposed to allowing Nucor into a MEEIA structure that largely benefits EMW and Nucor while imposing unnecessary additional costs on ratepayers.

Hull supplies the practical alternative. If Nucor can provide real curtailment value, the Commission need not force that value through EMW's MEEIA BDR. SPP demand response and EMW's MBDR tariff require more rigorous metering, baseline reporting, verification, and settlement based on actual performance.<sup>17</sup> Those mechanisms may be more demanding, but that is precisely why they better fit Nucor's volatile load and better protect customers from paying for unverified savings.

#### **Issue A.2**

Would Nucor's participation in EMW's MEEIA BDR Program produce benefits to all EMW customers?

#### **Staff's Answer to Issue A.2**

No. EMW has not demonstrated, with reliable data, that Nucor's MEEIA BDR participation would produce benefits to all EMW customers.

EMW claims that Nucor's participation in its MEEIA BDR program would produce benefits to all EMW customers because Nucor's curtailment would create SPP resource adequacy value, reduce the MW capacity EMW must otherwise account for, and produce avoided capacity-cost benefits.<sup>18</sup> EMW witnesses assert that prior Nucor participation produced more than \$2.5 million in avoided capacity-cost benefits,<sup>19</sup> that Evergy-registered

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<sup>16</sup> *Id.*, pg. 5, lines 7-11.

<sup>17</sup> Ex. 100, pg. 8, lines 3-14; pg. 9, lines 21-30; pg. 10, lines 1-12; pg. 11, lines 3-22; and pg. 12, lines 1-4.

<sup>18</sup> Ex. 101, pg. 5, lines 1-11.

<sup>19</sup> Exhibit 1, Direct Testimony of Brian File, pg. 7, lines 19-20 and pg. 8, line 1.

demand response can be used in SPP resource adequacy workbooks to reduce EMW's net peak demand,<sup>20</sup> and that Nucor's participation would provide system-wide avoided-cost benefits.<sup>21</sup>

Staff argues that, due to Nucor's large and highly volatile load, the proposed baseline method is not sufficiently reliable to forecast or verify demand reductions with reasonable certainty.<sup>22</sup> Staff also posits that EMW has not shown actual generation projects or specific capacity purchases that would be avoided,<sup>23</sup> and that Nucor's participation would impose ratepayer-funded incentives, administrative costs, and potential earnings opportunity without a demonstrated, customer-realized net benefit.<sup>24</sup> Staff therefore opposes approval of Nucor's participation in EMW's MEEIA BDR program absent verifiable savings, actual avoided capacity value(s), total costs, customer realization, and protection of affected customer classes; or in the alternative, conditions which provide the Commission with methods of verification for EMW's claims.

Section 393.1075, RSMo, does not authorize MEEIA cost recovery merely because a program is labeled a demand-side program; it requires that approved demand-side programs result in energy or demand savings and be beneficial to all customers in the customer class, regardless of whether the programs are utilized by all customers.<sup>25</sup> EMW asserts system-wide benefits based on past curtailments of Nucor; however, EMW's analysis is based on the improper participation of Nucor during the Company's MEEIA

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<sup>20</sup> Exhibit 5, Surrebuttal Testimony of James (JP) Meitner, pg. 2, lines 21-23 and pg. 3, line 1.

<sup>21</sup> Exhibit 6, Surrebuttal Testimony of Linda J. Nunn, pg. 3, lines 23-24.

<sup>22</sup> Exhibit 102, pg. 9, lines 1-5.

<sup>23</sup> Ex. 101, pg. 5, lines 9-11.

<sup>24</sup> Ex. 105, pg. 2, lines 8-25.

<sup>25</sup> § 393.1075.4, RSMo.

Cycle 3 in program years 2021 and 2022.<sup>26</sup> This analysis is also based on the avoided costs ordered by the Commission for EMW’s MEEIA Cycle 3.<sup>27</sup>[R71] For this application, EMW used the avoided costs in its MEEIA Cycle 4 application in Case No. EO-2023-0370, despite those avoided costs not being ordered by the Commission; it is EMW’s position that those avoided costs were “implicitly” approved by the Commission when it approved the MEEIA Cycle 4 Non-Unanimous Stipulation and Agreement.<sup>28</sup> The Office of the Public Counsel (“OPC”), a signatory to said agreement, does not agree that implicit approval of the avoided costs included in EMW’s MEEIA Cycle 4 application was part of the agreement.<sup>29</sup>

EMW has not shown, with reliable quantified evidence in this docket, that Nucor’s participation will produce verified demand savings, verified avoided capacity costs, benefits realized by all affected customers or customer classes, and benefits exceeding all costs. While it is clear that EMW will benefit through an additional \$200,000 in projected earnings opportunity if Nucor were to participate in MEEIA BDR,<sup>30</sup> and Nucor would benefit by receiving approximately \$1.14 million in incentive for participating in MEEIA BDR,<sup>31</sup> ratepayers would be on the hook for unnecessary costs.<sup>32</sup>

### **Issue A.2.a**

Do the quantified benefits of Nucor’s participation in EMW’s MEEIA BDR program exceed the qualified costs?

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<sup>26</sup> Ex. 101, pg. 4, lines 18-20 and pg. 5, lines 1-4; see also Ex. 100, pg. 4, lines 1-9.

<sup>27</sup> Ex. 4, pg. 3, lines 7-8; see also Transcript Vol. 1, pg. 117, lines 3-19.

<sup>28</sup> *Id.*, lines 14-19.

<sup>29</sup> Transcript Vol. 1, pg. 243, lines 15-18.

<sup>30</sup> Ex. 101, pg. 3, lines 11-14.

<sup>31</sup> *Id.*, pg. 4, line 3.

<sup>32</sup> *Id.*, pg. 5, lines 13-16.

### **Staff's Answer to Issue A.2.a**

No. Staff's position is that the reliable evidence does not support the conclusion that the quantified benefits of Nucor's participation in EMW's MEEIA BDR program exceed the quantified costs. EMW claims that Nucor's participation would produce avoided cost benefits exceeding the incentives paid to Nucor.<sup>33</sup> But EMW's showing depends on assumed or deemed values rather than demonstrated current savings. Its calculation relies on historical or estimated MW reductions, avoided-capacity-cost figures, assumed resource-adequacy treatment, and modeled portfolio effects. EMW does not identify an actual avoided capacity purchase, an avoided generation project, or a specific reduction in costs to non-Nucor ratepayers. Instead, its claimed benefit rests on the proposition that Nucor's participation would create resource-adequacy value that should be treated as a system benefit.<sup>34</sup>

There is not reliable proof of net quantified benefits. Staff concludes that the avoided-capacity claim is unsupported by adequate workpapers or documentation, that the claimed Cycle 4 avoided-capacity benefits are unsubstantiated, and that non-Nucor ratepayers will not benefit unless EMW can actually avoid additional capacity purchases or reduce the amount of new generation needed to serve EMW customers.<sup>35</sup>

The absence of defined avoided costs, more than anything, reveals that Nucor's participation will not provide benefits exceeding the qualified costs. OPC witness Dr. Geoff Marke put it best when he asked the question "What are we

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<sup>33</sup> *Id.*, pg. 4, lines 18-20 and pg. 5, lines 1-11.

<sup>34</sup> Ex. 6, pg. 3, lines 23-24.

<sup>35</sup> Ex 101, pg. 5, lines 1-11.

avoiding?”<sup>36</sup> As Dr. Marke notes, nothing is being avoided, and the influx of requests for certificates of convenience and necessity from EMW is evidence of that.<sup>37</sup>

According to Dr. Marke, “[H]eaven and earth has changed,” since the MEEIA Cycle 4 agreement in EO-2023-0370 was approved by the Commission: data centers were not a part of the conversation, the increase in generation build-out had not yet begun, and to get Nucor into MEEIA, EMW “is trying to shoehorn an avoided—avoided cost estimate that’s four, five year old that was premised on shaky data at best, and trying to put that as a forward proxy for what we’re actually doing is—it doesn’t reflect reality.”<sup>38</sup>

By contrast, the costs are concrete and reflect reality. Staff identifies program administration costs, participant incentives, and an earnings opportunity for EMW. Nucor could receive approximately \$1.14 million per year in incentives, and EMW shareholders could receive approximately \$200,000 in additional earnings opportunity. Staff also questions the factual basis for the claimed benefits because Nucor’s volatile load makes reliable baseline measurement impossible. If demand reductions are overstated, the benefit-cost analysis will be skewed and may create the misleading appearance that benefits exceed costs.

