Robin Carnahan
Secretary of State

Administrative Rules Division
Rulemaking Transmittal Receipt

Rule ID: 12107
Date Printed: 10/4/2010
Rule Number: 4 CSR 240-3.164
Rulemaking Type: Proposed Rule
Date Submitted to Administrative Rules Division: 10/4/2010
Date Submitted to Joint Committee on Administrative Rules: 10/4/2010

Name of Person to Contact with questions concerning this rule:

Content: Harold Stearley	Phone: 2-8459	Email: harold.stearley@psc.mo.gov	Fax:
RuleDataEntry:	Phone:	Email:	Fax:

Included with Rulemaking:

Cover Letter	10/04/2010
Affidavit for public cost	10/04/2010

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Secretary of State
Administrative Rules Division

RULE TRANSMITTAL

Administrative Rules Stamp

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SECRETARY OF STATE
ADMINISTRATIVE RULES

Rule Number 4 CSR 240-3.164

Use a "SEPARATE" rule transmittal sheet for EACH individual rulemaking.

Name of person to call with questions about this rule:
Content Harold Stearley Phone 573-522-8459 FAX _____
Email address harold.stearley@psc.mo.gov

Data Entry same Phone _____ FAX _____
Email address _____

Interagency mailing address Public Service Commission, 9th Fl, Gov.Ofc Bldg, JC, MO

TYPE OF RULEMAKING ACTION TO BE TAKEN
☐ Emergency rulemaking, include effective date
☒ Proposed Rulemaking
☐ Withdrawal ☐ Rule Action Notice ☐ In Addition ☐ Rule Under Consideration
☐ Order of Rulemaking
Effective Date for the Order _____
☐ Statutory 30 days OR Specific date _____

Does the Order of Rulemaking contain changes to the rule text? ☐ NO
☐ YES—LIST THE SECTIONS WITH CHANGES, including any deleted rule text:

Small Business Regulatory Fairness Board (DED) Stamp

SMALL BUSINESS
REGULATORY FAIRNESS BOARD
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JOINT COMMITTEE ON
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ADMINISTRATIVE RULES

Missouri Public Service Commission

POST OFFICE BOX 360
JEFFERSON CITY MISSOURI 65102
573-751-3234
573-751-1847 (Fax Number)
http://www.psc.mo.gov

October 4, 2010

Honorable Robin Carnahan
Secretary of State
Administrative Rules Division
600 West Main Street
Jefferson City, Missouri 65101

Re: 4 CSR 240-3.164 Electric Utility Demand-Side Programs Filing and Submission Requirements

Dear Secretary Carnahan:

CERTIFICATION OF ADMINISTRATIVE RULE

I do hereby certify that the attached is an accurate and complete copy of the proposed rulemaking lawfully submitted by the Missouri Public Service Commission.

The Missouri Public Service Commission has determined and hereby certifies that this proposed rulemaking will not have an economic impact on small businesses. The Missouri Public Service Commission further certifies that it has conducted an analysis of whether or not there has been a taking of real property pursuant to section 536.017, RSMo 2000, that the proposed rulemaking does not constitute a taking of real property under relevant state and federal law, and that the proposed rulemaking conforms to the requirements of 1.310, RSMo Supp 2009, regarding user fees.

The Missouri Public Service Commission has determined and hereby also certifies that this proposed rulemaking complies with the small business requirements of 1.310, RSMo Supp 2009, in that it does not have an adverse impact on small businesses consisting of fewer than twenty-five full or part-time employees or it is necessary to protect the life, health, or safety of the public, or that this rulemaking complies with 1.310, RSMo Supp 2009, by exempting any small business consisting of fewer than twenty-five full or part-time employees from its coverage, by implementing a federal mandate, or by implementing a federal program administered by the state or an act of the general assembly.

Statutory Authority: Section 393.1075.11, RSMo 2000.

If there are any questions, please contact:

Morris Woodruff, Chief Regulatory Law Judge
Missouri Public Service Commission
200 Madison Street
P.O. Box 360
Jefferson City, MO 65102
(573) 751-2849
morris.woodruff@psc.mo.gov

Morris L. Woodruff
Chief Regulatory Law Judge

AFFIDAVIT

PUBLIC COST

STATE OF MISSOURI)
)
COUNTY OF COLE)

I, David Kerr, Director of the Department of Economic Development, first being duly sworn, on my oath, state that it is my opinion that the cost of proposed rule, 4 CSR 240-3.164, is less than five hundred dollars in the aggregate to this agency, any other agency of state government or any political subdivision thereof.

David W Kerr

David Kerr
Director
Department of Economic Development

Subscribed and sworn to before me this 14th day of September, 2010, I am commissioned as a notary public within the County of Cole, State of Missouri, and my commission expires on 17 JULY 2011.

