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	)))	**Case No. EX-2010-0368**

PUBLIC COUNSEL'S APPLICATION FOR REHEARING AND REQUEST FOR STAY

COMES NOW the Office of the Public Counsel for its Application for Rehearing states as follows:

1. The Commission issued four Orders of Rulemaking in this case. None bears an effective date, but the accompanying transmittal sheets indicate that the effective date for each order is the "Statutory 30 days." In addition, Section 386.409.3 RSMo 2000 provides that: "Every order or decision of the commission shall of its own force take effect and become operative thirty days after the service thereof…." The Orders of Rulemaking were not served upon Public Counsel (nor apparently were they served upon any participants in the rulemaking case), but the Commission's Electronic Filing and Information System indicates that they were issued on February 9, 2011. Although it is not clear when the Orders of Rulemaking will become effective, they cannot become effective earlier than thirty days after February 9, or March 11. An application for rehearing which has been filed before the effective date of a Commission order is a prerequisite for an appeal pursuant to Section 386.510. This application for rehearing is filed before the effective date of the Orders of Rulemaking.

2. The Orders of Rulemaking are unlawful in that they exceed the Commission's statutory authority and erroneously interpret the law with respect to penalties, do not comply with the statutory requirements for an order of rulemaking, and they are unreasonable in that they failed to properly take certain comments into consideration. The Orders of Rulemaking exceed

the Commission's statutory authority in two ways: they authorize an extra-rate-case single-issue mechanism (the Demand Side Program Investment Mechanism or DSIM); and they authorize the recovery of lost revenues.

3. The Commission's willful disregard[1] of the limits of its authority is unfortunate. Public Counsel was actively involved in the legislative process and worked to shape SB 376 so that it would put demand-side and supply-side options on a level playing field without unjustly enriching utility shareholders at the expense of utility ratepayers. **By willfully exceeding the authority granted, the Commission is retarding rather than advancing energy efficiency in Missouri.** The Commission chose to make an unlawful single-issue recovery mechanism the centerpiece of its rule and gave short shrift to the mechanisms and options actually authorized by the rule. Recognizing that the extra-rate-case single-issue DSIM will be held unlawful, and finding that the Commission has failed to act on other aspects of SB 376, Missouri utilities are unlikely to embrace energy efficiency as they would have if the Commission had simply followed the law. An application for rehearing serves two purposes: it gives the commission a final opportunity to recognize and correct its errors; and it preserves issues for appeal. Public Counsel hopes that the Commission will, in response to this and other applications for rehearing, belatedly recognize that its rules exceed its statutory authority and work to advance energy efficiency in ways that are consistent with that authority.

[1] Before it even published a proposed rule, the Commission was advised by many parties including the Commission's own Staff, whose only role is to serve as a neutral advisor to the Commission, that SB 376 did not give the Commission authority to create such a mechanism.

4. The two most relevant cases to start a discussion of single-issue ratemaking are Hotel Continental and UCCM.[2] Hotel Continental concerned a Tax Adjustment Clause (TAC), and UCCM concerned a Fuel Adjustment Clause (FAC); the TAC was found not to be unlawful single-issue ratemaking, but the FAC was found unlawful. The Court in UCCM did a very thorough job of recapitulating the Hotel Continental analysis, but ultimately concluded that taxes were so different from fuel costs and other operating costs of a utility that the Hotel Continental analysis simply does not apply to costs other than taxes. The Missouri Supreme Court in UCCM found that the Hotel Continental single-issue ratemaking exception for a TAC was carefully and narrowly drawn. The Court found that, not only would the exception not extend to a FAC, it would not even apply to other kinds of taxes. Indeed, there is no hint in UCCM of a category of costs that the Court would consider to be similar enough to a gross receipts tax to qualify for an exception.

> In contrast, a fuel adjustment clause would not be of such limited scope. While it could nominally be considered a "rule relating to a rate", as was the tax adjustment clause, the commission does not thereby gain power to permit its use if this would in effect initiate a new method of granting rate increases. As noted in Hotel Continental, non-tax operating costs (such as fuel) fall into a wholly separate category than does the tax cost at issue in that case. Although in their brief respondents attempt to distinguish a fuel adjustment clause from an adjustment clause for labor, supplies, construction and so forth on the basis that fuel is the largest single expense item, in oral argument they admitted that the rationale behind authorization of a fuel adjustment clause could be used to justify adjustment clauses covering these other items of operating expense. **To permit all such costs to be automatically adjusted would create a third method of approval of rates not within the contemplation of the authorizing statutes.**[3]

[2] Hotel Continental v. Burton, 334 S.W.2d 75 (Mo. 1960) and State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41, 56-58 (Mo. banc 1979)

[3] UCCM, *supra*, at 53-54; emphasis added.

