BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Union Electric Company d/b/a)
Ameren Missouri's 2nd Filing to Implement) **File No. EO-2015-0055**
Regulatory Changes in Furtherance of Energy)
Efficiency as Allowed by MEEIA)

REPORT AND ORDER

Issue Date: October 22, 2015

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TABLE OF CONTENTS

Appearances 2

Procedural History 4

Background 5

Discussion 7

EM&V 9

Performance Incentive.. 11

Overall benefits versus costs 13

Conclusions of Law 14

Decision 16

Ordered Paragraphs.. 19

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REPORT AND ORDER

APPEARANCES

Matthew R. Tomc, Esq., and **Wendy K, Tatro, Esq.**, Corporate Counsel and Assistant General Counsel, 1901 Chouteau Avenue, MC 1310, P.O. Box 66149, St. Louis, Missouri 63109, for Union Electric Company d/b/a Ameren Missouri.

James B. Lowery, Esq., Smith Lewis, LLP, 111 South 9th Street, Columbia, Missouri 65201, for Union Electric Company d/b/a Ameren Missouri.

L. Russell Mitten, Esq., Brydon Swearengen & England, PC, 312 East Capitol Avenue, Jefferson City, Missouri 65102, for Union Electric Company d/b/a Ameren Missouri.

Henry B. Robertson, Esq., Great Rivers Environment Center, 319 N. Fourth Street, Suite 800, St. Louis, Missouri 63102, for Natural Resources Defense Council.

David C. Linton, Esq., 314 Romaine Spring View, Fenton, Missouri 63026, for United for Missouri, Inc.

Alexander Antal, Esq., Associate General Counsel, 301 West High Street , Jefferson City, Missouri, 65102, for the Missouri Division of Energy.

Edward Downey, Esq., Bryan Cave, LLP, 221 Bolivar Street, Suite 101, Jefferson City, Missouri, 65101, for the Missouri Industrial Energy Consumers.

Jill Tauber, Esq. and Chinyere Osuala, Esq., Earthjustice, 1625 Massachusetts Ave., N.W., Suite 702, Washington, D.C. 20036, for Sierra Club.

Maxine I. Lipeles, Esq., Washington University in St. Louis, One Brookings Drive, St. Louis, Missouri, 63130, for Sierra Club.

Andrew Linhares, Esq., 1216 Subella Drive , Columbia, Missouri, 65201 for Earth Island Institute, d/b/a Renew Missouri and for The National Housing Trust and Tower Grove Neighborhoods Community Development Corporation.

David Woodsmall, Esq., 308 East High Street, Jefferson City, Missouri 65101, for Midwest Energy Consumers Group.

Andrew Zellers, Esq., General Counsel, Brightergy, LLC, 1712 Main Street, Sixth Floor, Kansas City, Missouri 65108, for Brightergy, LLC.

Tim Opitz, Esq., Assistant Counsel, Office of the Public Counsel, 200 Madison Street, Suite 650, Post Office Box 2230, Jefferson City, Missouri 65102, for the Office of the Public Counsel.

Marcella L. Mueth, Esq., Whitney Payne, Esq., Bob Berlin, Esq., Associate Staff Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: **Ronald D. Pridgin, Deputy Chief.**

Procedural History

On December 22, 2014, Union Electric Company d/b/a Ameren Missouri applied to the Commission for approval of certain demand-side programs, a Technical Resource Manual (TRM), and a Demand-Side Investment Mechanism (DSIM) (collectively, "the Utility Plan") as contemplated by the Missouri Energy Efficiency Investment Act (MEEIA) and the Commission's implementing regulations. The Commission provided notice and set a deadline of January 13, 2015, for applications to intervene.