Annette Kehner

Notary Public

ANNETTE KEHNER
Notary Public - Notary Seal
State of Missouri
Commissioned for Cole County
My Commission Expires: July 17, 2011
Commission Number: 07492656

Title 4 – DEPARTMENT OF ECONOMIC DEVELOPMENT
Division 240 – Public Service Commission
Chapter 3 – Filing and Reporting Requirements

PROPOSED RULE

4 CSR 240-3.164 Electric Utility Demand-Side Programs Filing and Submission Requirements

PURPOSE: This rule sets forth the information that an electric utility must provide when it seeks approval, modification or discontinuance of demand-side programs.

(1) As used in this rule, the following terms mean:

(A) Avoided cost or utility avoided cost means the cost savings obtained by substituting demand-side programs for existing and new supply-side resources. Avoided costs include avoided utility costs resulting from energy savings and demand savings associated with generation, transmission and distribution facilities. The utility shall use the same methodology used in its most recently adopted preferred resource plan to calculate its avoided costs.

(B) Baseline energy forecast means a reference end-use forecast of energy in the absence of any new demand-side programs but including the effects of naturally occurring energy efficiency and any codes and standards that were in place and known to be enacted at the time the forecast is completed.

(C) Baseline demand forecast means a reference end-use forecast of demand in the absence of any new demand-side programs but including the effects of naturally occurring energy efficiency and any codes and standards that were in place and known to be enacted at the time the forecast is completed.

(D) Demand means the rate of electric power use over an hour measured in kilowatts (kW).

(E) Demand-side portfolio or portfolio of programs means all of a utility's demand-side programs at a defined point in time.

(F) Demand-side program means any program conducted by the utility to modify the net consumption of electricity on the retail customer's side of the meter including, but not limited to, energy efficiency measures, load management, demand response, and interruptible or curtailable load.

(G) Demand-side program plan means a particular combination of demand-side programs to be delivered according to a specified implementation schedule and budget.

(H) Economic potential means energy savings and demand savings relative to a utility's baseline energy forecast and baseline demand forecast respectively resulting from customer adoption of all cost-effective measures, regardless of customer preferences.

(I) Electric utility or utility means any electric corporation as defined in section 386.020, RSMo.

(J) Energy means the total amount of electric power that is used over a specified interval of time measured in kilowatt-hours (kWh).

(K) Energy efficiency means measures that reduce the amount of electricity required to achieve a given end-use.

(L) Evaluation, measurement and verification or EM&V means the performance of studies and activities intended to evaluate the process of the utility's program delivery and oversight and

to estimate and/or verify the estimated actual energy and demand savings, utility lost revenue, cost effectiveness and other effects from demand-side programs.

(M) Lost revenue means the net reduction in utility retail revenue, taking into account all changes in costs and all changes in any revenues relevant to the Missouri jurisdictional revenue requirement, that occur when utility demand-side programs approved by the commission in accordance with 4 CSR 240-20.094 cause a drop in net retail KWh below the level used to set the electricity rates. Lost revenues are only those net revenues lost due to energy and demand savings from utility demand-side programs approved by the commission in accordance with 4 CSR 240-20.094 Demand-Side Programs and measured and verified through EM&V.

(N) Maximum achievable potential means energy savings and demand savings relative to a utility's baseline energy forecast and baseline demand forecast respectively resulting from expected program participation and ideal implementation conditions. Maximum achievable potential establishes a maximum target for demand-side savings that a utility can expect to achieve through its demand-side programs and involves incentives that represent a very high portion of total programs costs and very short customer payback periods. Maximum achievable potential is considered the hypothetical upper-boundary of achievable demand-side savings potential, because it presumes conditions that are ideal and not typically observed.

(O) Measure means any device, technology or operating procedure that makes it possible to deliver an adequate level and quality of energy service while:

1. Using less energy than would otherwise be required; or

2. Altering the time pattern of electricity so as to require less generating capacity or to allow the electric power to be supplied from more fuel-efficient units.

(P) Non-participant test (sometimes referred to as the ratepayer impact measure test or RIM test) is a measure of the difference between the change in total revenues paid to a utility and the change in total cost incurred by the utility as a result of the implementation of demand-side programs. The benefits are the avoided cost as a result of implementation. The costs consist of incentives paid to participants, other costs incurred by the utility and the loss in revenue as a result of diminished consumption. Utility costs include the costs to administer, deliver and evaluate each demand-side program.

(Q) Participant test means the test of the cost-effectiveness of demand-side programs that measures the economics of a demand-side program from the perspective of the customers participating in the program.