Accordingly, Staff concludes that EMW has not proven that quantified benefits exceed quantified costs. EMW’s testimony is too dependent on unsupported assumptions, stale avoided costs, and deemed values. The Non-Unanimous Stipulation between Nucor and EMW fails for the same reasons. It permits participation first, and asks whether the

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<sup>36</sup> Transcript Vol. 1, pg. 243, lines 21-22.

<sup>37</sup> *Id.*, pg. 246, lines 15-18.

<sup>38</sup> *Id.*, pg. 247, lines 5-19.

statutory requirements were satisfied later. It fails to demonstrate (1) a reduction in capacity purchases directly attributable to Nucor's participation; (2) whether ratepayers, by customer class, realize any resulting savings; and (3) how verified and ratepayer-realized reductions in capacity costs compare to the total costs of implementation, including incentives, administrative costs, earnings opportunity costs, and other participation-related expenses.<sup>39</sup>

Without clear evidence of the items listed above, it cannot be shown that Nucor's participation in EMW's MEEIA BDR would provide net benefits for customers.

**Issue A.2.b**

Does EMW's MEEIA BDR program have sufficient verification process for curtailments?

**Staff's Answer to Issue A.2.b**

No. Staff's position is that EMW's MEEIA BDR program does not provide a sufficient verification basis to determine whether the MEEIA statutory requirements are met.

MEEIA does not merely permit a utility to pay incentives for assumed curtailments. It requires demand-side programs to produce energy or demand savings, to be beneficial to all customers in the affected class, and to be supported by cost-effective, measurable, and verifiable savings. Section 393.1075 also requires annual reporting of program expenditures, savings impacts, avoided costs, cost-effectiveness, and net economic benefits.

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<sup>39</sup> Ex. 105, pg. 2, lines 29-34.

Given Nucor's volatile load and EMW's baseline methodology, there is no reliable way within the record to know whether the claimed curtailments are real, whether the amount of curtailment is accurately measured, whether the claimed benefits exceed the costs, or whether non-Nucor ratepayers receive the statutory benefit. Accordingly, the statutory problem is not merely procedural. It is substantive. Without reliable verification, the Commission cannot determine whether the MEEIA mandates have been satisfied. EMW's proposal therefore rests on assumed savings, assumed avoided costs, and assumed customer benefits, rather than verified facts sufficient to meet MEEIA's requirements. EMW therefore has not met its burden of proof.

As described more fully in this brief addressing issue A.2.c, there are other demand response pathways available to EMW and Nucor that would not harm other ratepayers with high administrative and incentive costs. These pathways always provide for far more reliable processes for verifying curtailment and performance.

**Issue A.2.c**

Are there other demand response participation pathways available for Nucor and what benefits or detriments, if any, do those alternative pathways have?

**Staff's Answer to Issue A.2.c**

Yes. Staff's position is that Nucor may be able to participate in demand response through pathways outside MEEIA, and that those alternatives are preferable if the Commission decides to allow Nucor to participate.<sup>40</sup> Staff is not opposed to Nucor participating in demand response. Staff agrees that it makes sense for one of EMW's largest

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<sup>40</sup> Exhibit 100, pgs. 5-13.

customers to curtail load during stressed grid conditions. But Staff's position is that Nucor should not do so through a ratepayer-funded MEEIA BDR program. Instead, EMW and Nucor should use or develop an alternative pathway that does not rely on DSIM-funded incentives, administrative costs, or earnings opportunities. The available alternatives include participation in regional wholesale demand response markets, including SPP, either directly, through EMW, or through an Aggregator of Retail Customers ("ARC"). Staff also identifies EMW's Market Based Demand Response tariff as an existing tariff mechanism by which EMW could offer Nucor's curtailment into the SPP Integrated Marketplace, with compensation based on SPP settlement payments.<sup>41</sup>

For example, Staff witness Jordan Hull details how larger commercial and industrial loads, like Nucor, may participate in regional wholesale demand response markets operated by SPP.<sup>42</sup> Participants are compensated for reducing load during periods of system stress by partaking as a market participant, either directly or through third-party ARCs.<sup>43</sup> Customers can work with a utility directly or in conjunction with an ARC to bid load reductions into wholesale markets and earn revenue outside of MEEIA.<sup>44</sup> SPP operates its demand response programs through a tariffed market mechanism that allows electricity customers to reduce or shift their electricity usage in response to grid conditions, high wholesale prices, or reliability needs.<sup>45</sup> SPP recognizes two distinct forms of demand response resources: Dispatchable Demand Response Resource and Block Demand

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<sup>41</sup> *Id.*, pg. 7, lines 3-16.

<sup>42</sup> *Id.*, pg. 5, lines 12-15.

<sup>43</sup> *Id.*, lines 15-18.

<sup>44</sup> *Id.*, lines 17-19 and pg. 6, line 1.

<sup>45</sup> *Id.*, pg. 6, lines 4-6.

Response Resource.<sup>46</sup> Based on Nucor's previous curtailment when it was improperly participating in EMW's MEEIA Cycle 3, Nucor appears to be a best fit as a Block Demand Response Resource.<sup>47</sup> As a Block Demand Response Resource, Nucor could see load reductions that are not real-time dispatchable, but can still reduce grid withdrawals under instruction.<sup>48</sup>

Unlike EMW's MEEIA BDR program, the SPP demand response program requires participants to deliver highly verified and measurable energy reductions.<sup>49</sup> Under SPP, savings must be backed by detailed baseline calculations, real-time performance data, and strict compliance with dispatch instruction to ensure that committed load reductions are reliable and auditable.<sup>50</sup> EMW's MEEIA BDR does not require the same stringent measurement and verification requirements, allowing for easier participation but with less emphasis on precision and enforceability.<sup>51</sup>

One big difference is the approach to a baseline: EMW uses the customer baseline load model or day averaging, whereas SPP requires an hourly baseline from the last thirty calendar days.<sup>52</sup> Due to the wide fluctuation with Nucor's load, using the customer baseline load model or day averaging inaccurately estimates potential demand reductions, not capturing the lows and highs of the load deviations.<sup>53</sup> SPP's verification process, on the other hand, offers greater credibility and integration into wholesale energy markets,

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<sup>46</sup> *Id.*, lines 6-12.

<sup>47</sup> *Id.*, lines 15-17.

<sup>48</sup> *Id.*, line 10-12.

<sup>49</sup> *Id.*, pg. 9, lines 27-30.

<sup>50</sup> *Id.*, pg. 10, lines 1-3.

<sup>51</sup> *Id.*, lines 3-6.

<sup>52</sup> *Id.*, lines 8-11.

<sup>53</sup> Ex. 102, pg. 9, lines 2-5.

while also demanding a higher level of operational discipline and accuracy from participants.<sup>54</sup> This approach is advantageous to ratepayers versus EMW's focus on flexibility and less stringent measurement and verification requirements.<sup>55</sup>

Besides SPP, EMW also has other demand response tariffs available for it to use in regard to Nucor outside of MEEIA. For example, EMW's Market Based Demand Response Program (MBDR), bearing tariff sheet numbers 156-156.3, permits customers to participate with EMW in the wholesale SPP marketplace. While there are currently no customers participating in demand response under this tariff, Nucor and EMW would receive benefits under this tariff, with Nucor receiving any net proceeds of curtailment through a credit on its monthly bill, and EMW receiving the resource adequacy certification it needs.<sup>56</sup> If Nucor fails to perform, it would instead receive a charge on its bill for said failure.<sup>57</sup>

The benefits of these alternatives are that they can still provide curtailment benefits, potential accreditation benefits, and financial benefits to both EMW and Nucor, while better protecting other ratepayers. Staff states that non-MEEIA demand response would use SPP's more rigorous baseline and verification requirements, which are a better fit for Nucor's volatile load, and would help ensure that customers receive system benefits from verified curtailment without paying MEEIA incentives, administrative costs, and earnings opportunities. The detriments are practical rather than fatal. Nucor and EMW would need a contract amendment, and any SPP-based pathway would require compliance

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<sup>54</sup> Ex. 100, pg. 10, lines 6-9.