The Commission received timely intervention requests from: The Missouri Division of Energy; Midwest Energy Consumers Group; Brightergy, LLC; Missouri Industrial Energy Consumers; Earth Island Institute d/b/a Renew Missouri; United for Missouri; Natural Resources Defense Council; Sierra Club; Kansas City Power & Light Company; KCP&L Greater Missouri Operations Company; National Housing Trust; and Tower Grove Neighborhood Community Development Corporation. Responses to those applications were due January 20, 2015. The Commission received no responses and, thus, granted those requests.

The Commission held an evidentiary hearing on July 20-22, 2015. Parties filed briefs on August 13, 2015, and reply briefs on August 26, 2015.

Background

In 2009, the Missouri legislature set Missouri's regulated utilities and this Commission on the path to increasing energy efficiency by enacting MEEIA, setting forth, "It shall be the policy of the state to value demand-side investments equal to traditional investments in supply and delivery infrastructure and allow recovery of all reasonable and prudent costs of delivering cost-effective demand-side programs."[1] In essence, MEEIA is designed to encourage Missouri's investor-owned utilities to offer and promote energy efficiency programs and projects designed to reduce the amount of electricity used by the utility's customers. The law recognizes that under traditional regulation, a utility has a strong financial incentive to sell as much electricity to its customers as possible because more sales result in greater profits. MEEIA creates an opportunity to change that financial incentive to better align the utility's financial interest with the public interest in encouraging the efficient use of energy.

Under MEEIA and with Commission approval, electric utilities may offer demand-side programs and special incentives to participating customers designed to put demand-side initiatives on equal footing with traditional supply-side resources. In order to accomplish that equal footing, the law requires the Commission to do three things:

> (1) Provide timely cost recovery for utilities;
> (2) Ensure that utility financial incentives are aligned with helping customers to use energy more efficiently and in a manner that sustains or enhances utility customers' incentives to use energy more efficiently; and
> (3) Provides timely earnings opportunities associated with cost-effective measurable and verifiable savings.[2]

[1] Section 393.1075.3. RSMo.
[2] Section 393.1075.3 RSMo.

MEEIA is permissive in nature and, by its express language, does not require utilities to offer demand-side programs. MEEIA allows such demand-side programs only so long as those programs are approved by the Commission, result in measurable demand or energy savings, and are beneficial to all customers. The Commission is thus responsible for reviewing a utility's MEEIA plan and determining whether the plan accomplishes the goals of MEEIA.

The Commission promulgated rules to implement MEEIA.[3] The Commission's rules provided for a mechanism designed to allow cost recovery between rate cases, which is termed a Demand Side Investment Mechanism (DSIM). The rule provides default parameters that govern the operation of the mechanism and includes provisions that allow both lost revenue and incentive recovery. The Missouri Court of Appeals upheld the Commission's MEEIA rules, finding that MEEIA allows for adjustment between rate cases, and also finding that utility lost revenues are a cost within the context of MEEIA.[4]

In 2012, Ameren Missouri filed its first MEEIA case. This was also the first MEEIA case before the Commission. Following a collaborative process involving Ameren Missouri and other stakeholders, the Commission approved the largest utility-sponsored investment in energy efficiency programs in Missouri history.

Part of what the Commission approved in that case was a DSIM. Consistent with MEEIA, Ameren's DSIM was designed to align the interests of the utility with helping its customers use energy more efficiently. The DSIM also removed significant barriers to Ameren Missouri's pursuit of cost-effective energy savings. The Commission applauds

[3] Commission Rule 4 CSR 240-20.093, .094.
[4] *State ex. rel. Public Counsel v. PSC*, 397 S.W.3d 441, 450-52 (Mo. App. W.D. 2015).

the efforts of Ameren Missouri, and all of the other parties, in negotiating the 2012-2015 “Cycle 1” MEEIA Plan.

