BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

BRIGHTERGY, LLC INITIAL BRIEF

COMES NOW Brightergy, LLC ("Brightergy") by and through counsel, and states the following for its Initial Brief in response to the filings made in this docket by Kansas City Power & Light Company and KCP&L-Greater Missouri Operations Company (collectively, "KCP&L" or the "Company") in support of it application for programs under the Missouri Energy Efficiency and Investment Act ("MEEIA"):

I. Introduction

The Company submitted a proposed MEEIA Cycle II program to the Commission on August 28, 2015, which was subsequently modified by the the stipulation filed on November 23, 2015 (the "Non-Unanimous Stipulation") (collectively, the "Proposal"). On November 30, 2015, Brightergy filed its Objection to Non-Unanimous Stipulation and Agreement (the "Objection").

Brightergy's Objection focused on two issues. First, the Proposal does not meet the statutory standard of achieving all cost effective demand-side savings. Because the Company proposes to end a cost-effective program that has accounted for the majority of its realized efficiency savings under its first MEEIA program, it cannot be ruled to achieve all savings. The Objection was limited to the custom lighting program aimed at Commercial and Industrial ("C&I") customers only.

Second, the Company's request for a variance from the Commission's rule setting the procedure by which the Company can cease offering any program under MEEIA is unnecessary, and the Commission should not cede its authority to the Company.

Commissioner Rupp noted that the process leading to the Proposal seemed to be the product of group think. Tr. 91. This observation, when considered with the fact that the custom lighting program filed by the Company in its original application went unchanged by the Proposal, should encourage the Commission that there is room for negotiations on this point.

On the basis of Brightergy's objections, the Commission should not approve the Company's MEEIA Proposal. Instead, as it recently did in the Ameren MEEIA II case, the Commission should inform the parties that they should continue negotiations in order to resolve these two objections.

II. <u>The Proposed Program Rebates Are Too Low to Drive Investment</u>

A. The Cycle II Proposal Does Not Meet Statutory Standards.

At issue in the debate over the change from KCP&L's Cycle I business custom rebate efficiency program ("Cycle I") to the structure set out in the Proposal is whether the new structure will drive demand at the same level as it did under Cycle I. Because the evidence gathered in this docket points to lesser demand and increased freeridership, the Proposal does not meet the statutory standard of achieving all cost-effective savings.

The legislature's directive to the parties in this docket is clear:

> "The commission shall permit electric corporations to implement commission-approved demand-side programs proposed pursuant to this section with a goal of achieving **<u>all</u>** cost-effective demand-side savings. Recovery for such programs shall not be permitted unless the programs are approved by the commission, result in energy or demand savings and are beneficial to all customers in the customer class in which the programs are proposed, regardless of whether the programs are utilized by all customers.

> The commission shall consider the total resource cost test a preferred cost-effectiveness test."[1]

As a foundational rule of statutory construction, each word of a statute must be given meaning. See, e.g. State ex rel. BP Products North America Inc. v. Ross 163 S.W.3d 922, 927 (Mo. Banc 2005). When each word of the MEEIA statute is carefully considered and given meaning, the conclusion is that an electrical corporation submitting a MEEIA plan for approval cannot simply ignore a structure that provides cost-effective demand-side savings.

With its Proposal, KCP&L has presented the Commission with a plan that ignores the largest and most important cost-effective program in its portfolio. As KCP&L readily admits:

> For MEEIA Cycle I, ***the Custom Rebate Program contributes the lion's share of energy efficiency savings*** to the Company's portfolio. For MEEIA Cycle I through November 30, 2015, the Custom Rebate Program represents 41% and 55% of the realized energy savings relative to the total portfolio in GMO and KCP&L-MO, respectively. ***It is a key program*** to the Company's success in MEEIA to reaching its energy savings targets.[2]

No party has argued that the custom C&I rebate program under the Company's MEEIA Cycle I plan did not achieve significant savings, nor did any party argue that those achieved savings were not cost effective.

Instead, the parties noted the significant demand-side savings realized under Cycle I. Ex. 102, Winslow Direct at 4 (noting that the business custom incentive rebate program was the "lion's share" of the entire program savings, at 41% of GMO's realized energy savings, and 55% of KCP&L's realized savings), Exhibit 500, Blake Rebuttal at 10. (noting that the Cycle I program made the economic case.) In contrast, the Cycle II Proposal will not drive the same level of investment because the payback time will be increased. Tr. 282. Additionally, the evidence demonstrates that the Cycle I program was cost effective. See Ex. 202, Rogers Surrebuttal, Schedule JAR-SR-2.

By any reading of the evidence in this docket, the Cycle I program achieved savings and was cost effective. The argument that the Company has found a less effective program

[1] Section 393.1075.4.

