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. EX-2010-0368**

BRIEF OF MDNR, NRDC, GRELC, AND RENEW MISSOURI

The Department of Natural Resources, Natural Resources Defense Council, Great Rivers Environmental Law Center, and Renew Missouri submit this brief in response to the Commission's Order of August 25 to address the legal issues raised in this docket concerning the draft rule on 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" and "timely earnings opportunities" 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.

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. 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.

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 statute directs the Commission to "Provide timely earnings opportunities associated with cost-effective measurable and verifiable efficiency savings." § 393.1075.3(3). This standard is different from traditional rate of return, "used and useful," steel-in-the-ground rate making.

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. This discretion is broad enough to encompass cost-recovery riders. 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 new procedures and special mechanisms are needed that are different from those found in traditional supply-side rate making. These are left to the discretion of the Commission.

The MEEIA recognizes that demand-side investments are different from supply-side investments and require separate treatment. The statute authorizes 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.

The only case on point that we are aware of is *Georgia Power Co. v. Georgia Industrial Group,* 214 Ga.App.196, 447 S.E.2d 118 (1994). The state had enacted an IRP Act that encouraged demand-side investments. The court noted the difference between demand-side expenses and rate-basing of generation assets. It upheld a demand-side cost recovery rider under a statutory provision that allowed recovery of costs and incentives "in rates." The court reasoned that the statute was a departure from traditional test year, rate-of-return rate making, particularly because it authorized incentives in place of the traditional rate of return. The statute did not explicitly authorize a rider. 447 S.E.2d at 120–1. The MEEIA's provisions for "timely" cost recovery and earnings opportunities are more explicit than the Georgia statute.

An administrative agency has reasonable latitude regarding what methods and procedures to adopt in carrying out its statutory duties. *Citizens for Rural Preservation v.Robinett*, 648 S.W.2d 117, 128 (Mo.App. WD 1982). The legislative delegation of authority includes by implication everything necessary to make the power or duty effectual or complete. *AT&T v. Wallemann*, 827 S.W.2d 217, 224 (Mo.App. WD 1992). The Commission can decide what is "timely" and what is necessary to achieve the goal of maximizing demand-side investments.

MEEIA and Chapter 22

The draft rule attempts to integrate the MEEIA with the Chapter 22 IRP rule in various respects including:

- Approval of programs is conditioned on their being part of the utility's preferred resource plan or having otherwise been through 22.060 integration. 20.194(3)(A)3.
- In demonstrating program cost-effectiveness the utility must show "The impacts on annual revenue requirements and net present value of annual revenue requirements as a

result of the integration analysis in accordance with 4 CSR 240-22.060 over the twenty (20)-year planning horizon." 3.164(2)(B)3.

- The methodologies for determining avoided cost and probable environmental costs are the same as for the utility's preferred resource plan. 3.164(1)(R, U); 20.094(1)(D, F).

As a result, the draft rule violates the MEEIA.

The criterion of the MEEIA is the cost-effectiveness of demand-side programs. § 393.1075.3–.4.

Under the latest Chapter 22 rewrite, the primary criterion is the minimization of utility costs, but utilities may use other critical factors. 22.010(2). The utility assesses alternative resource plans against a number of performance measures. 22.060(2). Alternative resource plans are mixtures of demand-side and supply-side resources. 22.060(3). The most cost-effective demand-side portfolio could fail the IRP tests if it were packaged with a bad set of supply-side resources.

Selection of a preferred resource plan is contingent on the policy objectives and performance measures and also on the judgment of utility decision-makers. 22.070(1). While it would appear from 22.070(1)(C) that a PRP will maximize demand-side resources, it is not clear how the winnowing of ARPs assembled under 22.060 will automatically yield a PRP with the most cost-effective demand-side portfolio; the minimally compliant ARP of 22.060(3)(A)1 and the optimally compliant ARP of 22.060(3)(A)5 could both fail for reasons having nothing to do with their demand-side components. Furthermore even the demand-side component of the PRP is subject to the judgment of utility decision-makers. 22.070(1)(C).

Chapter 22 defines probable environmental costs with reference to the decision-makers' judgment as to what mandates could be significant. 22.020(45); 22.040(2)(B). The MEEIA speaks more comprehensively of "avoided probable environmental compliance costs." § 393.1075.2(6).

Lowest PVRR, IRP policy objectives, performance measures, critical uncertain factors and decision-makers' judgment are all criteria absent from the MEEIA. SB 376 is a delegation of specific rulemaking authority to achieve the MEEIA's purposes. § 393.1075.11. Chapter 22, by contrast, has no specific legislative authority. Its status as an internal Commission rule is shown by the limited, procedural nature of the Commission's review of utility IRPs: only deficiencies in Chapter 22 compliance, not in the substance of the plans, is reviewable. 22.080 (7, 8, 16).

