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

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.

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Respectfully submitted,

By _____

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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.