(R) Probable environmental cost means the expected cost to the utility of complying with new or additional environmental legal mandates, taxes or other requirements that, in the judgment of the utility decision-makers, may be imposed at some point within the planning horizon which would result in compliance costs that could have a significant impact on utility rates. The utility shall use the same methodology used in its most recently adopted preferred resource plan to calculate its probable environmental costs.

(S) Program pilot means a demand-side program designed to operate on a limited basis for evaluation purposes before full implementation.

(T) Realistic achievable potential means energy savings and demand savings relative to a utility's baseline energy forecast and baseline demand forecast respectively resulting from expected program participation and realistic implementation conditions. Realistic achievable potential establishes a realistic target for demand-side savings that a utility can expect to achieve through its demand-side programs and involves incentives that represent a moderate portion of

total program costs and longer customer payback periods when compared to those associated with maximum achievable potential.

(U) Societal cost test means the total resource cost test with the addition of societal benefits (externalities such as, but not limited to, environmental or economic benefits) to the total benefits of the total resource cost test.

(V) Staff means all commission employees, except the secretary of the commission, general counsel, technical advisory staff as defined by section 386.135 RSMo, hearing officer, or regulatory judge.

(W) Technical potential means energy savings and demand savings relative to a utility's baseline energy forecast and baseline demand forecast respectively resulting from a theoretical construct that assumes all feasible measures are adopted by customers of the utility regardless of cost or customer preference.

(X) Total resource cost test or TRC means the test of the cost-effectiveness of demand-side programs that compares the avoided utility cost plus avoided probable environmental cost to the sum of all incremental costs of end-use measures that are implemented due to the program (including both utility and participant contributions), plus utility costs to administer, deliver and evaluate each demand-side program to quantify the net savings obtained by substituting the demand-side program for supply-side resources.

(Y) Utility cost test means the test that compares the avoided utility costs to the sum of all utility incentive payments, plus utility costs to administer, deliver and evaluate each demand-side program to quantify the net savings obtained by substituting the demand-side program for supply-side resources.

(2) When an electric utility files for approval of demand-side programs or demand-side program plans as described in 4 CSR 240-20.094(3), the electric utility shall file or provide a reference to which commission case contains the following information. All models and spreadsheets shall be provided as executable versions in native format with all formulas intact:

(A) A current market potential study. The current market potential study shall use primary data and analysis for the utility's service territory. The determination of whether to conduct a market potential study for the utility's service territory or for all statewide investor-owned electric utilities shall be at the discretion of the electric utility. If the current market potential study of the electric utility that is filing for approval of demand-side programs or a demand-side program plan is part of a statewide investor-owned electric utilities market potential study, the sampling methodology shall reflect each utility's service territory and shall provide statistically significant results for that utility. The current market potential study shall be updated with primary data and analysis no less frequently than every four (4) years. To the extent that primary data for each utility service territory is unavailable or insufficient, the market potential study may also rely on or be supplemented by data from secondary sources and relevant data from other geographic regions. The current market potential study shall be prepared by an independent third party with opportunities for commission staff and stakeholder review and input in the planning stages of the analysis including review of assumptions and methodology in advance of the performance of the study, and shall include at least the following:

1. Complete documentation of all assumptions, definitions, methodologies, sampling techniques, and other aspects of the current market potential study;

2. Clear description of the process used to identify the broadest possible list of measures and groups of measures for consideration;

3. Clear description of the process used to determine technical potential, economic potential, maximum achievable potential and realistic achievable potential for a twenty (20)-year planning horizon for major end-use groups (e.g., lighting, space heating, space cooling, refrigeration, motor drives, etc.) for each customer class; and

4. Identification and discussion of the twenty (20)-year baseline energy and demand forecasts. If the baseline energy and demand forecasts in the current market potential study differ from the baseline forecasts in the utility's most recent 4 CSR 240-22 triennial compliance filing, the current market potential study shall provide a comparison of the two (2) sets of forecasts and a discussion of the reasons for any differences between the two (2) sets of forecasts. The twenty (20)-year baseline energy and demand forecasts shall account for the following:

A. Discussion of the treatment of all of the utility's customers who have opted out;

B. Changes in building codes and/or appliance efficiency standards;

C. Changes in customer combined heat and power applications; and

D. Third party and other naturally occurring demand-side savings.

(B) Demonstration of cost-effectiveness for each demand-side program and for the total of all demand-side programs of the utility. At a minimum, the electric utility shall include:

1. The total resource cost test and a detailed description of the utility's avoided cost calculations and all assumptions used in the calculation. To the extent that the portfolio of programs fails to meet the TRC test, the utility shall examine whether the failure persists if it considers a reasonable range of uncertainty in the assumptions used to calculate avoided costs;

2. The utility shall also include calculations for the utility cost test, the participant test, the non-participant test and the societal cost test; and

3. 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.