Discussion

The case before the Commission now involves Ameren Missouri’s “Cycle 2” MEEIA Plan, which would cover the years 2016-2018. Ameren Missouri, KCP&L, GMO, The Missouri Division of Energy, Natural Resources Defense Council, and United for Missouri filed a Non-Unanimous Stipulation and Agreement on June 30 (“Utility Stipulation”). Some highlights of that stipulation are:

> The total Plan energy savings target will be increased by approximately 37% to a total savings equivalent of 583,563 megawatt-hours (“MWh”).
>
> The program budget will be increased to $197,209,859 (an approximately 47% increase over the original Plan).
>
> The Signatories agree that the overall budget for Low-Income ("LI") programs will be increased by 58% reaching a total overall budget for LI energy efficiency programs of $10.75 million. The entire LI program budget of $10.75 million will be utilized to deliver energy efficiency services to Ameren Missouri customers who are owners and operators of multi-family low-income (“MFLI”) properties.
>
> The Signatories agree that the Company will add a Small Business Direct Install program as part of its overall portfolio. The target energy savings for this program will equal 30,000 MWh, and its target budget will equal $9.9 million. The program will target small business customers that are difficult to reach through traditional energy efficiency programs.
>
> A two-tiered Throughput Disincentive-Net Shared Benefit. Tier 1 is a fixed value designed to insure a percentage of revenues are accrued. Tier 2 is a sharing percentage adder calculated after the entire three-year cycle and based on the rate case interval in that time period and the amount of rate increase granted in future rate cases.
>
> A Performance Incentive based on EM&V using deemed energy savings, performed after each of the three program years. Ameren Missouri will be allowed to recover $30 million if it achieves its energy savings targets.

On July 7, Earth Island Institute, Midwest Energy Consumers Group, Missouri Industrial Energy Consumers, Renew Missouri, Staff, and OPC filed a competing Non-Unanimous Stipulation and Agreement ("Non-Utility Stipulation"). On July 8, those same parties filed an amended stipulation. Some of the highlights of the amended stipulation are:

> Multi-Family Low Income ("MFLI") and Small Business Direct Install ("SBDI") programs the same as or substantially similar to the programs listed in the utility stipulation.
>
> By October 31, 2015, Ameren Missouri shall issue a request for proposal (RFP) for a third-party mediator who shall select a panel of experts to recommend possible increases in the projected kWh savings of the total portfolio for 2017 and 2018, with particular focus on program participation rates.
>
> The Signatories agree to the inclusion of a Throughput Disincentive Mechanism to make the utility indifferent as to any reduction in sales of energy because of programs' measures installed under MEEIA. The Signatories agree to necessary waivers to effectuate this section. Each month Ameren Missouri will bill 66.67% of the unrealized revenue value.
>
> Following the determination of realized kWh savings, Ameren Missouri will potentially recover additional revenues associated with kWh savings for that program year:
>
> i. If the determination of realized kWh savings indicates that the measures performed at a level of efficacy greater than 66.67% of the initially projected kWh savings associated with that measure, further revenues will be provided to match the level of realized kWh savings found, up to 133.33% of the projected kWh savings.
>   1. If it is determined that additional revenues are appropriate, the MEEIA rate for each rate class will be adjusted to provide these revenues over the following 12 billing months.
>
> ii. Recovery will be limited to 133.33% of initially projected savings.
>
> iii. If a program is found through study to have actually generated kWh savings below 66.67% of the projected kWh savings, no refunding will be required.

In its September 9, 2015 Agenda meeting, the Commission directed the parties to report to the Commission whether they could continue negotiating a MEEIA plan that would include retrospective Evaluation, Measurement, and Verification ("EM&V") in calculating the throughput disincentive and that would also include a Performance Incentive that has a component recognizing supply-side investment reductions associated with energy savings caused by MEEIA. The parties were unable to negotiate such a plan.[5]

By rule, the Commission must approve Ameren Missouri's plan, approve the plan with modifications acceptable to Ameren Missouri, or reject the plan.[6] In this case, Ameren Missouri has presented several modifications to its plan that it would find acceptable[7] and made clear that it does not find the modifications presented in the Non-Utility Stipulation acceptable. Therefore, the Commission must decide whether it can approve the Utility Plan in any of its iterations. For the reasons set forth below, the Commission cannot approve the Utility Plan.