[2] Ex. 102, Winslow Direct, page 4 (emphasis added).

structure that would be cheaper is not a compelling reason to jettison the program in the face of the MEEIA statute's command.

Additionally, the Commission has provided its own guidance on the types of programs that it will approve. In its Report and Order in Ameren's recent MEEIA filing, the Commission noted that it would not approve any application for a MEEIA program would result in ratepayers paying more for energy savings than the MEEIA plan actually causes.[3]

Further, the Commission noted that non-participating ratepayers would have to be better off paying to help some ratepayers reduce usage than they would be paying a utility to build a power plant." Id. at 16-17.

Under each of these guideposts from the Commission, the Proposal falls short. With demonstrated freeridership problems, ratepayers will be sinking MEEIA funds into projects that would have taken place in the absence of a MEEIA program. Ratepayer dollars being paid toward these freerider programs are not causing any actual energy savings, and therefore the Proposal does not meet Commission standards.

Similarly, because the Proposal will not drive demand and will spend ratepayer funds on freerider projects, nonparticipating ratepayers will not be better off than they would have been if the funds had been spent on other infrastructure projects.

KCP&L has proposed a program that does not achieve all cost-effective demand-side savings. The Proposal, in fact, is likely to result in far less investment than the Company realized in Cycle I. See Tr. 289.

B. The Proposal Will Not Drive Efficiency Investment

Evidence in this docket points to a drastically weakened market for energy efficiency products under the Proposal. Efficiency customers look to payback period as a determining factor in making an investment, and impact of doubling the payback time on an investment will be that fewer C&I customers will invest. No party disputed the fact that payback times will

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[3] Report and Order at 18, In the Matter of Union Electric Company d/b/a Ameren Missouri's 2nd Filing to Implement Regulatory Changes in Furtherance of Energy Efficiency as allowed by MEEIA, Case No. EO-2015-0055 (2015).

drastically increase under the Proposal. Instead, the Company argued that doubling the payback time will have no impact on the level of efficiency investment. Tr. 111.

Evidence from several sources points to payback period as a definitive factor in business efficiency investments, including independent studies (Exhibit 506, Synapse Study), noting that "The payback threshold for moving forward with energy efficiency investments was remarkably consistent across industries and regions. Most customers require payback periods of four years or less. However, projects with payback periods of three or four years are rarely approved."

Notably, KCP&L's own MEEIA Cycle II filing is in sync with the Synapse report, noting that "The key barriers are return on investment… Many customers have internal return on investment hurdles that are quite aggressive, sometimes as short as a one year payback" Exhibit 504. Further, evidence demonstrated that customers in the Company's service territory look to paybacks of one to four years. Tr. at 290.

Brightergy illustrated through several examples presented at hearing that the payback time will double under the proposed structure. The impact to hospitals, municipalities and school districts will be stark. Exhibit 505.

Evidence on the record also demonstrates that the result of the increased payback time will be fewer new investors, and more efficiency dollars going to freerider projects. Low incentive levels result in freeridership. Higher incentives, by contrast, lead to higher investments. Tr. 192.

Under cross examination, Staff's witness admits that the Custom Rebate Structure contained in the Stipulation will increase the incidence of free-ridership. Specifically, in response to a hypothetical customer of a commercial / industrial customer faced with a $10,000 capital investment that delivers $5,000 of energy savings in the first year, Staff admits that such a customer would already have a two-year payback period.[4] Given this short pay-back period, Staff concedes that this customer should already make such an energy efficiency investment.[5] While such a customer would not have received a rebate under the Cycle I program,[6] this customer would receive a $5,000 rebate under the Proposal.[7] Staff readily admitted that, by

[4] Tr. 176
[5] Tr. 177-178
[6] Tr. 177
[7] Tr. 176

providing a rebate to such a customer, the Cycle II program will increase the likelihood of free-ridership.[8]

Faced with the obvious conclusion, that the proposed Cycle II Custom Rebate program structure is faulty and leads to increased free-ridership, Staff attempts to divert such criticism by claiming that such a hypothetical represents an "extreme example."[9] Upon further examination, it became clear that Staff has no foundation to support its contention that such a hypothetical represents an "extreme example." Indeed, Staff's witness admits that, in his current role, he has no opportunity to market energy efficiency programs.

Q. So you don't know, just from that experience, whether this is an extreme example?

A. That's correct.[10]

Further, while Staff witness has experience with gas energy efficiency programs, he has no experience with electric energy efficiency programs.[11] Finally, while concluding that this represents an "extreme example," Staff witness never took the opportunity to talk to Brightergy or any other market participants to determine whether such examples are actually experienced in the market.[12]

Indeed, the testimony of the **only** witness with market experience leads to the conclusion that Staff is patently wrong regarding the incidence of such companies. As the following dialogue with Commissioner Kenney demonstrates, customers, such as those portrayed in the hypothetical, do actually exist.