(C) Detailed description of each proposed demand-side program to include at least:

1. Customers targeted;

2. Measures included;

3. Customer incentives;

4. Proposed promotional techniques;

5. Specification of whether the program will be administered by the utility or a contractor;

6. Projected gross and net annual energy savings;

7. Proposed annual energy savings targets and cumulative energy savings targets;

8. Projected gross and net annual demand savings;

9. Proposed annual demand savings targets and cumulative demand savings targets;

10. Net-to-gross factors;

11. Size of the potential market and projected penetration rates;

12. Any market transformation elements included in the program and an EM&V plan for estimating, measuring and verifying the energy and capacity savings that the market transformation efforts are expected to achieve;

13. EM&V plan including at least the proposed evaluation schedule and the proposed approach to achieving the evaluation goals pursuant to 4 CSR 240-3.163(7) and 4 CSR 240-20.093(7);

14. Budget information in the following categories:

A. Administrative costs listed separately for the utility and/or program administrator;

B. Program incentive costs;

C. Estimated equipment costs;

D. Estimated installation costs;

E. EM&V costs; and

F. Miscellaneous itemized costs, some of which may be an allocation of total costs for overhead items such as the market potential study or the statewide technical reference manual.

15. Description of any strategies used to minimize free riders;

16. Description of any strategies used to maximize spillover; and

17. For demand-side program plans, the proposed implementation schedule of individual demand-side programs.

(D) Demonstration and explanation in quantitative and qualitative terms of how the utility's demand-side programs are expected to make progress towards a goal of achieving all cost-effective demand-side savings over the life of the programs. Should the expected demand-side savings fall short of the incremental annual demand-side savings levels and/or the cumulative demand-side savings levels used to review the utility's progress, the utility shall provide detailed explanation of why the incremental annual demand-side savings levels and/or the cumulative demand-side savings levels cannot be expected to be achieved, and the utility shall bear the burden of proof.

(E) Identification of demand-side programs which are supported by the electric utility and at least one (1) other electric or gas utility (joint demand-side programs).

(3) Designation of program pilots. For programs designed to operate on a limited basis for evaluation purposes before full implementation (program pilot), the utility shall provide as much of the information required under subsections (2)(C), through (E) as is practical and shall include explicit questions that the program pilot will address, the means and methods by which the utility proposes to address the questions the program pilot is designed to address, a provisional cost-effectiveness evaluation, the proposed geographic area and duration for the program pilot.

(4) When an electric utility files to modify demand-side programs as described in 4 CSR 240-20.094(4), the electric utility shall file a complete explanation for and documentation of the proposed modifications to each of the filing requirements in section (2). All models and spreadsheets shall be provided as executable versions in native format with all formulas intact.

(5) When an electric utility files to discontinue a demand-side program as described in 4 CSR 240-20.094(5), the electric utility shall file the following information. All models and spreadsheets shall be provided as executable versions in native format with all formulas intact:

(A) Complete explanation for the utility's decision to request to discontinue a demand-side program;

(B) EM&V reports for the demand-side program in question; and

(C) Date by which a final EM&V report for the demand-side program in question will be filed.

(6) Variances. Upon request and for good cause shown, the commission may grant a variance from any provision of this rule.

(7) Rule review. The commission shall complete a review of the effectiveness of this rule no later than four (4) years after the effective date, and may, if it deems necessary, initiate rulemaking proceedings to revise this rule.

AUTHORITY: section 393.1075.11 RSMo Supp. 2009. Original rule filed [date], effective [date].

PUBLIC ENTITY COST: This proposed rule will not cost state agencies or political subdivisions more than $500 in the aggregate.

PRIVATE ENTITY COST: This proposed rule is estimated to cost affected private entities $1,120,000 in year one, $320,000 in year two, $320,000 in year three and $1,120,000 in year four.

NOTICE TO SUBMIT COMMENTS AND NOTICE OF PUBLIC HEARING: Anyone may file comments in support of or in opposition to this proposed rule with the Missouri Public Service Commission, Steven C. Reed, Secretary of the Commission, P. O. Box 360, Jefferson City, MO 65102. To be considered, comments must be received at the Commission's offices within thirty (30) days after publication of this notice in the Missouri Register and should include a reference to Commission Case No. EX-2010-0368. Comments may also be submitted via a filing using the Commission's electronic filing and information system at http://www.psc.mo.gov/case-filing-information. A public hearing regarding this proposed rule is scheduled for Monday, December 20, 2010, at 10:00 a.m., in Room 310 of the commission's offices in the Governor Office Building, 200 Madison Street, Jefferson City, Missouri. Interested persons may appear at this hearing to submit additional comments and/or testimony in support of or in opposition to this proposed rule, and may be asked to respond to commission questions. Any persons with special needs as addressed by the Americans with Disabilities Act should contact the Missouri Public Service Commission at least ten (10) days prior to the hearing at one (1) of the following numbers: Consumer Services Hotline 1-800-392-4211 (voice) or Relay Missouri at 711.