Evaluation, Measurement, and Verification

Electric utilities make money by selling energy. Consequently, a utility has a natural disincentive to promote energy efficiency programs that would reduce its sales. This is known as a throughput disincentive.[8]

To combat this disincentive and fulfill the MEEIA directive that utility financial incentives be aligned with helping customers use energy more efficiently, DSIM must have some sort of mechanism to compensate utilities for the lost sales that result from implementing MEEIA programs. In Ameren's MEEIA Cycle 1, parties stipulated to deeming

[5] Ameren Missouri filed a pleading on September 25, 2015 that contained a proposal to address the concerns stated in the Commission's September 9, 2015 order. Staff and OPC objected to the proposal.

[6] Commission Rule 4 CSR 240-20.094(3).

[7] The first set of modifications Ameren Missouri would find acceptable came in the form of the Utility Stipulation. Following the hearing, in its *Response to Commission Order* filed September 22, 2015, Ameren Missouri proposed additional modifications to the Utility Plan as modified by the Utility Stipulation. The Commission was not persuaded that these proposed modifications addressed the Commission's concerns.

[8] Ex. 703, p. 2

the annual energy and demand savings and annual net shared benefits ("NSB") that Ameren would recover using a throughput disincentive-net shared benefits ("TD-NSB") mechanism.[9] Looking at that mechanism after the fact, it is clear that Ameren Missouri benefitted significantly from deeming the savings and benefits rather than using EM&V to determine the actual energy and demand savings and actual annual NSB amounts.[10]

Comparing to Cycle 1, Cycle 2 under the Utility Plan would increase Ameren's earnings and reduce verification of actual energy savings. In fact, under the Utility Plan, Ameren Missouri could be over-compensated by nearly $25 million for its 2014 Net Throughput Disincentive ("NTD") compared to what the NTD would be if the 2014 NTD was based upon the utility's portion of annual net shared benefits achieved and documented through EM&V reports.[11]

In total, Ameren Missouri could collect an NTD valued at $60 million over the course of three years.[12] That NTD would have no retrospective true-up or EM&V audit.[13] Instead, the "deemed" values for each efficiency measure would act as a static baseline for determining annual energy and demand savings and would be based on "deemed" annual energy savings, "deemed" annual demand savings, and "deemed" avoided costs for each measure. Customers would have no guarantee of receiving a return of net benefits from these measures.[14]

[9] Commission File No. EO-2012-0142; Ex. 709, p. 31.
[10] Ex. 709, pp. 31-32; Ex. 800, p. 7; Ex. 801, p. 13.
[11] Ex. 710, p. 17.
[12] Tr. 351-52.
[13] Ameren Missouri argues it cannot, due to Generally Accepted Accounting Principles (GAAP), use retrospective EM&V for the throughput disincentive. Tr. 493-94. However, Staff witness Mark Oligschlaeger testified credibly that there is nothing in the GAAP accounting principles that prohibits the Commission from setting rates based on a retrospective review and true-up of the throughput disincentive. Tr. 839.
[14] Ex. 712, pp. 8-9.

Without retrospective EM&V to true-up the energy and demand savings that actually occurred, the "deeming" of savings for each installed efficiency measure protects only Ameren Missouri by shifting all risk of whether those savings benefits ever occur to Ameren Missouri customers during a 20 year period.[15] Furthermore, Ameren Missouri would collect its program costs, a share of projected/deemed net savings benefits from its throughput disincentive, and any earned performance incentive award all upfront in the first 6 years of that 20 year period.[16]

Performance Incentive

As noted above, under MEEIA, the Commission shall "[p]rovide timely earnings opportunities associated with cost-effective measurable and verifiable efficiency savings."[17] This gives Ameren Missouri's shareholders an earnings opportunity to compensate for foregone supply-side investment opportunity. This earnings opportunity is a performance incentive.

