Question	NRDC, et al.	EnerNOC	ECS	MIEC	KCPL/GMO	Empire	ECI	MEG
5. What is meant by the term(s) "rate design modifications" / "rate design modification" as it appears in Section 393.1124.5?	Rate design is the process for allocating a utility's revenue requirement among rate elements, such as a customer charge, demand charge, reactive power charge, and energy charge, in a particular tariff or for a particular customer class. Changing from declining block rates to inclining block rates would be an example of a rate design modification. There has been some discussion about whether adopting decoupling, whereby an annual true-up would ensure that no more and no less than the authorized revenues are actually collected, constitutes a change in rate design. Our view is that it does not, because it would not change the way in which the utility's authorized revenue requirement is allocated among rate elements, but rather would ensure that any under-recovery or over-recovery would be either collected or refunded, respectively. On the other hand, putting more or all of the fixed costs associated with serving a given class of customer in a customer charge or other fixed monthly charge would be a rate design change.	Utilities rate designs may need to be modified to achieve the policy objectives of the MEEIA to value demand side resources equal to supply side investment. Attached to this filing at Appendix A is whitepaper published by Edison Foundation Institute for Electric Efficiency that evaluates various rate design modifications in-use throughout the United States.	No Comment	This refers to changes in the structure of the rates. For example, movement toward or adoption of a Straight Fixed Variable (SFV) rate design that the Commission has adopted for natural gas utilities. It could also include adding demand charges to rates that currently only have customer and energy charges.	A rate design modification would be something that alters the current pricing structure to an alternative pricing structure.	In Section 393.1124.5, the Commission is given authority to develop a variety of cost recovery mechanisms to encourage demand-side investments of which rate design modifications is one such mechanism. Empire believes rate design modifications also include cost recovery options such as, but not limited to, decoupling, a cost recovery surcharge or rider and a straight fixed variable rate design methodology.	No Comment	A rate design modification can be many things. A non-exhaustive list is: changing the relative levels of customer, demand and energy charges; de-averaging demand and/or energy charges into day/night or seasonal values; modifying any ratchet provisions; modifying credits for interruptibility, modifying pass-through adjustment clauses (like a fuel adjustment clause); and creating new rate forms (e.g., real time pricing).

The Staff has prepared this summary of responses given by stakeholders in the EW-2010-0187 and EW-2010-0265 working dockets. The Staff developed the response chart and video archive notes, and gathered the memorandums as a starting point for discussions in the EW-2011-0372 docket. The Staff does not intend for these summary documents to represent any position of each respective participant in this working docket.

- Legality of decoupling (p. 4)
- Meaning of "rate design modification" (p. 6-8)

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Consideration and Implementation of Section 393.1075, the Missouri Energy Efficiency Investment Act	)))	File No. EW-2010-0265 (item # 19)

LEGAL MEMORANDUM OF
WAL-MART STORES EAST, LP, AND SAM'S EAST, INC.

Wal-Mart Stores East, LP, and Sam's East, Inc., (collectively "Walmart") hereby submit their legal memorandum on the issues being addressed in this workshop. Walmart is a strong supporter of energy efficiency and demand-side alternatives to traditional supply-side options. Walmart commends the Commission and its Staff for moving forward with this workshop.

GENERAL COMMENTS

The Missouri Energy Efficiency Investment Act (the "Act") brings certain changes to the regulation of "demand-side investments" in Missouri. As a legal matter, however, the Act does not stand alone and cannot be interpreted in a vacuum. It leaves intact much, if not most, of the legal framework that has historically governed utility regulation in Missouri. Accordingly, the Act – and the regulatory changes it imposes – must be understood by looking at the actual language used, and that language must be interpreted within the context of the existing regulatory regime.

RESPONSES TO SPECIFIC QUESTIONS

1. The Legality Of Cost Recovery Between Rate Cases.

The Courts have recognized that the Commission is a body of limited jurisdiction and has only such powers as are "conferred by...statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted." *State ex rel.*

Utility Consumers Council of Missouri, Inc., v. Public Service Commission, 585 S.W.2d 41, 49 (Mo. 1979). The Commission has no authority to change the rate making scheme set up by the Legislature. *Id.* at 56.