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

DISSENTING OPINION OF COMMISSIONER TERRY M. JARRETT

The Public Service Commission ("Commission") has voted to transmit to the Secretary of State proposed rules regarding Senate Bill 376, codified at Section 393.1075, RSMo Cum. Supp. 2009, and known as the Missouri Energy Efficiency Investment Act ("MEEIA" or "Act"). MEEIA represents a positive step forward in promoting energy efficiency. However, transmitting proposed rules to the Secretary of State at this time is premature because some of the provisions are either unconstitutional or unlawful. These legal concerns should be addressed before formal rulemaking begins. Therefore, I dissent.

Portions of the proposed rules unlawfully exceed the scope of the Act and can only result in rules that are unlawful, unjust, arbitrary, and capricious. The rules as currently drafted reflect regulatory policy choices that are detrimental to electric utilities and the customers they serve – rather than enhancing the opportunities for electric utilities to develop effective energy efficiency programs as anticipated by the Act.

Following the law and promulgating rules that are within the grant of authority given to the Commission is critical to achieving the goals set out in MEEIA. Making policy choices that exceed the scope of the Act will not serve Missouri's citizens; rather, it will cause the rules implementing this important piece of energy legislation to be snarled in expensive, time-

consuming and unnecessary legal entanglements. Even worse, the proposed rules as written will not encourage electric utilities to implement energy efficiency programs.

This Commission should propose lawful rules that will not only withstand the scrutiny of notice and comment, but also JCAR and the courts of this state. The proposed rules do not.

My concerns are not limited to those items outlined here, but the issues identified below are unlawful and do not merit transmittal to the Secretary of State. Senate Bill 376 stated unequivocally that it is 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.***" Section 393.1075.3. The portions of the rules that concern me are at odds with this stated policy.

1. **Rules are not mandatory.** Section 393.1075.11 provides: "The commission shall provide oversight and ***may*** adopt rules and procedures and approve corporation-specific settlements and tariff provisions, independent evaluation of demand-side programs, as necessary, to ensure that electric corporations can achieve the goals of this section." (emphasis added). The use of the word "may" by the General Assembly means that this Commission is not required to adopt any rules. The Act is sufficient standing alone to implement its purposes. Rather than adopt rules, the Commission could choose to exercise its oversight in other proceedings, such as rate cases. It follows that if this Commission chooses to adopt rules, it should take great care to ensure that such rules do not go beyond the scope of the law. Unfortunately, the proposed rules go beyond the scope of the law in at least two important respects.

2. **Energy and demand "savings goals."** 4 CSR 240-20.094 (2)(A) and (B) establish energy and demand savings goals, increasing for each year between 2012 and 2020. Interested persons in the workshop and rulemaking process did not and cannot show that these

goals have any scientific basis or facts to support them, or are in any way relevant to Missouri's electric utilities. Instead, the percentages—by admission of the Commission staff—are based on statutory choices made in other states, rules or policy announcements. These other states do not have the same statutory or regulatory structure that we have in Missouri, so the goals do not translate to Missouri and our electric utilities.

This Commission is an agency of limited jurisdiction and authority, and the lawfulness of its actions depends entirely upon whether or not it has statutory authority to act. The General Assembly could have adopted set percentages of demand-side savings for each individual Missouri electric utility or it could have instructed the Commission to set such targets as part of its rulemaking authority (other states' statutes have done one or the other). Our General Assembly did neither. Instead, it stated simply that the programs need to be "cost-effective." There is no express or implied authority for the Commission to adopt standard savings goals in the regulations implementing MEEIA. These two subsections should be removed from the proposed rule altogether.