The sole purpose of a "performance incentive" under MEEIA is to give the company an earnings opportunity to place shareholders in a financial position comparable to the earnings opportunity they would have had if those shareholders made a future supply-side investment. A successfully implemented performance incentive would accomplish the policy goal of valuing equally supply-side and demand-side investments.[18]

[15] Tr. pp. 794-95.
[16] Id.
[17] Section 393.1075.3 RSMo
[18] Id.

Such an earnings opportunity may be based on different performance measures. A prime example of how those measures can vary, and what their impacts can be, is shown in the competing stipulations filed in this case.[19]

The Utility Stipulation bases its proposal on kilowatt hour savings, which looks at the total number of kWh of energy saved following the implementation of an energy efficiency measure. Reducing annual sales of kWh can benefit ratepayers. But, not all kWh are the same.

Utility capacity requirements are driven chiefly by the maximum amount of usage in a single hour during the year, known as "peak demand." Even if thousands of kWh were saved, if the summer peak demands are the same with and without a MEEIA Cycle 2, then Ameren Missouri would likely require the same capacity. Thus, it would not forego a future supply-side investment opportunity.

In other words, such a performance incentive would compensate Ameren Missouri for foregone earnings opportunities that are not actually foregone. For example, unless Ameren Missouri's MEEIA portfolio results in energy and demand reductions such that construction of a power plant would be cancelled or materially postponed, the shareholders will not have experienced a foregone supply-side earnings opportunity.

The kWh-based approach proposed in the Utility Stipulation would assume the same supply-side impact from a kWh saved under a nighttime lighting program as from a kWh saved under an air-conditioner recycling program. The distortions possible under this assumption would result in customers providing Ameren Missouri with a MEEIA earnings

[19] The Non-Utility Stipulation bases its performance incentive on kW, rather than kWh.

opportunity (under the guise of reducing future supply-side investment opportunities) without Ameren Missouri actually reducing any future supply-side investment opportunities.

This is not a matter of Ameren Missouri's ability to predict the future; this is a matter of building in a double-recovery windfall for Ameren Missouri. That double-recovery comes from ratepayers paying depreciation and return on equity on supply side investments and then paying again for performance incentives on demand-side programs.

But, if an electric utility successfully reduces its future capacity requirements by reducing customer electricity usage, it may be able to avoid or postpone installation of additional costly generation. It is those demand savings that actually reduce investments necessary for the utility to meet its peak demand requirements. That, in turn, reduces future revenue requirements paid by customers, as well as future earnings opportunities made available to investors.

Overall benefits versus costs

The Cycle 2 portfolio offers significantly lower projected energy and demand savings than Cycle 1.[20] A Cost/benefit comparison of the Cycle 1 portfolio, the Cycle 2 Utility Plan portfolio, and the Cycle 2 Utility Stipulation portfolio shows that the Utility Stipulation provides for even higher costs and relatively lower net benefits for the customers as a whole and for non- participating customers than even the initial Cycle 2 Utility Plan.[21]

These costs, to be borne by Ameren Missouri ratepayers, are upwards of $250 to $300 million over 3 years. The program cost would be approximately $197M.[22] The

[20] Tr. pp. 748-49.

[21] Ex. 712, p. 6.

[22] Utility Stipulation, p. 3.

Throughput Disincentive would be approximately $60 million.[23] And the Performance Incentive could run from $23 million to $48 million.[24] Clearly, these are not insignificant amounts.

Conclusions of Law

1. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. The Commission will assign the appropriate weight to the testimony of each witness based upon their qualifications, expertise and credibility with regard to the attested-to subject matter.[25]

2. In making its determination, the Commission may adopt or reject any or all of any witnesses' testimony.[26] Testimony need not be refuted or controverted to be disbelieved by the Commission.[27] The Commission determines what weight to accord to the evidence adduced.[28] "It may disregard evidence which in its judgment is not credible, even though there is no countervailing evidence to dispute or contradict it."[29] The

[23] Tr. 351-52.