The simple reality is that the Missouri Energy Efficiency Investment Act does not expressly allow cost recovery between rate cases, nor does it require such by necessary implication. The Act mandates only that demand-side and supply-side investments are to be valued *equally*. Mo. Ann. Stat. § 393.1075.3 (Vernon 2010). It does not require preferential treatment for demand-side investments. Rather, the Act *requires* only the following:

1. "[T]imely cost recovery for utilities;"
2. 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. "[T]imely earnings opportunities associated with cost-effective measurable and verifiable efficiency savings."

Id.

The word "timely" as used in the Act does not necessarily mean "between rate cases." Its ordinary meaning[1] is "opportune," "appropriate" or "suitable." Supply-side investments are not recovered between rate cases under the statutory regime established by the Missouri Legislature. *See* Mo. Ann. Stat. § 393.140.5 (allowing changes in rates only "after a hearing"), and Mo. Ann. Stat. § 393.150.1 (allowing changes in rates only after a hearing) (Vernon 2010).

[1] Words used in statutes are to taken in their "plain or ordinary and usual sense," absent some clear technical meaning. Mo. Ann. Stat. § 1.090 (Vernon 2010).

To allow recovery of demand-side investments between rate cases, while supply-side investments are recovered in rate cases would give preferential treatment to demand-side investments. This is contrary to the clear language of the Act that demand-side and supply-side investments are to be valued equally. *Id.* § 393.1075.3.

Section 386.266 is the only express statutory authority for recovery between rate cases in Missouri. However, that section is clearly limited to "fuel and purchased power costs" and "costs...to comply with any federal, state, or local environmental law, regulation, or rule." *Id.* § 386.266.1 & 386.266.2. Neither of these provisions – nor any other provision of Missouri law – expressly mandate the recovery of demand-side costs or investments between rate cases.

Section 393.1075.5 of the Act does allow the Commission to develop "cost recovery mechanisms to further encourage investments in demand-side programs...." However, the language is not mandatory, it is *permissive.* In other words, the Commission need not allow any such recovery.

Further the language in Section 393.1075.5 must be interpreted in the context of, and consistent with the other provisions of Missouri law. Missouri law clearly requires that rates be changed only after a hearing, and does not allow for the types of between-hearing mechanisms being advocated by some parties. *See* Mo. Ann. Stat. § 393.140.5 (allowing changes in rates only "after a hearing"), and Mo. Ann. Stat. § 393.150.1 (allowing changes in rates only after a hearing) (Vernon 2010).

2. The Legality Of Decoupling

The term "decoupling" is somewhat ambiguous and has not been defined as part of this docket. As typically understood, the term refers to the *ex post*, or after-the-fact, recovery of revenues and by extension earnings, lost as the result of energy efficiency and demand-side management activities.

Missouri law expressly allows decoupling only under Section 386.266.3. However, this section clearly applies only to "gas corporation[s]." *Id.* at § 386.266.3. It provides no authority for decoupling by electric utilities.

As noted previously, Section 5 of the Act provides that the Commission "may develop cost recovery mechanisms to further encourage investments in demand-side programs...." *Id.* at § 393.1075.5. Initially, the language of this section is clearly *permissive* rather than *mandatory.* That is, the Commission need not develop such mechanisms.

Further, however, this section only allows the development of "*cost* recovery mechanisms." The plain and ordinary meaning of the word "cost" does not include a reduction in revenues. Mo. Ann. Stat. § 1.090 (Vernon 2010). Rather, the word "cost" is normally understood to mean "expenditure" or "outlay." There is nothing in the Act to suggest that "cost" is being used in anything other than its ordinary meaning.

Thus, decoupling is not permitted under current Missouri law.

3. The Applicability Of Section 386.266.8 RSMo.

Section 386.266.8 of the Missouri statutes has no applicability to decoupling, between rate case adjustments, "rate design modifications," or any of the other issues being discussed in this docket. By its own terms section 386.266.8 applies only "*[i]n the event* the commission lawfully approves an incentive or performance-based plan..." *Id.* at § 386.266.8 (emphasis added).