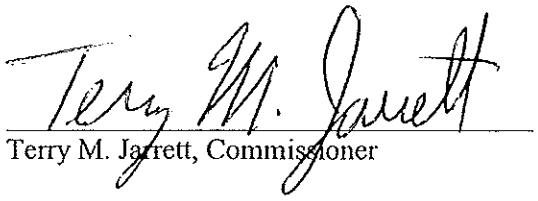
3. **Penalties.** 4 CSR 240-20.094 (2) establishes that if a participating electric utility does not meet the energy savings goals discussed above, then the electric utility may be subject to a penalty or other, undefined, adverse consequences. The Act provides no express or implied authorization for the imposition of penalties or adverse consequences; to the contrary, the Act is designed to incent electric utilities to create programs which result in decreased sales. This unlawful provision negates the positive attributes of the Act. Cost recovery and incentives fail to outweigh the wide ranging risks of incurring the penalties or adverse consequences possible from an electric utility participating under the Act. Why would an electric utility spend a large amount of money to implement an energy efficiency program when it would face the risk of a

penalty or other adverse consequences (such as negative treatment in a rate case) if arbitrary and unscientific goals are not achieved? The risk of penalties or adverse consequences stifle experimentation, creativity and innovation, three things that the Act was designed to encourage. The current language in 4 CSR 240-20.094 (2) goes beyond the Commission's statutory authority, works against the General Assembly's mandate to incent electric utilities to implement energy efficiency programs, and should be stricken from the rule.

Conclusion

The proposed rules as currently written do not enable or encourage electric utilities to achieve the purposes of the Act. They need more work to bring them into compliance with the law. Therefore, they should not be transmitted to the Secretary of State until the unlawful provisions have been removed.

Sincerely,



Terry M. Jarrett, Commissioner

Submitted this 28th day of September, 2010

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

DISSENT OF COMMISSIONER JEFF DAVIS TO PUBLISH RULES IMPLEMENTING THE MISSOURI ENERGY EFFICIENCY INVESTMENT ACT

I dissent fully with my colleagues in the reasoning and decision to transmit the proposed "energy efficiency" rules to the Secretary of State. My disagreement is not with what my colleagues are trying to do, but with the way they are going about it.

There are three major issues with regard to this rulemaking: (1) the presence of "energy and demand 'savings goals'" in 4 CSR 240-20.094(2)(A) and (B); (2) the penalty language prescribed in 4 CSR 240-20.094(2); and (3) the legality of the cost recovery mechanism.

I. The discussion of energy and demand savings goals...

With regard to the energy and demand "savings goals" outlined in 4 CSR 240 20.094(2)(A) and (B), it is my opinion that these goals are not supported by competent and substantial evidence.

I am not opposed to this Commission establishing energy and demand savings goals. I must oppose adopting a standard based on the standards set by other states around us without competent and substantial evidence adduced in the hearing process to support the goals we have adopted and further approving language that could be used to penalize utilities for failure to meet those targets beginning in 2012.

When establishing goals of this nature and attaching a penalty thereto for non-compliance, we need to take evidence in support of those goals and the parties supplying that evidence need to be subject to cross-examination. A one-size fits all goal might be fine for an entity like the state of Missouri, but it may not be feasible for an individual utility. A wide range of factors, especially weather, can affect a utility's ability to meet these goals. An evidentiary hearing would be the only way to get to the truth of the matter by establishing an appropriate record on which standards could be based. Now, utilities are going to be put in the unenviable task of having to prove themselves innocent in front of the Commission if they are unable to comply with goals established without hearing or evidence, but they'll sure "sound good" when we read them in the newspaper.

Of equal or even greater concern to me is the stakeholder process by which the PSC Staff assembled these rules. More interest groups and parties are intervening in PSC cases and taking positions in rulemakings than ever before. Public concern for the environment and rising rates in a weak economy is understandable, but we also have to be wary that many of these special interest groups have their own agendas that include selling products and services as well as achieving certain environmental goals that are not necessarily aligned with keeping the rates low or the lights on.

Throughout the stakeholder process in developing these rules, the utilities did not appear to be on equal footing with the other stakeholder groups. As an observer of the process, it was my impression that all a stakeholder had to do to get something in the rule was convince a majority of the other stakeholders to vote with them. The effect is to send the wrong message to intervenors and participants – just get a bunch of your

buddies to come in, support your position no matter how absurd it may be and you'll get something out of the deal.

That's my impression of what happened here. When the utilities opposed a proposal, the PSC Staff would attempt to split the difference between the two factions. The PSC Staff is in a tough spot and performed admirably in this regard, but the problem is the same one that has been manifesting itself in rate cases for the last several years – "splitting the difference" between two positions often causes parties to take increasingly outrageous positions in an effort to gain a more favorable outcome.

It's important to remember that utilities are the ones responsible for keeping the lights on and delivering heat to people's homes. As such, they are not entitled to preferential treatment by this Commission; however, they should be entitled to due process including the ability to present evidence and cross-examine witnesses regarding the goals we are setting for them.