If DSM costs are very much like gross receipts taxes, then the Commission could allow a single-issue ratemaking exception for them without explicit statutory authority. If, on the other hand, they are more like fuel, "labor, supplies, construction and so forth," then the Commission would need explicit statutory authority. The Court's analysis of the differences between a TAC and FAC clearly point out that DSM costs are much more like fuel costs than gross receipts taxes. The Commission's "powers are limited to those conferred by statute, either expressly, or by clear implication, as necessary to carry out the powers specifically granted."[4] Thus the Commission could only allow single-issue ratemaking for DSM costs if the legislature explicitly granted the Commission such authority.

5. The statute authorizing FACs and Environmental Cost Recovery Mechanisms[5] is detailed, runs several pages, and **explicitly** allows single-issue ratemaking. So does the statute authorizing Infrastructure Recovery Surcharges.[6] Even the oldest of the statutorily-created single-issue ratemaking exceptions, for nuclear decommissioning costs,[7] while considerably shorter than the other two, **explicitly** allows single-issue ratemaking:

> Notwithstanding any other provision of law to the contrary, **the public service commission shall have the power, pursuant to regulations, to review and authorize changes to the rates** and charges contained in the schedules of an electric corporation as a result of a change in the level or annual accrual of funding necessary for its nuclear power plant decommissioning trust fund only after a full hearing and after considering all facts relevant to such funding level or accrual rate. The commission shall also have the authority to adopt regulations to govern the procedure for submission, examination, hearing and approval of such tariff changes and to ensure that the amounts collected from ratepayers and paid

[4] Utilicorp United Inc. v. Platte-Clay Elec. Co-op., Inc., 799 S.W.2d 108, 109 (Mo. App. W.D. 1990)
[5] Section 393.1000, *et seq*. RSMo Cum. Supp. 2006.
[6] Section 386.266 RSMo Cum. Supp. 2008.
[7] Section 393.292 RSMo 2000.

> into such trust funds will be neither greater nor lesser than the amounts necessary to carry out the purposes of the trusts.[8]

In contrast to the explicit way in which the legislature has created every other single-issue ratemaking exception, the Commission opines that the legislature's use of the single word "timely" in two sentences creates a single-issue ratemaking exception. The Commission considers "timely" to mean "faster than otherwise allowed by law and by a method not otherwise allowed by law." That is an awful lot to read into a little word, particularly since it is directly contrary to common dictionary definitions of the word. The legislature did not define "timely" in the context of SB 376. "In the absence of a statutory definition, words will be given their plain and ordinary meaning as derived from the dictionary."[9] Webster's Third New International Dictionary Unabridged (1976)[10] defines "timely" as "done or occurring at a suitable time; occurring at a normal or expected time; falling within a time prescribed by law…." Thus the word "timely" **refers** to the period of time prescribed or allowed by law. It does not **create** the lawful period of time.

6. The Commission's opinion that the use of the word "timely" allows an extra-rate-case single-issue rate adjustment mechanism is further undermined by the fact that the legislature considered an explicit grant of authority to allow single-issue ratemaking in SB 376, **but then deliberately took it out**. SB 376, as introduced, explicitly provided that the Commission could use cost recovery mechanisms including "a cost adjustment clause for collection of costs

[8] *Ibid*. Emphasis added.
[9] State v. Moore, 303 S.W.3d 515, 520 (Mo. 2010)
[10] It should be noted that recent Missouri Supreme Court decisions frequently cite to this same dictionary, albeit a 1993 edition.

associated with energy efficiency programs."[11] When the full Senate voted on SB 376, that phrase was completely removed, and the statute as enacted also omits it. It is simply not plausible to assert that – in contrast to the explicit language of other single-issue ratemaking exceptions and in contrast to the explicit language in early versions of SB 376 itself – the legislature meant to create an exception to one of the core principles of utility law by using the single word "timely."

7. The Commission claims that: "The argument that the proposed rule would in and of itself authorize single-issue ratemaking is unfounded and premature. Until an exact DSIM is established there is no way to claim that original implementation or any periodic adjustments would constitute single-issue ratemaking." This is like claiming that a rule that purports to authorize murder is not unlawful until a murder is committed. The rules authorize a single-issue ratemaking mechanism without statutory authority, and so the rule is unlawful – even if such a mechanism is never used.

8. As the Missouri Supreme Court noted in UCCM,[12] there are only two permissible ways to raise rates in Missouri: the complaint method and the file-and-suspend method.[13] There is no authority in Missouri law for a third method of raising rates to account for revenues that might have been realized, all else being equal, if a utility had not taken certain actions. The Commission's "powers are limited to those conferred by statute, either expressly, or by clear

[11] SB376, Introduced, Section 393.1124.3. Later drafts, including the draft that became the Senate Committee Substitute, had the same phrase in Section 393.1124.5.
[12] UCCM, *supra*, at 53.
[13] Since UCCM was decided in 1979, the Missouri Legislature has created several other mechanisms, but the premise of UCCM (that rates can be raised only by these two methods unless an explicit statutorily-created mechanism exists) is still valid.