The Commission has not approved any such plan and, therefore, section 386.266.8 is inapplicable. Further, if the Commission were to approve such a plan, section 386.266.8 requires only that "such plan shall be binding on the commission for the entire term of the plan." *Id.* In addition, by its express terms Section 386.266 is restricted to periodic rate adjustments relating to "fuel and purchased power costs," and costs...to comply with any...environmental law, regulation, or rule." *Id.* at §§386.266.1 & 386.266.2.

Costs and investments related to energy efficiency and demand-side investments do not fall within these categories. Further, as discussed previously, decoupling does not reflect a changing cost structure. Rather, it refers to reductions in revenues resulting from energy efficiency and demand-side management programs.

Finally, it should be noted that Section 386.266 contains no reference to Section 393.1075, nor does Section 393.1075 contain any reference to Section 386.266. In fact, these two sections are in different subchapters and deal with different topics. There is no basis for construing Section 386.266.8 as authority for allowing decoupling in Missouri.

4. The Meaning Of "Rate Design Modification" As Used In Section 393.1075.5, i.e., Does It Include Decoupling, etc.

The term "rate design modification" is not defined in Section 393.1075, or in any other Missouri statutes. Neither is the term defined in any Missouri statutes. However, the term "rate design" has a well known meaning within the context of utility regulation.

In its IRC Staff Subcommittee Glossary, the National Association of Regulatory Utility Commissioners ("NARUC") defines "rate design" as: "The type of prices used to signal consumers and recover costs. For example, these can involve block pricing, multipart prices, seasonal rates, time of use rates, and bundled services." *See* Attachment "A."

In the context of utility regulation the term "rate design" is commonly understood as referring to the *ex ante*, or before-the-fact, process of developing rate structures for recovering an individual utility's aggregate revenue requirement, i.e., recovery of the utility's costs of providing utility service, together with a reasonable return on its rate base devoted to utility service. Rate design is the determination of the specific rates that will yield the required revenues on a going forward basis. *See* C. Phillips, Jr., *The Regulation of Public Utilities*, 433-552 (1993).

Words used in statutes are to taken in their "plain or ordinary and usual sense," absent some clear technical meaning. Mo. Ann. Stat. § 1.090 (Vernon 2010). Thus, the term "rate design modification" as used in Section 393.1075.5 must be understood as referring to the rate design process as that term is used in the context of utility regulation.

Decoupling, as that term is commonly understood, is not a rate design modification. That is, as commonly understood, decoupling is not concerned with changing rate structures in order to recover a utility's operating expenses or a return on its rate base. Rather, decoupling is an after-the-fact effort to recover "lost revenues." This is an addition to the recovery of costs and a return on investment.

This conclusion is reinforced by the language that precedes the term "rate design modifications" in Section 393.1075.5. That is, the section permits the Commission to develop "*cost recovery mechanisms* to further encourage investments in demand-side programs...." *Id.* at § 393.1075.5. The section goes on to mention "rate design modifications" as an example of such "cost recovery mechanisms," not a lost revenue recovery mechanism.

Some may point to Section 393.1075.3.2 as authorizing decoupling. However, it does not.

Section 393.1075.3.2 must be understood within the confines of the general policy statement set out in Section 393.1075.3: "It shall be the policy of the state to value demand-side investments *equal* to traditional investments in supply and delivery infrastructure and allow recovery of all reasonable and prudent *costs* of delivering cost-effective demand-side programs." *Id.* § 393.1075.3 (emphasis added).

That is, when Section 393.1075.3(2) speaks of ensuring "that utility financial incentives are *aligned* with helping customers use energy more efficiently...," that alignment refers to the recovery of *costs*, which is a function of before-the-fact rate design, not the after-the-fact recovery of lost revenues.

Therefore, the "rate design modification" language of Section 393.1075.3(5) does not allow after-the-fact decoupling.

5. The Scope Of Cost-Effective Demand-Side Savings

Section 393.1075.4 establishes a "goal" of achieving "all cost-effective demand-side savings." The use of the term "cost-effective" makes it clear that something less than all possible demand-side savings is intended. Only those programs that are "cost-effective" are to be included.