If the Commission subordinates the MEEIA to Chapter 22, it will be imposing criteria not prescribed by the legislature. The MEEIA rules will be invalid if they go beyond the statutorily conferred authority or attempt to modify or extend the statute. *PharmFlex Inc. v. Division of Employment Security*, 964 S.W.2d 825, 829 (Mo.App. WD 1997).

A chronologically later statute creating a specific statutory scheme prevails over earlier, more general laws. *Control Technology and Solutions v. Malden R-1 SD*, 181 S.W.3d 80, 83 (Mo.App. ED 2005). Therefore the Commission cannot use its general rulemaking powers under §§ 386.250(6) and 393.140(11) to make rules inconsistent with the MEEIA. To do so would be to exercise a legislative function in violation of the separation of executive from legislative powers. Mo. Constitution Article II, § 1; *Missouri Coalition for the Environment v. JCAR*, 948 S.W.2d 125, 132–4 (Mo. 1997); *State ex rel. Rothrum v. Darby*, 345 Mo. 1002, 137 S.W.2d 532, 536–7 (Mo. 1940).

Chapter 22 and the MEEIA can only be harmonized by ensuring that a demand-side portfolio that satisfies the criteria of the MEEIA automatically becomes part of the preferred resource plan, not the other way around.

Lost Revenue and Decoupling

One of the primary policies of the MEEIA is to align utility financial incentives with customer incentives to use energy more efficiently. § 393.1075.3(2). The draft rule makes specific provision for lost revenue recovery (e.g. 20.093(1)(M, R), 20.093(2)(G)) but none for any means, such as revenue decoupling, to remove the utility's incentive to sell more electricity.

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, however, does not remove the throughput incentive. (NAPEE, "Aligning Utility Incentives," p. 5-10). Decoupling holds the utility harmless from revenue declines while still allowing customers' bills to go down. Lost revenue recovery allows utilities to recover more than their fixed-cost revenue requirement due to increased sales between rate cases even if those increased sales are made possible by weather or economic conditions unrelated to DSM. Since customers see no benefit from efficiency on their bills, they are deprived of the incentive to use energy more efficiently, and incentives are misaligned. This is a violation of the MEEIA.

Section 393.1075.5 gives the Commission a broad menu of cost recovery mechanisms and earnings opportunities. Lost revenue recovery is not cost recovery; there are no costs. It is not an earnings opportunity as defined by the MEEIA: "earnings opportunities associated with cost-effective measurable and verifiable efficiency savings." § 393.1075.3(2). The association between lost revenues and efficiency savings is inverse, not to say perverse.

By making no provision for removing the throughput disincentive for utilities to do efficiency programs, the draft rules fail to implement the statutory goal of aligning utility and customer incentives.

Achieving the Goal of All Cost-effective Savings

The MEEIA sets "a goal of achieving all cost-effective demand-side savings." § 393.1075.4. The draft rule speaks of a "Guideline to review progress toward an expectation that the electric utility's demand-side programs can achieve a goal of all cost-effective demand-side savings." 20.094(2). A utility can use either realistic achievable potential or the numeric goals in 20.094(2)(A)and (B). But annual demand and energy savings targets are also set for each individual program or program plan, 20.094(1)(A) and (B); and these targets "are not necessarily the same as the incremental annual energy and demand savings goals and cumulative annual energy and demand savings goals specified in 4 CSR 240-20.094(2)." 20.093(2)(H)1.

The statutory goal has been lost in the shuffle. A goal cannot be achieved by a toothless "guideline to review progress toward an expectation" of achieving it. Doubtless the reason for backing off from the "all cost-effective" goal is the objections raised by some stakeholders to the annual percentage goals.

We have been the proponents of such goals. They are not "hard" targets; no one contends that SB 376 is an energy efficiency portfolio standard with mandatory targets. Rather, the interim goals should offer a presumptive way, not conclusive but rebuttable by the utility, of demonstrating progress toward the goal of all cost-effective savings. They are stair steps toward that ultimate goal.

Interim goals are well within the rulemaking authority granted to the Commission in § 393.1075.11. An administrative agency has reasonable latitude regarding what methods and procedures to adopt in carrying out its statutory duties. *Citizens for Rural Preservation v.Robinett*, 648 S.W.2d 117, 128 (Mo.App. WD 1982). The legislative delegation of powers and duties includes by implication everything necessary to carry out the power or duty and make it effectual or complete. *AT&T v. Wallemann*, 827 S.W.2d 217, 224 (Mo.App. WD 1992). "Where the grant of power is clear, the detail for its exercise need be given only within practical limits. The rest may be left to the administrative agency delegated the duty to accomplish the legislative purpose." Id. at 224–5.

Since the Commission clearly has the power to see that the statutory goal is achieved, it necessarily has the power to designate way stations on the road to achieving it.

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