<sup>55</sup> *Id.*, lines 3-6.

<sup>56</sup> *Id.*, pg. 12, lines 1-2.

<sup>57</sup> *Ibid.*

with SPP technical, metering, baseline, verification, and performance requirements. Those requirements are more demanding than EMW's MEEIA BDR process, but that is also why Staff views them as more reliable.<sup>58</sup>

Accordingly, Staff recommends that if the Commission permits Nucor to participate in demand response, it should require EMW to do so outside MEEIA, through a pathway that avoids ratepayer funding but still preserves curtailment, accreditation, and financial benefits.<sup>59</sup>

### **Issue B**

Would the existing hold-harmless and cost-tracking protections in the Nucor Agreement, Schedule Special Incremental Load (SIL), and the Stipulation approved in File No. EO-2019-0244 protect non-Schedule SIL customers from any cost shift attributable to Nucor's service under Schedule SIL if Nucor were to participate in any EMW demand response programs?

### **Staff's Answer to Issue B**

No. The existing hold-harmless and cost-tracking protections in the Nucor Agreement, Schedule SIL, and the EO-2019-0244 Stipulation would only protect non-Schedule SIL customers if all costs attributable to Nucor's participation in MEEIA are correctly included in the hold-harmless and cost-tracking process.<sup>60</sup> EMW and Nucor's proposal does not include those costs in consideration of the hold-harmless provision or the cost-tracking process.

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<sup>58</sup> *Id.*, pg. 8, lines 3-14.

<sup>59</sup> *Id.*, pg. 13.

<sup>60</sup> Ex. 102C, p. 3, lines 18-22.

- **The Hold-harmless Provision**

EMW and Nucor’s SIL is designed to provide certain Customers with new or incremental increases in load access to a special rate that is not based on the Company's actual cost of service but is designed to recover no less than the incremental costs of serving the new load.<sup>61</sup> This is a different approach from that of tariffed rates for other classes.

All charges for service under this rate schedule must be limited to the charges contained in the contract between EMW and Nucor.<sup>62</sup> The SIL tariff explicitly states that “[n]on-participating customers shall be held harmless from any deficit in revenues provided by any customer served under this tariff.”<sup>63</sup> The SIL tariff further reaffirms the hold-harmless provision by requiring the Company to make additional revenue adjustments covering any shortfall to the revenue requirement calculation through the true-up period.<sup>64</sup> Lastly, MEEIA requires the commission to fairly apportion the costs and benefits of demand side programs to each customer class.<sup>65</sup> Nucor’s participation in MEEIA BDR will incur service costs such as program administration costs, monetary participation incentives to Nucor, DSIM charges, and an earning opportunity for EMW.<sup>66</sup> EMW has decided that those participation costs would flow through the DSIM Rider and would be eliminated from the calculation of base rates.<sup>67</sup> Company witness Linda Nunn (“Nunn”) cites a previous Commission order as precedent for this application.

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<sup>61</sup> Schedule SIL P.S.C. Mo. No. 1, Sheet 157.

<sup>62</sup> Schedule SIL P.S.C. Mo. No. 1, Sheet 157.2.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> § 393.1075(5), RSMo.

<sup>66</sup> Ex. 102C, p. 3, lines 8-10.

<sup>67</sup> EO-2026-0129, EMW Response to Staff Data Request No. 0009.

Based on ordered paragraphs 1 and 3 of the Commission order in Case No. EO-2019-0132 (March 11, 2020), customers who opt out of MEEIA but participate in demand response will be compensated, and per the Demand-Side Investment Mechanism (“DSIM”) tariff, the costs associated with the participation will flow through to other customers through the DSIM charges.<sup>68</sup> However, the actual report and order states verbatim:

1. The MEEIA Cycle 3 Plans, as put forth by Evergy Missouri Metro and Evergy Missouri West, and modified by the Commission, are approved for a period of three years from the effective date of this order. Avoided costs shall be calculated using the average cost of the seven bids to supply capacity which Evergy Missouri West received in response to a 2017 Request for proposal as described in testimony.
2. [omitted]
3. Opt-out customers shall be allowed to participate in Evergy Missouri Metro’s and Evergy Missouri West’s business response program. The Companies are not required to publish compensation in their tariffs.<sup>69</sup>

The relevant Tarriff states:

Costs of and Incentives for the Business DSM Programs reflected herein shall be identified in a charge titled "DSIM Charge" appearing as a separate line item on customers’ bills and applied to customers’ bills as a per kilowatt-hour charge as specified in the SGS, MGS, LGS, LPS, SGA, MGA, LGA, or TPP rate schedules. All customers taking service under said rate schedules shall pay the charge regardless of whether a particular customer utilizes a demand-side program available hereunder, unless they have opted-out as provided for previously.<sup>70</sup>

While DSIM charges can be paid by non-participating customers, Nucor has the option of opting out of paying the DSIM charge. Nucor is the only member of its rate class and, thus, able to opt-out of paying the DSIM charge while shifting those costs to customers

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<sup>68</sup> Ex. 6, pg. 3, lines 9-13.

<sup>69</sup> Report and Order, Case No. EO-2019-0132, Ordered Paragraphs 1 and 3 (March 11, 2020).

<sup>70</sup> P.S.C. Mo. No. 2, R-2D.

not within its class. This is an attempt to circumvent the hold-harmless provision because it will leave all other customers paying the bill.

Here, the Application and the Non-Unanimous Stipulation and Agreement are in direct conflict with the hold-harmless provision. EMW incorrectly believes that the costs of serving Nucor “is not tied in any way to the establishment of their SIL contract pricing.”<sup>71</sup> Witness Nunn states that the cost of providing Nucor with electricity is “distinct and unrelated” from the cost of Nucor not receiving that same electricity.<sup>72</sup> These conclusions are wrong in that Nucor is not currently a MEEIA participant because the SIL contract does not currently permit it to.<sup>73</sup> Nucor’s participation in MEEIA will incur significant costs, and non-schedule SIL customers will ultimately pay for Nucor’s MEEIA participation if not held-harmless from this unjust cost allocation.<sup>74</sup> The SIL contract is clear that cost of service will not be allocated to customers outside the confines of the SIL. Allowing Nucor to participate in MEEIA will require non-SIL customers to pay for unnecessary costs.<sup>75</sup> EMW incorrectly believes that Nucor should bear no costs at all.

The SIL contract specifically considers the unique service and demand requirements of Nucor. These considerations are distinct and uniquely related to whether Nucor needs electricity. The contractual service pricing is based upon Nucor’s demand. EMW and Nucor simply wish to have two bites at the same apple. Further, any allocation of the costs through DSIM mechanisms conflicts with the SIL requirement for the company to make additional

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<sup>71</sup> Exhibit 4, Surrebuttal Testimony of Brian File, p. 2, lines 10-11.

<sup>72</sup> Ex. 6, p. 3, lines 21-24 through p. 4, lines 1-2.

<sup>73</sup> Ex. 101C, p. 2, lines 3-5.

<sup>74</sup> Ex. 102C, p. 2.

<sup>75</sup> Ex. 101C, p. 4, lines 13-15.

revenue adjustments covering any shortfall to the revenue requirement. If allowed to move forward, the costs of Nucor's participation will be allocated to other ratepayers because Nucor is the only customer within its rate class, and is currently opted-out of paying those same costs.

If approved without modification, the agreement between Nucor and EMW would not protect non-Schedule SIL customers from any cost shift attributable to Nucor's service and participation in MEEIA and DSIM programs.