Q. So is that hypothetical realistic?

A. Yeah. It's -- it's -- it's realistic.

Q. You get that type of like five-to-one payback?

A. We love those customers. That's –

Q. I think the customers would love you.

A. Well, we can sell that all day long because that's doesn't need any type of –

[8] Tr. 178
[9] Tr. 190
[10] Tr. 198
[11] Tr. 198
[12] Tr. 198-199

Q. Yeah. But do you see it? Because that -- to me, that seems -- just as a novice, that just seems pretty high. Because I would think that anybody who has that, you ought to be able to sell them.

A. I agree. Those are the customers we're tracking. That's why our market development specialists that are pounding the phones every day, they're trying to target people that have high run hours. Because people that have high run hours where they're operating their business and running multiple shifts, we can –

Q. Those are the type that can achieve those –

A. Yes.

Q. Okay. Especially –

A. We like -- yes.

Q. Okay.

A. Those are the ideal customers, because clearly the better -- the shorter the payback, the higher the probability we're going to be able to make that sale.[13]

Additionally, low incentive levels can lead to free ridership because the incentive levels are not compelling to disinterested consumers, and are only reducing the cost of investments that would be made in the absence of a program. TR. 226: 3-12.

The weak market potential under the Proposal is also reflected by the reaction of the Company's trade allies and ratepayers. After soliciting support from approximately 200 trade allies, the company received one supportive email. Tr. 106, Tr. 107. The company received far more emails in support of the Cycle I program. p. 107: 15-17. The Company's witness noted that the program change could make potential investors less interested in future investments. Tr. 133. Staff's witness acknowledged that in order to be effective, a rebate structure must be compelling to a customer in order to drive investment. Tr. 188.

KCP&L has argued that the process was a collaborative and extensive one. Evidence indicates that the custom lighting program as originally filed is precisely the same program that was the product presented to the Commission. Tr. 218.

[13] Tr. 295-297

Further, the decision was made to change the incentive structure mid-cycle, before any customers or trade allies were notified. This announcement came in a form letter on April 23, 2015. (Ex. 501, announcing that "Effective July 1, 2015, all Custom lighting and non-lighting rebates will be awarded on a per kWh energy savings at a flat rate structure. These projects will receive $0.10 per kWh saved up to 50% of the project cost."

In cross examination, the Company's witness admitted that despite soliciting positive feedback from more than 100 trade allies, the company received only one supportive email. Tr. 106. This email, included as an appendix in testimony, expresses support for both programs.

In fact, upon announcing the change, the Company reversed itself due to feedback from trade allies and customers, a fact it noted in a follow up communication: "Over the past two weeks, since announcing the incentive payment plan changes, many trade allies and customers have expressed concern regarding the impact of this change to on-going and potential projects. As a result, we have decided not to implement the proposed change to a flat $0.10/kWh in July." Ex. 502. The Company's witness was unable to explain the disconnect between these two positions. Tr. 123.

Finally, the Company is unlikely to have any incentives to adjust rates. Because the free riders will have sufficient enough demand under the lowered rebate structure to spend the MEEIA funds and achieve the Company's low savings targets, the Company will not need to make the program more attractive to investors who would not otherwise be compelled to invest. Tr. 283.

C. Surrounding States and Utilities Have Similar Programs

The Company's Cycle I rebate structure is in line with a number of surrounding states and utilities. Ex. 500, Blake Rebuttal 6. That same structure results in an even lower rebate amount than programs in the northeastern United States. Id.

An argument that a cost-effective program which drives efficiency investment should be rejected fails for both legal and policy reasons. Nowhere does the MEEIA statute require, or even suggest, that the Commission should survey other states and utilities and mold the MEEIA

program to conform to other market norms. It is therefore a fact that the Commission is free to ignore.

From a policy standpoint, if a program drives demand and meet statutory requirements, it should be approved by the Commission. Whether that same structure is successful in other jurisdictions is irrelevant to the Commission's consideration of what is best for KCP&L's ratepayers. However, Staff's witness noted that the only difference between KCP&L's Cycle I program and the examples Brightergy highlighted is that a number of other states have required efficiency benchmarks for utilities. Tr. 191-192.

The fact that utilities with legally required benchmarks employ program designs with more aggressive incentive levels is, however, instructive in this docket. When utilities face a penalty for noncompliance, they employ programs similar to KCP&L's Cycle I structure. When targets are higher and legally binding, utilities raise incentives to meet them. Id.