implication, as necessary to carry out the powers specifically granted."[14] Much like the provision in early versions of SB 376 that authorized the DSIM adjustment mechanism, there was a provision in the first, introduced version of SB 376 that authorized the recovery of lost revenues. And like the single-issue ratemaking provision, the provision that authorized the recovery of lost revenues was deliberately taken out. SB 376, as introduced, explicitly authorized the Commission to "allow[] the utility a fixed investment recovery mechanism to recover lost margins...."[15] The legislature, recognizing how controversial this provision would be, and how much opposition it would draw, wisely decided to remove it, and it did not even survive through the first committee vote in the Senate Committee on Commerce, Consumer Protection, Energy and the Environment. Since the legislature considered giving the Commission the authority to implement a lost revenue mechanism, but then deliberately declined to do so, it would be clearly beyond the Commission's authority to implement such a mechanism.

9. The Commission erred in concluding that the language of Section 393.1075.3 precludes the use of penalties as a tool for aligning a utility's financial incentive with promoting energy efficiency.[16] This section, *inter alia*, requires the Commission to ensure that "utility financial incentives are aligned with helping customers use energy more efficiently…." In its comments, the Missouri Energy Development Association opined that only positive financial incentives are statutorily authorized under this section, and in its Response, the Commission agreed. Nothing in Section 393.1075.3 restricts the Commission to the use of only positive rewards to align incentives. It is troubling that the Commission chose to interpret its statutory authority too broadly when it comes to rewarding utilities (through the use of a single-issue

[14] Utilicorp United, *supra*, at 109.
[15] SB376, Introduced, Section 393.1124.3
[16] See, *e.g.*, Rule 4 CSR 240-20.094, Comment #10 and Response.

recovery mechanism and the recovery of lost revenues) and too narrowly when it comes to penalizing utilities. Utility financial incentives can be aligned with helping customers through the use of rewards or penalties or a combination of the two. The National Action Plan for Energy Efficiency ("NAPEE")[17] was a resource used by all parties involved in the drafting of SB 376, and was the source for many of the concepts embodied in the legislation. NAPEE clearly contemplates the use of penalties: "Incentives for energy efficiency should be linked to achieving performance objectives to avoid unnecessary expenditures, and be evaluated by regulators based on their ability to produce cost-effective program performance. Performance objectives can also form the basis of penalties."[18] Penalties for utilities that fail "to value remand-side investments equal to traditional investments in supply and delivery infrastructure" could be a very powerful tool to align a utility's incentives with helping its customers use energy more efficiently, and the Commission erred in concluding that it had no statutory authority to impose penalties.

10. In its Order of Rulemaking for Rule 4 CSR 240-20.094, Comment #7 and Response, the Commission failed to respond at all to a significant portion of the comments noted. At page 10 the Commission summarizes a Public Counsel comment that:

> Public Counsel has a couple of additional concerns with annual energy and peak demand savings goals that are set forth in Subsection (2)(A) of the rule. The rule does not specify how the savings goals that would apply for each utility should be calculated. OPC believes that the numbers used to calculate the goals should be weather normalized and that the numbers relied on to determine the extent to which each utility has met the goals should also be weather normalized. Perhaps the rule drafters assumed there was no need to specify this in the rule. However, OPC believes this would help reduce the potential for future differences over how this portion of the rule should be applied. The rule also fails to specify the base or numerator that would be used to calculate the goals that would apply to each utility and to the calculation of the utility's performance relative to the goals. If weather normalized numbers are used, it may be appropriate to simply use the

[17] http://www.epa.gov/cleanenergy/documents/suca/napee_report.pdf
[18] *Ibid*., page 2-9.

> prior year's weather normalized annual energy and peak demand in order to calculate the amount of annual energy (MWhs) and annual peak demand (MWs) that correspond to the percent savings goals in each year for a particular utility.

The Commission's Response to issues raised by the parties in Comment #7 provides no response whatsoever to the additional concerns of Public Counsel raised in the above quoted paragraph. Section 536.021.6(4) requires that an order of rulemaking include "a concise summary of the state agency's findings with respect to the merits of any such testimony or comments which are opposed in whole or in part to the proposed rule…." The Commission failed to comply with this requirement. Pursuant to 536.021.7, any rule "shall be null, void and unenforceable unless made in accordance with the provisions of this section."

11. The Commission may by order direct that the operation of an order be stayed upon receipt of an application for rehearing.[19] The Commission should stay the operation of its Orders of Rulemaking until such time as it corrects the issues raised herein.

WHEREFORE, Public Counsel respectfully requests that the Commission grant rehearing of its Orders of Rulemaking and also stay the effectiveness of those Orders of Rulemaking until such time as it corrects the issues raised herein.

Respectfully submitted,

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[19] Section 386.500.3 RSMo 2000

I hereby certify that a copy of the foregoing has been emailed this 10th day of March 2011 to:

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