### **Issue C**

If the Commission approves Nucor's participation in the MEEIA BDR program, what, if any, impact should that have on EMW's ability to receive an earnings opportunity for verified savings produced by Nucor's participation under § 393.1075.3(3), RSMo?

### **Staff's Answer to Issue C**

Staff's position is that Nucor should not be allowed to participate in EMW's MEEIA BDR program because EMW has not shown that Nucor's participation would provide for cost effective, measurable, and verifiable efficiency savings.<sup>76</sup> If the Commission does approve Nucor's participation in EMW's BDR program, the Commission should order EMW to include the costs of Nucor's participation within the SIL contract's hold harmless provision, including any EMW earnings opportunity associated with Nucor's participation.<sup>77</sup> The Commission should also condition Nucor's participation in the MEEIA BDR program upon EMW comparing verified and ratepayer-realized capacity-purchase reductions, by

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<sup>76</sup> Ex. 101, pg. 3, lines 1-4.

<sup>77</sup> Ex. 102, pg. 12, lines 5-8; see also Ex. 105, pg. 7, lines 37-38 and pg. 8, lines 1-3.

class, against the total cost of implementation, including incentive costs, administrative costs, earnings opportunity costs, EM&V costs, and any other participation costs related to Nucor.<sup>78</sup>

Section 393.1075.3(3), RSMo, provides the utility an earnings opportunity for cost effective, measurable, and verifiable efficiency savings. In order for the Commission to reward a utility with an earnings opportunity, it must ensure that (1) savings are measurable and verifiable; (2) programs are beneficial to all customers regardless of participation, and (3) costs and benefits are fairly apportioned among customer classes. An earnings opportunity cannot be justified where the underlying savings are speculative, unverified, or not shown to benefit all customers regardless of participation.

Staff's position is that those statutory predicates have not been proven here. Nucor's claimed curtailments depend on an unreliable baseline, and overstated demand reductions would skew the benefit-cost analysis and create the misleading impression that benefits exceed costs.<sup>79</sup> EMW's proposed baseline methodology, a 9-of-10 Unadjusted Customer Baseline model, is an inadequate approach due to the wide fluctuations in Nucor's load; as stated by Staff witness Justin Tevie, "this approach inaccurately estimates potential demand reductions from a demand response program...[and] it may not capture the lows and the highs of the load deviation."<sup>80</sup> In fact, EMW does not have the ability to accurately forecast Nucor's load for the purposes of setting a baseline for measuring and verifying

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<sup>78</sup> Ex. 105, pg. 7, lines 30-33.

<sup>79</sup> Ex. 101, pg. 4, lines 9-12; see *also* Ex. 102, pg. 9, lines 1-5.

<sup>80</sup> Ex. 102, pg. 8, lines 16-21 and pg. 9, lines 1-5.

performance during a demand response event;<sup>81</sup> Nucor's participation in EMW's MEEIA BDR program would allow Nucor to collect millions in incentives, fully funded by captive EMW ratepayers, for curtailments that are not measured against a reliable baseline load.<sup>82</sup> Further, it is Staff's concern that EMW wants Nucor's participation in its BDR program to help EMW achieve target savings that might otherwise be missed.

As argued throughout this brief, a reliable measure of a participant's baseline load is important because that baseline load is used to calculate the magnitude of demand savings or reductions.<sup>83</sup> If demand savings are overstated, this could skew subsequent analysis relying on estimated benefits, and a benefit impact analysis could conclude that benefits are much higher than they otherwise would have been, potentially misleading the reader and giving the false impression that benefits to all customers exceed the costs.<sup>84</sup> This could subsequently lead to incentive payouts to Nucor and an additional earnings opportunity for EMW despite the lack of effective, measurable, and verifiable efficiency savings. Nucor's participation also runs the risk of ratepayers' being on the hook for associated administrative costs, unless such costs are included within the hold harmless provision of the SIL contract.<sup>85</sup>

Staff also reminds the Commission that Nucor was not allowed to participate in the BDR program when EMW's Cycle 4 targets were established.<sup>86</sup> Allowing Nucor in mid-way through Cycle 4 would materially benefit EMW by helping it achieve target savings it might

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<sup>81</sup> *Id.*, pg. 9, lines 7-11.

<sup>82</sup> Ex. 101, pg. 4, lines 6-12.

<sup>83</sup> Ex. 102, pg. 11, line 8-9.

<sup>84</sup> *Id.*, lines 11-15.

<sup>85</sup> Ex. 100, pg. 4, lines 10-19; see also Ex. 105, pg. 6, lines 19-23.

<sup>86</sup> Ex. 100, pg. 4, lines 15-18; see also Ex. 201, Surrebuttal of Geoff Marke, pg. 4, lines 15-18.

otherwise not achieve, thereby allowing shareholders to capture additional earnings opportunity funded by ratepayers.<sup>87</sup> Staff identifies that additional earnings opportunity as approximately \$200,000, in addition to approximately \$1.14 million in annual incentives to Nucor.<sup>88</sup> Ratepayers should not pay an additional earnings opportunity where the claimed savings are not reliably established, the avoided-capacity benefits are unsubstantiated, and the participation would impose unnecessary additional costs on ratepayers.

The Non-Unanimous Stipulation entered into between Nucor and EMW also seems to attempt to mitigate concerns regarding the earnings opportunity, but for the most part appears to merely restate requirements that EMW must already follow under its existing MEEIA tariff.<sup>89</sup> While the stipulation states that Nucor's kW contribution to EMW's BDR goal will not exceed 30%,<sup>90</sup> the current BDR tariff for EMW already prohibits any single customers from accounting for more than 30% of the jurisdiction's annual MW participation requirement.<sup>91</sup> The stipulation also states that EMW will not count any Nucor KW curtailment towards meeting the 65% threshold required to vest its earnings opportunity for the BDR program.<sup>92</sup> As noted by both Staff and EMW, this provision rings hollow because EMW is already positioned to achieve the 65% vesting threshold with or without Nucor's participation.<sup>93</sup>

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<sup>87</sup> *Ibid*; see also Ex. 101, pg. 3, lines 11-14

<sup>88</sup> Ex. 101, pg. 3, lines 11-14 and pg. 4, line 3.

<sup>89</sup> Ex. 105, pg. 3, lines 1-2.

<sup>90</sup> Ex. 8, Non-Unanimous Stipulation and Agreement, pg. 2, para. 6.

<sup>91</sup> Ex. 105, pg. 3, lines 2-5.

<sup>92</sup> Ex. 8, pg. 2, para. 7.

<sup>93</sup> Ex. 105, pg. 3, lines 8-9; see also Transcript – Volume 1 (Evidentiary Hearing – Jefferson City, MO – May 26, 2026), pg. 128, lines 9-12.

Accordingly, if the Commission approves Nucor's participation in MEEIA BDR, Staff recommends that the Commission order EMW to include the costs of Nucor's participation within the SIL contract's hold harmless provision, including any EMW earnings opportunity associated with Nucor's participation.<sup>94</sup> The Commission should also condition Nucor's participation in the MEEIA BDR program upon EMW comparing verified and ratepayer-realized capacity-purchase reductions, by class, against the total cost of implementation, including incentive costs, administrative costs, earnings opportunity costs, EM&V costs, and any other participation costs related to Nucor.<sup>95</sup>

### **III. The Commission can Authorize Nucor Participation Only by Defining the Conditions For that Participation**

Nucor is served under Schedule SIL. That tariff gives the Commission the gatekeeping role here: service under Schedule SIL may not be combined with MEEIA programs, demand response programs, or off-peak discount programs unless otherwise ordered by the Commission when approving a contract for service under the tariff. Staff witness Jordan Hull explains that under this tariff language, Nucor needs Commission approval before it may participate in MEEIA demand response or any other demand response program.<sup>96</sup>

That gatekeeping role matters because the Commission approved the SIL structure with a customer-protection premise: non-participating customers must be held harmless from revenue deficiencies or cost shifts created by service under Schedule SIL. Staff witness Justin Tevie explains that Schedule SIL requires EMW to identify the costs and revenues

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<sup>94</sup> Ex. 102, pg. 12, lines 5-8.