The Commission need not lend any weight to the decisions of other utilities' compliance plans, but if it chooses to, it should be instructive that the more aggressive efficiency targets lead to higher incentives, lending weight to the argument that the Cycle I rebate structure is effective in driving investment.

III. Regulatory Flexibility

The Company has requested a variance from the Commission's rule establishing the procedure under which the entire MEEIA program can be cancelled.[14] Currently, the Commission must approve this action. The Company asks that the Commission remove itself from the equation and trust the Company to make this decision unilaterally.

The Company made no legal arguments as to why the Commission should grant the variance. To the contrary, the Commission's rulemaking has been upheld by the courts. See, e.g. State ex rel. Public Counsel v. PSC, 397 S.W.3d 441 (Mo. App, W.D., 2013). In the absence of legal arguments, the Company relies on several misplaced policy arguments to justify its variance. As noted in testimony, Ameren did not request such a provision in either its Cycle I or Cycle II filings. Tr. 151. Additionally, it appears to be a provision that is unpopular with the

[14] 4 CSR 240-20.094(5)

other stakeholders in the process. Other parties either do not support this provision, or would likely get rid of it if they were able. Tr. 195.

Citing "uncertainty" related to verification of Cycle I savings, unknown outcomes from the Commission's MEEIA rulemaking process, and the Clean Power Plan as policy reasons, the Company made the case that one of these factors could lead to the decision to cancel the program without Commission input. Tr.147-148. The Company was not able to provide any specific outcomes that could result from any of these policy procedures that could cause the MEEIA program to become unsustainable. Id. The Company also argued that it needs more certain timing for ending the program. Tr. 148. The current rule requires the Commission to make a decision within 30 days.[15]

The arguments against ceding such authority to the Company are significant. As KCP&L readily admits, any decision to "shut down the programs will have a huge impact on everyone involved."[16] Despite this "huge impact", the signatories believe that KCP&L, not the Commission, should be the entity making the decision to terminate the MEEIA programs. Secondly, recognizing that numerous other entities make business plans and invest capital in reliance on the existence of the utility energy efficiency programs, a Commission decision to cede its authority to the utility would create a "hostile" environment that discourages these trade allies from investing in the KCP&L service area.

In addition to the lack of policy and legal rationale supporting this request, allowing the variance could result in a depressed market for energy efficiency. Although some argued at the evidentiary hearing that a so-called "nuclear option" could be leveraged to create a sense of urgency among potential customers and drive demand, the likely outcome is less interest in the program. With the threat of a 30-day cancellation, many customers would be reluctant to begin the process of evaluating their property for efficiency investments, and would likely be nervous about the program's viability. Tr. 285. Additionally, for many C&I customers, 30 days is simply too narrow of a window to evaluate a proposal and make a large investment decision. Id.

As a matter of policy, the Commission should not start abdicating its authority. By allowing this variance, the Commission would be granting its authority to the Company

[15] 4 CSR 240-20.094.5
[16] Tr. 149

unilateral authority to cancel the entire program with no oversight. No other utility has been granted such a waiver, nor has any even asked for it until now. Tr 163. This fact alone speaks to the fact that the variance is not needed and should not be granted.

The Commission's rule currently provides a mechanism allowing an electric utility to discontinue an approved demand-side program,[17] with the same 30-day timeline the company has requested in its Proposal. The sole difference between the Company's request and current law is that the decision maker will no longer be the Commission. The Company will have unilateral authority to discontinue all programs.

VI. Conclusion

Brightergy has raised issues through substantial evidence on the record that the Proposal does not meet the minimum standards under Section 393.1075. The Commission should withhold approval of the Proposal until such time as the Company has negotiated a rebate structure which will persuade C&I customers to invest in energy efficiency projects.

[17] 4 CSR 240-20.094.5

Dated January 29, 2016

Respectfully submitted,

_/s/ *Andrew J. Zellers*____________________
Andrew J. Zellers #57884
General Counsel/Vice President for Regulatory Affairs
Brightergy, LLC
1712 Main Street, 6th Floor
Kansas City, MO, 64108
(816) 866-0555 Telephone
(816) 511-0822 Fax
Email: andy.zellers@brightergy.com

David L. Woodsmall #40747
308 E. High Street, Suite 204
Jefferson City, MO, 65101
(573) 606-6006 Telephone
(573) 636-6007 Fax
david.woodsmall@woodsmalllaw.com

ATTORNEYS FOR BRIGHTERGY, LLC

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been emailed this 29th day of January, 2016, to all parties on the Commission's service list in this docket.

/s/ *Andrew J. Zellers*