Several parties were quick to point out that there is a wealth of information on this issue available, but other than comparing what is being published to what other states have enacted, there was no evidence in the record to support the goals being transmitted to the Secretary of State for publication are appropriate for the affected utilities. Further, there is no support whatsoever for the language contained in Sections 4 CSR 240-20.094(2)(A)(9) and (2)(B)(9) that contain annual default percentage goal reductions after the year 2020.

In conclusion, I am fine with setting goals for energy and demand savings by the respective utilities, but they need to be based on this Commission's findings and not findings in another state. Those goals should be established in an actual case here at

the PSC where all interested parties have an opportunity to have witnesses present evidence under oath and be subject to cross-examination. It is the only way to know whether we're getting truly honest answers from the parties. Anything less than that, particularly where there are penalties attached, is arbitrary and capricious.

II. Penalties for failure to comply with Section 4 CSR 240-20.094(2):

Section 4 CSR 240-20.094(2) states in pertinent part:

> The fact that the electric utility's demand-side programs do not meet the incremental or cumulative annual demand-side savings goals established in this section may impact the utility's DSIM revenue requirement but is not by itself sufficient grounds to assess a penalty or adverse consequence for poor performance.

Alternatively, I read this sentence to say: "The fact that the electric utility's demand-side programs do not meet the incremental or cumulative annual demand-side savings goals established in this section may be combined with any other factor to assess a penalty or impose adverse consequences on a utility for performance."

I was shocked and troubled that no utility offered any comment on this last-minute piece of wordsmithing. Arguably, the language is better than some of the other language that was proposed; however, it still leaves much to be desired.

It is important to remember that the PSC is a creature of statute and the case law is clear our powers are only those expressly conferred or clearly implied by statute. Section 393.1075 does not give us the authority to establish demand reduction and energy savings goals. Arguably, we might have that authority under other sections of law, but those sections are not being cited in this case. More importantly, Section 393.1075 contains no support for "penalties" or "adverse consequences."

Section 393.1075 contains only one reference to any kind of penalty that can be imposed pursuant to the statute. In Section 393.1075.14(3), the statute provides "The penalty for a customer who provides false documentation under subdivision (2) of this subsection shall be a class A misdemeanor." The express language of this provision emphasizes the point that if the legislature had wanted to penalize utilities for failing to comply with this act, they had ample opportunity to do so and affirmatively chose not to act.

Further, this language is inconsistent with the positive language used by the Missouri General Assembly in Section 393.1075.3, which states the purpose of the legislation:

> **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.**

One must presume the legislature knew what it was doing when enacting this law. This section clearly lays out the purpose of the act and clearly emphasizes positive financial incentives for utilities: "timely cost recovery," "ensuring that utility financial incentives are aligned with helping customers" and "provid[ing] timely earnings opportunities." The use of the term "incentives" by the General Assmebly evidences the

fact that they know how to provide "incentives" as well as "disincentives", but for whatever reason did not provide any disincentives for failure to act by the utility itself, probably because the act is in and of itself voluntary in nature.

Section 393.1075.4 further evidences the lack of a mandate for any kind of Commission-imposed penalty language by stating "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." Had the legislature wanted to require electric utilities to implement demand response programs, they would have made the language mandatory for the electric utilities to offer such programs instead of being permissive.

Thus, in addition to having "goals" not supported by competent and substantial evidence, we have an unlawful provision containing a "penalty" or "adverse consequence." The only penalty authority we have is that expressly given us in Section 386.570 and any reference to the contrary should be removed.

III. Questions Regarding Cost Recovery:

From the consumer perspective, the most hotly contested issue in this rulemaking is the presence of the cost recovery language. Section 393.1075.3(1) unequivocally states that the commission shall provide utilities with "timely cost recovery" in support of valuing demand-side utility investments equal to traditional investments in supply and delivery infrastructure.

What does "timely cost recovery" mean? Here, the dispute is not over the concept of "cost recovery," but what is "timely" in the context of cost recovery? Consumer advocates argued we are somehow violating the Supreme Court's ban on single-issue ratemaking. The electric utilities would have preferred a surcharge mechanism similar to the "Infrastructure System Replacement Surcharge" (ISRS) used by gas utilities and one water company in St. Louis County. In the end, the Commission did include cost recovery language patterned after the fuel adjustment surcharge.

This is one part of the rule that I actually support. I would have preferred the ISRS approach because it would have provided the utilities with more timely cost recovery, but I can live with it going forward and did not find the briefs of the opposing parties persuasive on the single-issue ratemaking point.

To me, this issue hinges on the definition of the word "timely." The word is not defined by case law, statute or rule, so we're left with the Canons of Statutory Construction. The Canons say to give words their plain and ordinary meaning as found in the dictionary. Merriam-Webster's On-line Dictionary offered several definitions of the word "timely." When using the term as an adjective as used by the legislature in this case, two definitions jumped off the page: "coming early or at the right time" and "appropriate under the circumstances."