<sup>95</sup> Ex. 105, pg. 7, lines 30-33.

<sup>96</sup> Ex. 100C, p. 2, lines 10-21.

associated with the SIL contract and to make revenue adjustments, through the true-up period in a general rate case if necessary, to hold non-Schedule SIL customers harmless.<sup>97</sup>

The amendment is, therefore, the place to solve the problems explained in the Introduction. It should not be treated as a minor wording change. It will, rather, alter the regulatory boundary that currently keeps Nucor's special-rate treatment separate from ratepayer-funded MEEIA incentives, administrative costs, evaluation costs, earnings-opportunity effects, and related cost recovery. If the Commission approves a broader path, the order should define that path with the conditions necessary to protect customers and make later compliance reviewable.

#### **IV. MEEIA Participation Is Available Only If Customer Benefits Are Measurable and Customer-Realized**

MEEIA supplies the conditions that make a ratepayer-funded path available. Staff's position statement and Staff's memorandum explain that recovery for a demand-side program is permitted only when the program is Commission-approved with statutory findings, results in energy or demand savings, and is beneficial to all customers in the customer class in which the program is proposed; the costs and benefits must also be fairly apportioned among customer classes.<sup>98</sup> Those statutory findings can be made only from reliable proof, not bare assumptions or bare "deemings."

EMW's proposal creates identifiable financial benefits for EMW and Nucor. Staff witness Mark Kiesling explains that Nucor's participation would help EMW reach BDR target levels and could produce approximately \$200,000 in additional earnings opportunity

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<sup>97</sup> Ex. 102C, p. 2, lines 4-31; p. 3, lines 1-22.

<sup>98</sup> Staff Position Statement at 2; Ex. 105, p. 1, lines 12-18.

for EMW shareholders. Nucor, in turn, could receive approximately \$1.14 million in annual incentives at the proposed \$60/kW-year incentive level. Those incentives would be funded by EMW ratepayers.<sup>99</sup>

So the proposal benefits EMW and Nucor. Staff's point is not to deny those benefits to EMW or Nucor. The point is, however, to make sure the customers who fund the benefits also receive corresponding, measurable, and fairly apportioned benefits. Kiesling explains that EMW's asserted avoided capacity benefits are unsupported by the evidence: there was no approved avoided capacity cost for Evergy's MEEIA Cycle 4, and unless EMW can avoid actual additional capacity purchases or reduce the amount of new generation needed to serve EMW customers, non-Nucor ratepayers will not benefit from Nucor's MEEIA BDR participation.<sup>100</sup>

Thus to reiterate: Staff does not ask the Commission to reject demand response or to deny benefits to EMW and Nucor. Staff asks the Commission to condition MEEIA recovery on proof that the demand savings are real, measurable, valued, *customer-realized*, and sufficient to exceed *all customer-borne costs*.

#### **V. The Commission Should Write the Conditions Now, Not Rely on Implied Approval From Prior Orders**

At hearing, EMW argued for abstracting two related implications from earlier Commission action. First, it argued that Schedule SIL "contemplated" Commission approval of Nucor's MEEIA BDR participation through a later contract amendment. Second—and going to the heart of the global issue now before the Commission—EMW

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<sup>99</sup> Ex. 101C, p. 2, lines 15-20; p. 3, lines 9-20; p. 4, lines 1-12; see also Ex. 105, p. 2.

<sup>100</sup> Ex. 101C, p. 4, lines 18-20; p. 5, lines 1-11; see also Ex. 105, pp. 1-2.

argued that the Commission's Cycle 4 MEEIA approval had already approved the costs and avoided-cost assumptions on which Nucor's proposed participation now depends, even though those matters were not stated in the order or tariff on their face.<sup>101</sup> EMW's witness Brian File acknowledged that Nucor was not allowed to participate in Cycle 4 because of the SIL language, but then he described the Cycle 4 avoided cost as what EMW "believe[s]" was implicitly approved.<sup>102</sup> OPC's witness, as a signatory to the Cycle 4 stipulation, rejected that understanding and testified that the parties never explicitly articulated the avoided-cost assumption.<sup>103</sup> Thus, the evidence established a disagreement among the parties about the meaning of an order and tariff.

Staff respectfully asks the Commission here just to "stop." Staff contends that the disagreement between the witnesses of EMW and OPC about things they "contemplated" before or when they may have signed a stipulation is a legal red-herring. The Commission should decide this issue from the tariff and orders solely as they are written unless, as written, the tariff and orders are themselves ambiguous. The language of the tariff is not ambiguous. That it does not say what EMW wishes it said does not make it ambiguous. That it does not address a question that one might reasonably anticipate would arise when EMW decided it wanted to do something new in the future when the business climate changed and EMW sought new regulatory treatment does not make it ambiguous. That it does not

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<sup>101</sup> Hearing Tr. at 26 (Everygy opening statement regarding Schedule SIL and asserted tariff contemplation of approval by contract amendment); Hearing Tr. at 116-117 (Mr. File testimony regarding approved Cycle 4 costs and implicitly approved avoided cost).

<sup>102</sup> Hearing Tr. at 116-117 (Mr. File testimony that Nucor was not allowed to participate due to SIL language and that EMW believed Cycle 4 avoided costs were implicitly approved).

<sup>103</sup> Hearing Tr. at 243-244 (Dr. Marke testimony that OPC did not understand avoided costs to have been implicitly approved and that the parties did not explicitly articulate the avoided-cost assumption).

address what EMW may have “contemplated” when it signed a stipulation does not make an order or tariff ambiguous.

Missouri law treats a Commission-approved tariff as Missouri law having the same force and effect as a statute.<sup>104</sup> A tariff is, therefore, interpreted as a statute: And if it is clear and unambiguous, it cannot be construed to have a meaning beyond its plain meaning.<sup>105</sup> The same result follows even if the tariff is viewed as partly contractual. The courts recognize that a tariff may partake partially of a contract, but also recognize that that fact does not open the door to using negotiations, assumptions, or antecedent filings to add terms omitted from the filed tariff or order. Under Missouri merger doctrine, a final written agreement prevents extrinsic evidence of other agreements from influencing the interpretation of the final writing.<sup>106</sup>

Here the controlling legal instrument is stronger than an integrated private contract: it is a Commission-approved tariff and order with legal effect. Prior proposals, work papers, negotiations, assumptions, and unapproved understandings are merged, if at all, into the order and tariff actually approved. They cannot be used to make the tariff or order say what they do not say. And under the familiar statutory construction canon *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another.<sup>107</sup>

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<sup>104</sup> *State ex rel. Mo. Gas Energy v. Pub. Serv. Comm'n*, 210 S.W.3d 330, 337 (Mo. App. W.D. 2006); *Allstates Transworld Vanlines, Inc. v. Southwestern Bell Tel. Co.*, 937 S.W.2d 314, 317 (Mo. App. E.D. 1996).

<sup>105</sup> *Allstates*, 937 S.W.2d at 317.

<sup>106</sup> See *Rosenfeld v. Boniske*, 445 S.W.3d 81, 88 (Mo. App. E.D. 2014).

<sup>107</sup> Under the familiar statutory-construction principle commonly described as *expressio unius est exclusio alterius*, the express inclusion of one thing may imply the exclusion of others not mentioned. See *Greenbriar Hills Country Club v. Director of Revenue*, 935 S.W.2d 36, 38 (Mo. banc 1996); see also *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885, 887 (Mo. banc 1999).