The remainder of the section clarifies what is intended by the term "cost-effective:" "The commission shall consider the total resource cost test *a preferred cost-effectiveness test.*" *Id.* at § 393.1075.4 (emphasis added). In other words, programs that satisfy the total resource cost test are "cost-effective" within the meaning of Section 393.1075.4, and are to be implemented in order to achieve the goal of that section; programs that fail to satisfy the total resource cost test are not "cost-effective" and need not be implemented.

Section 393.1075.4 goes on to create two exceptions to this general rule. First, programs targeted to low-income customers or general education campaigns need not satisfy the total resource cost test. There must, however, be a determination that such programs or campaigns are "in the public interest." *Id.*

A second exception is created for demand-side programs that do not satisfy the total resource cost-effectiveness test, so long as the costs above the cost-effective level are funded either by participating customers or from government sources. This ensures that customers will not be required to fund programs that are not cost-effective.

Dated this 13th day of May, 2010.

Respectfully submitted,

By _____

Rick D. Chamberlain, OBA # 11255
BEHRENS, TAYLOR, WHEELER
& CHAMBERLAIN
6 N.E. 63rd Street, Suite 400
Oklahoma City, OK 73105-1401
Tel.: (405) 848-1014
Fax: (405) 848-3155
rdc_law@swbell.net

ATTORNEY FOR WAL-MART STORES EAST, LP, AND SAM'S EAST, INC.

Rate design	The type of prices used to signal consumers and recover costs. For example, these can involve block pricing, multipart prices, seasonal rates, time of use rates, and bundled services. See tariff structure, and rate structure.
Rate level	The average price a utility is authorized to collect for electricity. A number of rate designs could yield the same average price.
Rate of interest	See interest rate.
Rate of return	A firm's profit expressed as a percentage of its assets.
Rate structure	The schedule and organization for customer billing. See rate design.
Rate surcharge	An additional charge on a customer's bill used to adjust prices. Sometimes, such temporary charges are imposed to cover costs associated with a particular event (for example, costs resulting from a disaster, such as a hurricane). Such a surcharge could also be applied in anticipation of a general rate increase to avoid rate shock or to address unique financial problems facing the utility.
Rate survey	A comparison of prices for a particular service across different firms.
Rate-of-return regulation	A regulatory method that provides the utility with the opportunity to recover prudently incurred costs, including a fair return on investment. Revenue requirements equal Operating Costs plus the allowed rate of return times the rate base. This mechanism limits the profit (and loss) a company can earn on its investment. Regulatory lag and special incentive plans are often used to offset the disincentive to minimize costs under this mechanism. See cost of service regulation.
Rates, block	A price that applies to specified amounts of service. See block rates.
Rates, demand	Charges for electric service as a function of the customer's rate of use or maximum demand (expressed in kilowatts) during a given period of time such as the billing period.
Rates, flat	Constant per unit price, regardless of usage levels.
Rates, lifeline	A low or reduced flat rate for service (up to a particular level of monthly consumption) with higher block rates thereafter. When used to target particular groups, such as the poor or aged, the rates are available to qualifying (usually lowincome) customers. These rates are sometimes subsidized by an increase in rates for other customer classes (Crosssubsidy).
Rates, seasonal	Varying service rates according to the time of year (summer or winter). These can be costbased, to the extent that peak demands (driving installed capacity) are seasonal in nature. Thus, such rates can provide efficient signals to consumers. Seasonal rates can be viewed as a very crude version of rates, time of use.
Rates, step	A price per unit consumed based on specified levels of use or demand. See block pricing.

ATTACHMENT "A"

-Decoupling: Statutory Authority and Rate Design (p. 4-7)

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of an Investigation into the Coordination of State and Federal Regulatory Policies for Facilitating the Deployment of all Electric Customers of All Classes Consistent With the Public Interest	)))))	File No. EW-2010-0265 (item # 27)

LEGAL MEMORANDUM OF NRDC, GRELC, MCE, MEEA, MVC AND SIERRA CLUB

The Natural Resources Defense Council, Great Rivers Environmental Law Center, the Missouri Coalition for the Environment, Missouri Votes Conservation, the Midwest Energy Efficiency Alliance and the Sierra Club submit this legal memorandum to address the legal issues raised in this docket concerning the scope and interpretation of SB 376.