[24] Utility Stipulation, App. A.

[25] Witness credibility is solely within the discretion of the Commission, who is free to believe all, some, or none of a witness' testimony*. State ex. rel. Missouri Gas Energy v. Public Service Comm'n*, 186 S.W.3d 376, 389 (Mo. App. 2005).

[26] *State ex rel. Associated Natural Gas Co. v. Public Service Commission,* 706 S.W.2d 870, 880 (Mo. App., W.D. 1985).

[27] *State ex rel. Rice v. Public Service Commission,* 220 S.W.2d 61, 65 (Mo. banc 1949).

[28] *Id.*

[29] *Id.*

Commission may evaluate the expert testimony presented to it and choose between the various experts.[30]

3. Where the evidence conflicts, the Commission determines which evidence is most credible. No law requires the Commission to expound upon which portions of the record the Commission accepted or rejected.[31]

4. The Missouri Energy Efficiency Investment Act states, in pertinent part:

> 393.1075. 3. It shall be the policy of the state to value demand-side investments equal to traditional investments in supply and delivery infrastructure and allow recovery of all reasonable and prudent costs of delivering cost-effective demand-side programs. In support of this policy, the commission shall:
>
> (1) Provide timely cost recovery for utilities;
>
> (2) Ensure that utility financial incentives are aligned with helping customers use energy more efficiently and in a manner that sustains or enhances utility customers' incentives to use energy more efficiently; and
>
> (3) Provide timely earnings opportunities associated with cost-effective measurable and verifiable efficiency savings.
>
> 4. The commission shall permit electric corporations to implement commission-approved demand-side programs proposed pursuant to this section with a goal of achieving all cost-effective demand-side savings. Recovery for such programs shall not be permitted unless the programs are approved by the commission, result in energy or demand savings and are beneficial to all customers in the customer class in which the programs are proposed, regardless of whether the programs are utilized by all customers. The commission shall consider the total resource cost test a preferred cost-effectiveness test. Programs targeted to low-income customers or general education campaigns do not need to meet a cost-effectiveness test, so long as the commission determines that the program or campaign is in the public interest. Nothing herein shall preclude the approval of demand-side programs that do not meet the test if the costs of the program above the level determined to be cost-effective are funded by the customers participating in the program or through tax or other governmental credits or incentives specifically designed for that purpose.

[30] *Associated Natural Gas**,** supra,* 706 S.W.2d at 882.
[31] *Stith v. Lakin*, 129 S.W.3d 912, 919 (Mo. App., S.D. 2004).

5. Commission Rule 4 CSR 240-20.094(3) states that the Commission must approve Ameren Missouri's plan, approve the plan with modifications acceptable to Ameren Missouri, or reject the plan. It also says that the Commission must do so after providing the opportunity for hearing. But even if a hearing is required, this case does not rise to the level of a contested case.

This is because . . . "The MAPA defines a "contested case" as "a proceeding before an agency in which legal rights, duties, or privileges of specific parties are required by law to be determined after hearing."[32]. The "law" referred to in this definition includes any ordinance, statute, or constitutional provision that mandates a hearing.[33]

Here, no legal rights, duties, or privileges are required by law to be determined after hearing, because no party has a legal right to receive, or a duty to give, energy efficiency programs. That energy efficiency is optional is evidenced by the statute that says "The commission shall permit electric corporations to implement commission-approved demand-side programs proposed pursuant to this section with a goal of achieving all cost-effective demand-side savings."[34] And because this is a non-contested case, the Commission is not required to make findings of fact.[35]

Decision

Simply put, the Commission would approve a MEEIA plan if non-participating ratepayers would be better off paying to help some ratepayers reduce usage than they

[32] § 536.010(2) RSMo.

[33] *State ex rel. Yarber v. McHenry*, 915 S.W.2d 325, 328 (Mo. banc. 1995); McCoy v. Caldwell County, 145 S.W.3d 427 (Mo. 2004).