Thus, Schedule SIL says what it says and does not say what it does not say. As Staff witness Hull correctly explains, Schedule SIL provides that service under the tariff may not be combined with MEEIA programs, demand-response programs, or off-peak discounts unless otherwise ordered by the Commission when approving a contract for service under the tariff.<sup>108</sup> That language does not authorize Nucor's MEEIA BDR participation. It prohibits that participation unless the Commission orders otherwise. Staff witness Tevie confirms the same point: the July 2019 Stipulation and Agreement approved in EO-2019-0244 did not specify any provision related to MEEIA, and Sheet 157 prohibits Nucor from participating in MEEIA unless otherwise ordered by the Commission when approving a contract for service under the tariff.<sup>109</sup> The express exception—the unless-otherwise-ordered exception—confirms the rule, i.e., the prohibition. Schedule SIL identifies the only route by which the prohibition can be lifted: a Commission order approving a contract for service under the tariff. The existence of that future-order exception does not imply that the Commission's future discretion was already exercised, silently limited, or tied by an earlier stipulation that did not mention MEEIA participation. To the contrary, EMW's argument defeats itself. If Nucor's MEEIA BDR participation expressly *required* future Commission approval, then that participation was, quite obviously, not *already approved* by implication—was in fact *excluded* absent future approval—in the earlier order. This is what the Latin canon says in Latin and means in plain English.

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<sup>108</sup> Ex. 100C, Hull Rebuttal, p. 2, lines 10-21.

<sup>109</sup> Ex. 102C, Tevie Rebuttal, p. 7, lines 16-21.

The Cycle 4 MEEIA order should be read the same way. Exhibit 400 approved the Cycle 4 agreement and compliance tariff sheets. It described the portfolio, budgets, compliance tariff process, and the Commission's approval of specified tariff sheets.<sup>110</sup> It did not identify an avoided-capacity-cost value for Cycle 4, did not make a Nucor-specific MEEIA BDR finding, and did not state that Nucor could participate despite Schedule SIL. Staff Exhibit 105, therefore, correctly states that the avoided capacity cost net benefit used by EMW was never approved for Cycle 4 and that there is no reference to avoided-cost values in the stipulation or in the report and order approving it in EO-2023-0369 and EO-2023-0370.<sup>111</sup>

The Commission should, therefore, decide this case from the text of the governing tariff and orders. The Commission can now certainly choose whether to approve a limited amendment with conditions. But it should not defer to and adopt some prior choice that it “contemplated”--but then decided not to say--in a prior tariff or Cycle 4 order.

## **VI. Nucor's Volatile Load Requires a Measurement Solution**

The record identifies the measurement problem that any approval must solve. A MEEIA BDR payment depends on estimating what the customer would have used absent curtailment, then comparing actual load to that baseline. If the baseline is wrong, the claimed savings are wrong. If the claimed savings are overstated, the benefit-cost analysis is misleading.

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<sup>110</sup> Ex. 400, Order Approving Agreement and Tariffs, pp. 1-7 and attached Non-Unanimous Stipulation and Agreement, pp. 1-4.

<sup>111</sup> Ex. 105, pp. 1-2, lines 29-34.

Staff witness Tevie explains that EMW uses a 9-of-10 unadjusted Customer Baseline Load model, also referred to as day averaging, for determining a Nucor's baseline. He further explains that Nucor's load fluctuates widely, that an averaging method is not satisfactory for such a load, and that EMW cannot accurately forecast the peak demand reduction resulting from a demand response event because Nucor's load is volatile and unpredictable. The figures in Tevie's rebuttal illustrate that volatility in both 15-minute and hourly data.<sup>112</sup> That is not a technical quibble. It goes to the heart of MEEIA cost recovery. Tevie explains that the baseline is used to calculate demand savings and incentive payments, and that overstated demand reductions distort rate impact analysis and cost-effectiveness tests by making benefits appear greater than they actually are.<sup>113</sup>

Witness Tevie identifies the problem with the application and stipulation: Nucor's value should not be assumed from a generalized or averaged baseline that cannot reliably account for Nucor's ordinary operating volatility. The solution is to require Nucor's curtailment value to be verified with interval-metered data, an appropriate measurement structure, and a capacity valuation mechanism tied to SPP or another market-based recognition of actual performance.

## **VII. Staff's Firm Load Cap Is a Practical Conceptual Framework for Conditional Approval**

The Firm Load Cap is Staff's constructive solution to the measurement problem. Staff believes a solution is possible and that the measurement problem does not require the Commission to deny the application, reject the stipulation, and abandon all possibility of a

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<sup>112</sup> Ex. 102C, p. 8, lines 11-21; p. 9, lines 1-10; p. 11, line 5.

<sup>113</sup> Ex. 102C, p. 11, lines 6-15.

limited trial. But the problem does require a measurement architecture different from that proffered by EMW. If Nucor's participation in EMW's MEEIA BDR program is allowed, the better approach is a firm, *pre-established* load obligation measured against Nucor's actual metered performance rather than a floating, *after-the-fact* baseline that attempts to reconstruct what Nucor would have used absent the demand call.

Exhibit 103 supports that distinction. The FERC/DOE demand-response measurement-and-verification report explains that load reductions, unlike generation output, cannot be directly metered: Performance must be determined by comparing observed load to an estimate of what load otherwise would have been, and that estimate is subject to error. The report therefore emphasizes EM&V methods that support accuracy, flexibility, simplicity/comprehensibility, and reproducibility. It also recognizes "firm load" demand response, in which a participant reduces to a pre-specified load on notification, as distinct from ordinary reduction-from-baseline programs.<sup>114</sup>

The same report identifies "Maximum Base Load" as a performance evaluation methodology based solely on a demand resource's ability to maintain electricity usage at or below a specified level during a demand response event. For firm-load programs, the report states that the participating load is effectively using a Maximum Base Load performance evaluation methodology, and that settlement may be a straightforward observation of how much the load exceeded the firm level.<sup>115</sup>

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<sup>114</sup> Ex. 103, pp. x-xi.

<sup>115</sup> Ex. 103, pp. 19, 28.

Exhibit 104 supplies additional support from the SPP planning framework. SPP accredits demand response programs based on a sustainable level of reduction. Its criteria require capability and operational testing, including a capability test at 100% of claimed capability or a reduction to a forecasted load by an amount equivalent to 100% of claimed capability, an operational test at a minimum of 50% of claimed capability for at least one hour, annual operational testing, and measurement and reporting in accordance with SPP business practices.<sup>116</sup>

Together, Exhibits 103 and 104 support Staff's firm load cap conceptual framework: if the Commission permits a trial, Nucor's performance should be measured against a pre-established, testable, interval-metered commitment rather than against a disputed after-the-fact baseline. Staff's Firm Load Cap applies that idea to Nucor's operational reality.<sup>117</sup>

#### **A. Why the Cap Should Replace a Floating Baseline**

The firm cap avoids the central weakness in EMW's proposed measurement method. It does not ask EMW, Nucor, Staff, or the Commission to reconstruct a hypothetical "but-for" load after the event. It asks a simpler and more objective question: during the demand call, did Nucor keep its actual load at or below the Commission-approved firm cap? That question can be answered from interval-meter data.

The Commission should not approve a demand-response trial in which the number of "strikes" required to determine nonperformance is left to be decided after the event.

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<sup>116</sup> Ex. 104, Section 7.1.10.

<sup>117</sup> Ex. 102C, p. 9, lines 1-10; p. 11, line 5; Ex. 105, pp. 3, 5-7.

If the compliance standard is not fixed before the demand call, EMW and Nucor may later argue that the facts and circumstances existing at the time of the event justify a different measure of performance — in effect, a four-strike rule adopted after the at-bat. That is the problem the firm cap solves. The firm cap fixes the rule of decision before the event occurs, while still allowing reasonable tolerances for volatility and operational flexibility. It therefore moves the trial from a deemed, estimated, or post hoc reconstruction of hypothetical curtailment to an actual metered performance obligation, consistent with the FERC/DOE discussion of firm-load or Maximum Base Load measurement and with SPP’s insistence on sustainable, tested demand-response capability.<sup>118</sup>

### **B. Example of How the Cap Could be Set**

To reiterate: The firm cap should not be set or reset when EMW calls a demand-response event. If EMW and Nucor are allowed to set the cap at dispatch, the cap ceases to be a firm standard and becomes another floating baseline.