Statutory Authority: Cost Recovery

The Commission's authority to allow cost recovery outside a general rate case is delegated by SB 376, which requires the PSC to allow "timely cost recovery" for DSM programs. § 393.1075.3(1). It would be unnecessary to specify this unless it meant something other than recovery in a general rate case.

The issue invites comparison to *State ex rel. UCCM v. PSC,* 585 S.W.2d 41 (Mo. Banc 1979), which held that the Commission did not have statutory authority to allow periodic recovery of fuel costs through an FAC. No law then permitted such a departure from general rate making in a proceeding that allowed consideration of all relevant factors. 585 S.W.2d at 51–8. Rate making procedure is statutory, however, and may be amended by a subsequent statute.

UCCM lays out the guiding principles. The Commission has only the powers conferred on it by statute, "either expressly, or by clear implication as necessary to carry out the powers specifically granted." The Commission statutes are to be liberally construed to effectuate their remedial purpose, but convenience, expediency and even necessity are not to be considered in determining whether an act of the Commission is authorized. If the commission does have the authority to act, then it has broad discretion in setting just and reasonable rates. 585 S.W.2d at 49. This discretion operates only within the circumference of the powers granted by the legislature; the Commission's general supervisory authority over utilities does not give it the authority to change the legislative rate making scheme. 585 S.W.2d at 56.

Unlike § 386.266, RSMo (FAC and ECRM) and §§ 393.1000–1015, RSMo (ISRS), the Missouri Energy Efficiency Investment Act (MEEIA) does not expressly say that costs can be recovered outside a general rate case, but it does so by clear implication.

Every clause of a statute must be given meaning. The legislature is not presumed to have intended a useless act. In enacting a new law, the intent of the legislature is ordinarily to effect some change in existing law. *Cub Cadet Corp. v. Mopec, Inc.*, 78 S.W.3d 205, 214–5 (Mo.App. WD 2002).

The MEEIA is the legislature's first specific delegation of PSC authority over DSM. It aims to give demand-side investments equal value with supply-side, § 393.1075.3, "with a goal of achieving all cost-effective demand-side savings." § 393.1075.4. Cost-recovery must be "timely," § 393.1075.3(1), which contemplates that the interval between rate cases may not be timely enough, or it would not need to be stated. Cost recovery is contingent on Commission approval of demand-side programs, but is not explicitly tied to rate cases. § 393.1075.4.

The law gives the Commission discretion to "develop cost recovery mechanisms to further encourage investments in demand-side programs including, in combination and without limitation" certain examples. § 393.1075.5. The Commission "may adopt rules and procedures…as necessary, to ensure that electric corporations can achieve the goals of this section." § 393.1075.11. This acknowledges that special mechanisms are needed that are different from those found in traditional rate making. These are left to the discretion of the Commission.

The MEEIA carves out a limited exception to the general rate making scheme. It would not, for example, authorize retroactive rate making. See *State ex rel. AG Processing v. PSC,* WD 70799 (Mo.App. March 23, 2010). It does, however, recognize that demand-side investments are different from traditional supply-side investments and require separate treatment. To that extent, the statute does authorize "single-issue rate making," or more accurately cost recovery that considers all factors relevant to demand-side rate making. Cost recovery under the MEEIA is contingent on many factors not normally present in rate cases. It involves incentives, earnings opportunities tied to energy savings, a cost-effectiveness test, low-income programs that need not meet a cost-effectiveness test, savings that are beneficial to all customers in a class even if not all customers utilize the programs, exemption of opt-out customers from demand-side charges only, and annual reports specific to demand-side programs.

Successful efficiency programs reduce sales. "The more uncertain the process for determining the prudence of expenditures, and the longer the time between an expenditure and its recovery, the greater the perceived financial risk and the less likely a utility will be to aggressively pursue energy efficiency." The National Action Plan for Energy Efficiency,

"Aligning Utility Incentives with Investments in Energy Efficiency" (2007), p. ES-2. Such a result would be contrary to the explicit goals of the MEEIA.

Read as a whole, the statute delegates authority to the Commission to oversee utility demand-side programs, and within that authority is broad discretion to determine what cost recovery mechanisms are "timely" and advance the goal of promoting demand-side investments.