[34] Section 393.1075.4.

[35] *State ex. rel. Public Counsel v. Public Service Com'n,* 210 S.W.3d 344, 355 (Mo. App. W.D. 2006).

would be paying a utility to build a power plant. Unfortunately, that is not the case here.[36] The evidence in this case shows that most Ameren Missouri customers will likely receive very little, if any, overall net benefits from the Utility Plan.[37] Approximately 87% of Ameren Missouri's customers are residential customers.[38] And a vast majority of those do not participate in MEEIA.[39]

Staff's analysis estimates that residential customers who are non-participants will pay $112 million with the expectation that they will receive benefits of $119 million as a result of the programs and DSIM in the Utility Stipulation. Thus, the net benefits non-participating residential customers are expected to receive are only worth an estimated $7 million and the costs/benefit ratio is only 1.06.[40] This benefit is down from a 2.07 benefits to cost ratio from the Cycle I Plan.[41]

Furthermore, the Utility Stipulation lacks retrospective EM&V. Without it, Ameren Missouri would have the perverse incentive to implement programs with high deemed energy reductions, but low actual energy reductions. Perhaps more importantly, it is clear Ameren Missouri has been over-compensated under Cycle 1, and it is almost certain the over-compensation would be exacerbated under the Utility Plan. However, without retrospective EM&V, it would be impossible for anyone to know how much Ameren Missouri collects from customers for energy savings that never materialized.

[36] The Non-Utility Stipulation filed on July 7, 2015, and amended on July 8, 2015, addresses the Commission's concerns, though the provisions of that stipulation are certainly not the only way to address the Commission's concerns.
[37] Ex. 712, p. 7.
[38] Id.
[39] Id.
[40] Id.
[41] Ex. 712, Sch. JAR-1.

Finally, the performance incentive in the Utility Stipulation lacks a component relating to a reduction of supply-side investment. Without such a component, ratepayers could continue to pay depreciation and rate of return on supply side investments, and then pay again for performance incentives on demand-side programs. This subverts the purpose of the performance incentive. When a company is successful in promoting energy efficiency, the performance incentive should be high. The company should absolutely be rewarded for such an accomplishment given the structure and goals of MEEIA. But the converse should be true as well; MEEIA was never intended to be a blank check.

The Commission is well aware of the value of MEEIA and continues to support the policies MEEIA established for the state of Missouri. Ameren Missouri's Cycle 1 Plan laid the groundwork for MEEIA implementation in all Missouri's regulated utilities, and the company is to be commended for that leadership. However, the Commission cannot approve a MEEIA plan in this case that results in ratepayers paying for more energy savings than the MEEIA plan actually causes. Furthermore, even if the proposed plan included a mechanism for measuring actual energy savings, the Commission cannot approve a plan that rewards the company for reductions in demand without requiring the company to show it has foregone supply-side earnings related to that reduction in demand.

The Commission appreciates the time and effort the parties expended on trying to arrive at a negotiated plan. However, the Commission finds the plan offered by Ameren Missouri does not comply with the purposes or provisions of MEEIA. Thus, the Commission must reject Ameren Missouri's proposed MEEIA plan. It is the Commission's hope that Ameren Missouri will consider this decision and present a new MEEIA plan that all parties and this Commission can support.

THE COMMISSION ORDERS THAT:

1. The Cycle 2 MEEIA Plan, as modified by the Non-Unanimous Stipulation and Agreement filed on June 30, 2015, and further modified on September 25, 2015, is rejected.

2. All pending motions and other requests for relief not granted are denied.

3. This Report and Order shall become effective on November 21, 2015.

BY THE COMMISSION

Morris L Woodruff

Morris L. Woodruff
Secretary

Hall, Chm., Stoll, Kenney,
Rupp, and Coleman, CC., concur
and certify compliance with the
provisions of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,
on this 22nd day of October, 2015.