The Commission can solve that problem procedurally. It can approve the measurement method now and require EMW and Nucor to make a compliance tariff filing proposing the actual MW value of the cap. The Commission may approve one cap for all Nucor demand-response events, or separate caps for defined seasons, products, or demand-response periods if the data justify them. But each cap must be set before the applicable trial period, season, or measurement period begins and may not be reset at the time of a demand call.

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<sup>118</sup> Ex. 103, pp. 19, 28, 49; Ex. 104, Section 7.1.10.

EMW and Nucor should support any proposed cap or caps with historical interval-meter data, workpapers, assumptions, calculations, and an explanation showing that each proposed cap is materially below Nucor's expected non-event load during comparable peak-risk periods and is reasonably designed to measure actual operational response rather than ordinary load volatility. Staff, the Office of the Public Counsel, and other parties should then have an opportunity to respond. The controlling principle is simple: EMW may call the event, but EMW may not set or revise the cap when it calls the event.

#### **VIII. Trial-Period True-Up and Hold-Harmless Protection**

Staff has now addressed the measurement problem. But as stated in the Introduction, this case presents two problems: a measurement problem *and a cost-recovery problem*. The firm cap solves the measurement problem prospectively. The hold-harmless true-up solves the cost-recovery problem retrospectively. At the end of the trial period, EMW should compile all interval-meter data for every Nucor demand-response event. For each compliance hour, EMW should calculate Nucor's Actual Compliance-Hour Load and compare it to the applicable firm cap. If the load is at or below the cap, Nucor performed for that hour. If the load exceeds the cap, Nucor did not fully perform for that hour, and the excess usage above the cap should be treated as unverified performance for purposes of the true-up.

EMW should then calculate a Verified Performance Ratio measuring the proportion of Nucor's claimed demand-response obligation actually verified during the trial period. Conceptually, the ratio should credit verified performance, reduce recovery for missed or

unverified performance, and avoid an unnecessarily punitive all-or-nothing result. But the ratio should not become a new deemed-savings device. It must be derived from actual interval-metered performance against the pre-established firm cap.

The true-up must include all customer-borne costs associated with Nucor's participation: participant incentives, bill discounts, administrative costs, implementation costs, evaluation, measurement and verification costs, carrying costs, and any EMW earnings opportunity. Administrative expenses are not outside the hold-harmless analysis merely because they were incurred to operate the program. They should be recoverable only in proportion to verified performance and actual customer-realized benefit.<sup>119 120</sup>

The Verified Performance Ratio is necessary, but not sufficient. MEEIA requires customer *benefit*, not mere customer participation. Recoverable customer-borne costs should therefore be limited to the lesser of: (1) total customer-borne costs multiplied by the Verified Performance Ratio; or (2) actual, measurable, customer-realized benefits produced by Nucor's verified demand-response performance. Any amount collected in excess of that recoverable amount should be returned through a revenue adjustment, credit, refund, or other Commission-approved hold-harmless adjustment.<sup>121</sup>

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<sup>119</sup> Ex. 102C, Tevie Rebuttal, p. 2, lines 4-31; p. 3, lines 1-22; p. 4, lines 9-12; p. 12, lines 5-16; see also Ex. 105, pp. 6-8.

<sup>120</sup> The Verified Performance Ratio compares what Nucor actually proved it delivered against what EMW and Nucor claimed. The denominator is the total demand-response performance claimed for all compliance hours. The numerator is the portion verified by interval-meter data showing Nucor stayed at or below the Firm Load Cap, with reductions for any excess load. That fraction is then applied to the total customer-borne costs EMW seeks to recover for Nucor's participation, including incentives, administration, EM&V, carrying costs, and any earnings opportunity. The recoverable amount should be the lesser of those performance-adjusted costs or verified customer-realized benefits.

<sup>121</sup> Example: EMW incurs \$1,000,000 in customer-borne costs for Nucor's participation. Nucor verifies 80% of its claimed performance, so the performance-adjusted cost is \$800,000. But if the actual, measurable customer benefit is only \$650,000, recovery is limited to \$650,000, because customers should not pay more than the verified benefit they actually received.

## **IX. Market-Based Demand Response Remains a Practical Pathway**

The record presents two practical pathways. As explained above, Nucor may participate in MEEIA BDR if the Commission adopts conditions that make participation lawful, measurable, and customer-protective. If EMW and Nucor cannot satisfy those MEEIA requirements, Nucor can still provide curtailment value outside MEEIA through market-based demand response. Staff supports Nucor's providing curtailment value through mechanisms that measure, value, and pay for verified performance without shifting unsupported costs to other customers. Non-MEEIA demand response remains one such path.

Staff witness Hull explains that large commercial and industrial customers may participate in regional wholesale demand response markets operated by the Midcontinent Independent System Operator, Inc. and SPP, either through the utility or through third-party Aggregators of Retail Customers. These alternatives can allow Nucor to provide curtailment value, create compensation for Nucor, and provide benefits to EMW without relying on ratepayer-funded MEEIA incentives.<sup>122</sup>

SPP demand response also supplies what the MEEIA BDR proposal presently lacks: more rigorous verification. Hull explains that SPP requires metering, baseline reporting, and technical verification. Payment is based on verified performance, with actual metered consumption compared to a baseline, and performance shortfalls can reduce payments or result in penalties. Hull further explains that SPP's demand response requirements are significantly more rigorous than EMW's program because savings must be

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<sup>122</sup> Ex. 100C, p. 5, lines 4-19; p. 6, lines 1-2; p. 12, lines 5-10.

supported by detailed baseline calculations, real-time performance data, and compliance with dispatch instructions.<sup>123</sup>

EMW already has a Market Based Demand Response ("MBDR") tariff that can operate in the SPP marketplace. Under that tariff, EMW may offer the customer's curtailment amount into the SPP Integrated Marketplace and compensate the participant based on SPP settlement payments. That structure allows Nucor and EMW to receive market-based benefits without imposing MEEIA incentives, administrative costs, and earnings-opportunity costs on other customers.<sup>124</sup>

That is another practical answer. If Nucor can provide real curtailment value, it should be able to do so through a mechanism that measures, values, and pays for verified performance without shifting unsupported costs to other customers.

#### **X. Staff's Conditions Are the Terms That Make Approval Lawful and Practical**

To approve Nucor's participation lawfully in EMW's MEEIA BDR program, the Commission should make approval conditional on the following terms:

1. Firm Load Cap / Firm Service Level. Nucor must be subject to a pre-established firm load cap, or a functionally equivalent firm-service-level standard, measured against actual interval-metered performance during each compliance hour. If a baseline approach is used instead, it must expressly account for Nucor's load volatility and must not rely on ordinary day-averaging that overstates savings.

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<sup>123</sup> Ex. 100C, Hull Rebuttal, p. 8, lines 3-14; p. 9, lines 21-30; p. 10, lines 1-12.

<sup>124</sup> Ex. 100C, Hull Rebuttal, p. 11, lines 3-22; p. 12, lines 1-4.

2. Reliable measurement and verification. Any claimed curtailment must be measured with interval-metered data, a transparent methodology, and workpapers sufficient for Staff, OPC, and the Commission to audit performance.
3. Verified SPP resource-adequacy credit. EMW must demonstrate that Nucor's curtailment produces verified credit from SPP toward EMW's resource-adequacy obligations and that the impact is reflected in EMW's SPP seasonal resource-adequacy workbooks.
4. All-cost net-benefit calculation. EMW must compare verified and customer-realized capacity-purchase reductions by class against the total cost of implementation, including incentive costs, administrative costs, earnings-opportunity costs, EM&V costs, carrying costs, and any other participation cost.
5. Ratepayer realization by class. EMW must demonstrate not merely modeled system value, but actual ratepayer realization of reductions in capacity purchases or other verifiable benefits by customer class.
6. Hold-harmless inclusion. All Nucor participation costs must be included in the SIL hold-harmless provision, including incentives, administrative costs, EM&V costs, and any EMW earnings opportunity associated with Nucor's participation.
7. Clawback or status quo ante protection. If verified, customer-realized benefits do not exceed all customer-borne costs, EMW and/or Nucor must credit or refund all amounts necessary to restore non-participating customers to the status quo ante.
8. Payment only for verified performance. If EMW does not call Nucor for demand-response events, or if Nucor fails to perform to the specified firm load cap or

firm-service-level standard, incentive payments, administrative costs, and earnings-opportunity effects associated with failed participation may not be recovered from ratepayers.