The originally introduced version of SB 376 provided for a "cost adjustment clause." This was later removed. However, the original bill did not include "timely cost recovery." The effect of the substitution was to broaden, not narrow, the Commission's discretion.

Applicable precedents are very sparse, but see *Georgia Power Co. v. Georgia Industrial Group,* 214 Ga.App.196, 447 S.E.2d 118 (1994). The court upheld a demand-side cost recovery rider under a statute that allowed recovery of costs and incentives "in rates." The court reasoned that the statute was a departure from traditional rate-of-return rate making, though the statute did not explicitly authorize a rider. 447 S.E.2d at 120–1.

Decoupling: Statutory Authority and Rate Design

The Energy Independence and Security Act of 2007, § 532, added the following standard to the PURPA § 111(d)(26 USCA § 2621(d)) standards that a state must consider:

> (17) RATE DESIGN MODIFICATIONS TO PROMOTE ENERGY EFFICIENCY INVESTMENTS.—
>
> (A) IN GENERAL.—The rates allowed to be charged by any electric utility shall—
>
> (i) align utility incentives with the delivery of cost-effective energy efficiency; and
>
> (ii) promote energy efficiency investments.

(B) POLICY OPTIONS.—In complying with subparagraph (A), each State regulatory authority and each nonregulated utility shall consider—

(i) *removing the throughput incentive* and other regulatory and management disincentives to energy efficiency;

(ii) **providing utility incentives** for the successful management of energy efficiency programs;

(iii) including the impact on adoption of energy efficiency as 1 of the goals of retail rate design, recognizing that energy efficiency must be balanced with other objectives;

(iv) **adopting rate designs that encourage energy efficiency** for each customer class;

(v) **allowing timely recovery of energy efficiency-related costs**; and

(vi) offering home energy audits, offering demand response programs, publicizing the financial and environmental benefits associated with making home energy efficiency improvements, and educating homeowners about all existing Federal and State incentives, including the availability of low-cost loans, that make energy efficiency improvements more affordable.

The policies highlighted in bold are incorporated in the Missouri Energy Efficiency Investment Act, particularly subsection § 393.1075.3, making this docket the proper forum for consideration of the new PURPA standard, including removal of the throughput incentive.

Section 410 of the American Recovery and Reinvestment Act of 2009 (ARRA) made it a condition of receiving grant money ("stimulus funds") that the governor of a state assure the Secretary of Energy that these policies will actually be implemented.

SEC. 410. ADDITIONAL STATE ENERGY GRANTS. (a) IN GENERAL.—

Amounts appropriated under the heading ''Department of Energy—Energy Programs—Energy Efficiency and Renewable Energy'' in this title shall be available to the Secretary of Energy for making additional grants under part D of title III of the Energy Policy and Conservation Act (42 U.S.C. 6321 et seq.). The Secretary shall make grants under this section in excess of the base allocation established for a State under regulations issued pursuant to the authorization provided in section 365(f) of such Act only if the governor of the recipient State notifies the Secretary of Energy in writing that the governor has obtained necessary assurances that each of the following will occur:

(1) The applicable State regulatory authority will seek to implement, in appropriate proceedings for each electric and gas utility, with respect to which the State regulatory authority has ratemaking authority, **a general policy that ensures that utility financial incentives are aligned with helping their customers use energy more efficiently and that provide timely cost recovery and a timely earnings opportunity for utilities associated with cost-effective measurable and verifiable efficiency savings, in a way that sustains or enhances utility customers' incentives to use energy more efficiently.**

The bolded language, slightly rearranged, is incorporated almost verbatim in the Missouri Energy Efficiency Investment Act, subsection 3, especially subdivisions (1)–(3). The MEEIA also refers to "rate design modifications" as a way to encourage demand-side investments. § 393.1075.5.

Even independently of federal law, Missouri law includes under the heading of "rate design" mechanisms that decouple revenue from sales and remove the utility's incentive to sell more gas or electricity. *State ex rel. OPC v. PSC,* 293 S.W.3d 63, 73–4 (Mo.App. S.D.2009);

State ex rel. Public Counsel v. PSC, 289 S.W.3d 240, 251 (Mo.App. W.D. 2009). See also *Ohio Consumers' Counsel v. PUC,* 2010 Ohio 134, 2010 WL 323283 (Ohio Jan. 26, 2010), which considers a sales decoupling rider as a rate design mechanism (p. 3 ¶ 3; p. 11 ¶ 37).

The MEEIA's derivation from federal law makes this conclusion inescapable. Decoupling is a matter of both rate design and aligning utility and customer incentives by removing the throughput incentive. The "Reference Manual and Procedures for Implementation of the 'PURPA Standards' in the EISA of 2007" (APPI, EEI, NARUC and NRECA 2008; http://www.naruc.org/resources.cfm?p=145) treats decoupling under the "rate design modification" standard (pp. 47, 52–3). Whatever it may mean elsewhere, in the context of § 111(d)(17) rate design includes decoupling.

Even if decoupling is not considered a matter of rate design, it falls under § 393.1075.3(2), aligning utility financial incentives with energy efficiency. The National Action Plan for Energy Efficiency, "Aligning Utility Incentives with Investments in Energy Efficiency" (2007), Chapter 5, deals with decoupling as an important part of aligning incentives because it removes the throughput incentive.

Lost revenue recovery is usually considered as an alternative to decoupling. However, it does not remove the throughput incentive. NAPEE, "Aligning Utility Incentives," p. 5-10. It does not meet the goals of the PURPA standard, ARRA or the MEEIA and should not be considered in this rulemaking.

Cost Recovery and EM&V

Staff takes the position that cost-recovery is not allowed by SB 376 until evaluation, measurement and verification of programs has been completed (4/8/10 draft rule §§ 7B, 9A.vi). This must be based on the clause in 393.1075.4, "Recovery for such programs shall not be

permitted unless the programs…result in energy or demand savings…" This phrase does not say "have resulted in" savings; does not say savings must be proved by EM&V; does not mention EM&V. Taking the statute as a whole and considering the context, it does not lead to the conclusion Staff has drawn.

The MEEIA requires the Commission to provide "timely cost recovery" and "timely earnings opportunities associated with cost-effective measurable and verifiable [not measured and verified] efficiency savings," § 393.1075.3(1) and (3). There is no reason why earnings opportunities, but not cost recovery, should be allowed without EM&V. That is not the intent of the law.

Cost recovery mechanisms are dealt with in 393.1075.5, and the list of such mechanisms includes "capitalization of investments in and expenditure for demand-side programs, rate design modifications, accelerated depreciation on demand-side investments, and allowing the utility to retain a portion of the net benefits of a demand-side program for its shareholders." There is no separation of cost recovery from earnings opportunities here. Instead, various kinds of earnings opportunities are treated under the heading of cost recovery.

The intent becomes clear when we consider the source of 393.1075.3, ARRA § 410: "provide timely cost recovery and a timely earnings opportunity for utilities associated with cost-effective measurable and verifiable efficiency savings." For both cost recovery and earnings opportunities, only "measur*able* and verifi*able*" savings are required. The separation of phrases from ARRA into 393.1075.3(1–3) appeared to break the link, but that was not intended.

The purpose of cost recovery mechanisms is "to further encourage investments in demand-side programs."§ 393.1075.5. The only reference to evaluation is in 393.1075.11:

"independent evaluation of demand-side programs...to ensure that electric corporations can achieve the goals of this section." Promoting DSM is the guiding purpose of the MEEIA.

There may be a time lag of several years between roll-out of a program and completion of EM&V. Delaying recovery, especially as programs start to move up the cost curve, might lead utilities not to propose or implement cost-effective programs. That would be directly contrary to the intent of the MEEIA.

MEDA: EUIC

MEDA in its "Working Draft" rule proposes to include in demand-side programs electric utility infrastructure projects (EUIC), defined in (1)H.i as:

> Electric utility infrastructure projects means projects owned by an electric utility that:
> i .Replace or modify existing electric utility infrastructure, including utility-owned buildings, if the replacement or modification is shown to conserve energy or use energy more efficiently

We disagree. EUIC is not within the scope of SB 376, which defines demand-side programs to mean only programs that "modify the net consumption of electricity on the retail customer's side of the electric meter," § 393.1075.2(3). It defines energy efficiency in terms of end-use efficiency. § 393.1075.2(4). However desirable EUIC may be, more efficient delivery of energy by the utility does not in itself affect customers' net consumption. Nothing in MEDA's proposed treatment of EUIC in § (6) of its working draft ensures or requires that this condition will be met.