9. Winter capability. EMW must demonstrate Nucor's capability to curtail during winter peak periods consistent with future SPP winter resource-adequacy periods.

10. Full peak-demand capacity accounting. EMW must accurately account for the cost of capacity necessary to serve the entirety of Nucor's peak demand in all future Cost and Revenue tracking reports.

These conditions are the terms that make Commission approval lawful, measurable, and fair—conditions that open up pathways to approval. Witness Tevie recommends that, if participation is allowed, EMW should include Nucor MEEIA BDR costs in the hold-harmless provision, identify actual avoided generation or capacity purchases, account for the cost of capacity necessary to serve Nucor's peak demand, and make true-up revenue adjustments sufficient to hold non-Schedule SIL customers harmless. Staff's memorandum further explains that the conditions ensure that any MEEIA-funded participation produces competently measurable, verifiable, customer-realized net benefits.<sup>125</sup>

## **XI. Conclusion**

Staff is not asking the Commission to stop a solution. Staff is asking the Commission to complete the solution. Staff's requested outcome is positive: yes to Nucor curtailment, yes to EMW receiving verified resource-adequacy value, and yes to a limited MEEIA BDR pathway if the order supplies the conditions necessary to make that pathway lawful.

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<sup>125</sup> Ex. 102C, p. 12, lines 5-16; see also Ex. 105, pp. 7-8.

The Commission should not approve the non-unanimous stipulation as filed, not because Staff opposes the solution the signatories are trying to build, but because the filed stipulation does not yet provide the objective standards needed to administer, enforce, and review the approval.

To be clear on Staff's view of the implications of this case. Staff believes that should the Commission approve the application or the non-unanimous stipulation without the conditions suggested by Staff, the Commission's order will invite reversal on appeal. Staff's opinion follows from both the record and Missouri law. In a contested PSC case, Sections 386.420 and 536.090 require a written order with findings of fact and conclusions of law sufficient to show the basis of the Commission's decision.<sup>126</sup> Those findings must do more than recite positions or announce a result. They must identify the basic facts and rationale sufficiently to permit meaningful judicial review.

The same principle applies to conditions imposed on future performance. Missouri law requires judgments and orders to be sufficiently definite and certain to be enforceable. Where enforcement depends on future acts outside the record, and the order leaves the meaning or measure of performance for later discretionary determination, the order is indefinite and unenforceable.<sup>127</sup> An otherwise indefinite order does not become certain merely because a later record might contain evidence that, if it had been incorporated into the order, would have supplied a standard.<sup>128</sup>

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<sup>126</sup> *State ex rel. Monsanto Co. v. Public Service Commission of Missouri*, 716 S.W.2d 791 (Mo. banc 1986); *State ex rel. Noranda Aluminum, Inc. v. Public Service Commission*, 24 S.W.3d 243 (Mo. App. W.D. 2000); *State ex rel. Laclede Gas Co. v. Public Service Commission*, 103 S.W.3d 813 (Mo. App. W.D. 2003).

<sup>127</sup> *City of Portage Des Sioux v. Lambert*, 323 S.W.3d 462 (Mo. App. E.D. 2010); *Fulton v. Adams*, 924 S.W.2d 548 (Mo. App. W.D. 1996).

<sup>128</sup> *Fulton*, 924 S.W.2d at 552-53.

Administrative law points in the same direction. An agency may not act in a totally subjective manner without guidelines or criteria. Its decision must rest on objective data, not mere surmise, guesswork, or gut feeling.<sup>129</sup> Conditions that turn on later compliance therefore must contain ascertainable standards against which compliance can be measured. That is especially true where the order will later support ratepayer-funded recovery and judicial review under Section 386.510.

This case shows why the standard matters. Without a predetermined baseline or firm-load standard, the Commission's order would not supply an ascertainable standard. A later demand-response event will produce an observed load number. But it will not reveal the load Nucor would have used absent the event. For example, Nucor may operate at 80 MW during a demand call, but the record will not show whether it would otherwise have operated at 82 MW, 100 MW, or 65 MW. Because Nucor's ordinary load is volatile, the Commission cannot infer curtailment merely from observed load. A later proceeding would not apply the order by ministerial computation; it would have to reconstruct a counterfactual that the order never made measurable. A later proceeding would not simply apply a fixed standard to known facts; it would have to invent the missing standard after the fact by estimating what Nucor would have used if no demand-response event had been called.

That defect cannot be cured after the fact. The compliance standard must appear in the order at the time approval is granted. A reviewing court must be able to look at the

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<sup>129</sup> *Board of Education of City of St. Louis v. Missouri State Board of Education*, 271 S.W.3d 1 (Mo. banc 2008); *LO Management, LLC v. Office of Administration*, 658 S.W.3d 228 (Mo. App. W.D. 2022).

Commission's order *now* and identify the standard *now* that will later be used to determine whether Nucor complied when a demand-response event occurs. If the order does not now establish that standard — by a Firm Load Cap, a firm-service-level standard, or some other objective metric — then later proceedings cannot supply what the order omitted. Staff would have no fixed benchmark to audit; EMW would have no fixed benchmark by which to prove recoverable savings; Nucor would have no fixed benchmark defining required performance; and the Commission would have no fixed benchmark on which to base findings capable of meaningful judicial review. An approval order lacking that pathway is not merely incomplete; it is structurally defective and invites an appellate court's reversal because no future record can make measurable a condition the order itself failed to define—now.

A Firm Load Cap supplies the missing legal and practical standard. It converts the demand-response obligation from a speculative reconstruction of but-for load into an objective comparison between actual interval-metered performance and a Commission-approved cap. The compliance question becomes simple and reviewable: did Nucor's Actual Compliance-Hour Load remain at or below the applicable Firm Load Cap? That question can be answered from meter data and arithmetic, not conjecture.

Accordingly, the Commission should approve a path for Nucor to provide demand-response value only if the order, at a minimum, requires something within the Firm Load Cap conceptual framework; a compliance-filing process to establish the cap before the trial period begins; reliable measurement and verification; verified SPP resource-adequacy treatment; an all-cost, customer-realized net-benefit calculation;

payment only for verified performance; full SIL hold-harmless inclusion; and clawback or status quo ante protection. If the signatories accept those conditions, the Commission will have solved the problem rather than merely postponed it. If the signatories decline because the Stipulation requires unconditional approval, then the Commission should reject the Stipulation as filed and approve only an amendment that excludes MEEIA BDR participation.

Accordingly, if the Commission permits Nucor to participate in EMW demand-response programs, the order should expressly require that all costs attributable to Nucor's participation be identified, tracked, included in the Schedule SIL hold-harmless calculation, and subject to true-up or refund if verified, customer-realized benefits do not exceed those costs.

Staff's position begins with yes: yes to Nucor providing real demand-response value, yes to EMW receiving verified resource-adequacy value, and yes to a lawful mechanism for recognizing both. But the Commission can get to yes only through an order that makes performance measurable before the event occurs and makes customers whole to the extent measured performance fails, as dictated by the verified performance ratio and hold-harmless framework. If no baseline, Firm Load Cap, firm-service-level standard, or other objective formula can now be adopted that would allow the Commission, and a court of appeals, to determine later whether compliance occurred, the Application and Non-Unanimous Stipulation must be rejected. If EMW's answer is that a hard baseline cannot practicably be implemented, the remedy is not approval without one. Staff does not welcome that result-- but the only lawful remedy is rejection of the application and the non-unanimous stipulation.

**WHEREFORE**, Staff respectfully submits this Initial Brief for the Commission's information and consideration.

**Respectfully Submitted,**

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**CERTIFICATE OF SERVICE**

The undersigned certifies by his signature below that on June 25, 2026, he filed the above captioned pleading in the EFIS file of the Missouri Public Service Commission.

/s/ Paul T. Graham