There may be system benefits or costs from EUIC that could indirectly cause customers to reduce — or increase — consumption. That would merely be incidental to EUIC, whereas under SB 376 reducing customers' energy consumption must be the purpose of the program.

From Video Archives and Notes from May 17 & 18, 2011 Workshops (EW-2010-0265)

Issue: How to deal with section 393.1075.5?
"Prior to approving a rate design modification associated with demand-side cost recovery, the commission shall conclude a docket studying the effects thereof and promulgate an appropriate rule."

Ameren- Initially asked what do we think constitutes a rate design modification? Is this decoupling? Does what we are doing in workshop now meet this requirement?

OPC- If we were to have an idea of the range of potential rate design mechanism that may be invoked by utilities that would help study the effects of such things. This would also be affected by the view of whether adjustments between rate cases are lawful.

Rich- Are adjustments between rate cases a rate design modification?

OPC- Rate design is what are the elements of the rate used to collect the utility's revenue requirement.

KCPL- That section lists out some specific things the commission could do and then anything else was lumped into the term rate design modification. The commission should take a step back and look at a statewide level and determine if these are the types of things that we should be doing. He would say that this workshop could count as this. The core question is can the utilities do these programs and earn money in a timely manner and are we setting up a structure to do this?

OPC- Thinks it means if a company came in and requested for example straight fixed variable the commission would say no we need to promulgate a rule. Doesn't think that decoupling is a form of rate design.

Rich- Some of these issues are going to need adjudication by the Commission. Raised the issue of if requesting declaratory judgment from the Commission is warranted.

NRDC- Thinks the sentence that refers to rate design mechanisms is the whole suite of items. This docket could have been the appropriate place to study the effects, but it doesn't appear that it is going to be. Would propose a study before the Commission approved any of the rate design modifications.

OPC- Seems the purpose is that you have a docket before approving specific modifications for a single utility. Could be a generic statewide docket where parties present their views and Commission can make a determination.

AUE- Wishes the term was defined in statute. Thinks declaratory judgments would be helpful. If this means all modifications to rates this would create some risk for timely recovery and would create a barrier to energy efficiency. A judgment would encourage the current investments yet alone any new ones.

OPC- Another example could be if a utility has declining block rates and see that as an impediment to their customer's investing in energy efficiency.

DNR- Important that we have a generic docket as Ryan discussed. Don't think that current rate structures send the appropriate rate signals to customers.

Issue: Lawfulness of Decoupling?
Rich- Is decoupling a tool we have available to us?

OPC- Doesn't believe decoupling is lawful. Prepared to challenge in court.

PSC Staff – Not lawful.

MEDA – Lawful. We should not preemptively eliminate "tools in the toolbox." Decoupling adjustments can wait for rate cases.

Wal-Mart- Proposed a middle ground approach. Can accomplish decoupling through the words of the state through "rate design" in the context of a rate case. Legislation doesn't expressly address decoupling either way. Causes confusion.

Henry Robertson- Thinks it is intent of statute for commission to consider decoupling as a rate design mechanism. This section is taken from federal law ARRA 410 and PURPA Standard 17- Rate Design Modification. This at least means that decoupling is a rate design modification under federal law. If you look at the EISA Standards Manual, decoupling is clearly given as an example of a rate design modification.

Rich- A difficulties associated with Straight Fixed Variable mechanism is that it reduces the amount of money a customer can save. It solves the utility's problem, but adds a problem for customers. A lot of states have struggled with this. If you don't like the adjustments outside of a rate case, then you probably don't like decoupling because changes are made outside of a rate case.

OPC- Decoupling was explicitly in a previous draft of legislation and it was deliberately taken out.

Wal-Mart- Would like to see federal legislation Henry is referring to.

OPC and Wal-Mart- Decoupling doesn't change the initial rate design mechanism.

NRDC- Joint statement with Wal-Mart states that decoupling isn't explicitly prohibited or allowed. Could be approved by Commission as a mechanism. Once approved in a rate case, annual adjustments or true-ups under the mechanism could be implemented.