As the legislature is often want to do, they have given the PSC wide latitude to decide how best to implement their directive. In this case, we've been instructed to phase in cost recovery for programs approved pursuant to Section 393.1075. Had they

wanted us to implement these charges in a rate case proceeding or by a tariff filing, they could have said so either expressly or implicitly. They didn't.

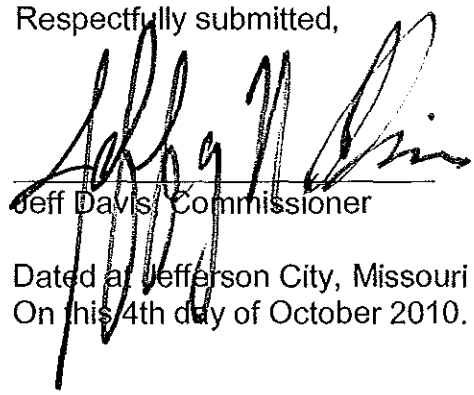
All relevant factors have to be considered in setting rates that are both just and reasonable. That being said I didn't find anything filed by the consumer advocates in this case to be persuasive on their point that what the Commission has done constitutes single-issue ratemaking. Likewise, I was not persuaded by the arguments of Ameren UE (now Ameren Missouri) and other parties in that company's previous rate case that in order to consider all relevant factors you have to spend eleven months analyzing three rounds of pre-filed testimony, two weeks of live testimony and two or three more rounds of briefings with an update to consider all relevant factors. Thus, based on the comments provided so far in this proceeding, I can find no evidence to persuade me that the Commission's chosen method of cost recovery in this rulemaking is unlawful. It's simply not the mechanism I would have chosen and I have grave concerns that removing these provisions would, in fact, violate Section 393.1075.3(1), which states the Commission "shall provide timely cost recovery for utilities" when approving these programs.

IV. Conclusion:

For the reasons set out above, I dissent with the Commission's decision to send these rules to the Secretary of State for publication. We should strip out the goals and have real proceedings for each of the affected utilities to determine what their energy and demand savings goals are. The penalty language associated with these goals is inconsistent with the statute and should be removed. Finally, the rate adjustment

mechanism used to implement these programs appears to be lawful, although not my favorite. "Timely cost recovery" is not meant to be instantaneous, but it shouldn't take11 months or longer as some parties have suggested.

Respectfully submitted,



Jeff Davis, Commissioner

Dated at Jefferson City, Missouri
On this 4th day of October 2010.

FISCAL NOTE
PRIVATE COST

I. **Department Title:** **Missouri Department of Economic Development**
Division Title: **Missouri Public Service Commission**
Chapter Title: **Chapter 3 - Filing and Reporting Requirements**

Rule Number and Title:	4 CSR 240-3.164 Electric Utility Demand-Side Programs Filing and Submission Requirements
Type of Rulemaking:	Proposed Rule

II. SUMMARY OF FISCAL IMPACT

Estimate of the number of entities by class which would likely be affected by the adoption of the rule:	Classification by types of the business entities which would likely be affected:	Estimate in the aggregate as to the first year cost of compliance with the rule by the affected entities:	Estimate in the aggregate as to the cost of compliance with the rule by the affected entities (years 2-4):
4	Investor-owned electric utilities	$1,120,000	$1,760,000

III. WORKSHEET

1. Estimated aggregate cost of compliance is based on information provided by the four (4) investor-owned electric utilities.
2. The estimated aggregate cost to Missouri electric utilities is provided for the first four (4) years as the rule contains language stating that the commission shall complete a review of the effectiveness of this rule no later than four (4) years after the effective date of this rule.
3. 2010 dollars were used to estimate costs. No adjustment for inflation is applied.

IV. ASSUMPTIONS

If adopted, this proposed rule (along with proposed rules 4 CSR 240-3.163, 4 CSR 240-20.093 and 4 CSR 240-20.094) will enact the provisions of the Missouri Energy Efficiency Investment Act established by SB 376 (2009).

This rule sets forth the information that an electric utility must provide when it seeks approval, modification or discontinuance of demand-side programs.

1. Kansas City Power and Light Company and KCP&L Greater Missouri Operations Company (KCPL/GMO) stated that the estimated fiscal impact includes costs associated with implementation of SB 376 excluding program costs of the demand-side programs. It is expected that the programs will be those programs

defined in the company's Integrated Resource Plan filing made with the Missouri Public Service Commission. Costs attributable to this rule include a market potential study with primary data updated at least every four (4) years, analytics for programs, and Evaluation, Measurement and Verification (EM&V). In addition, KCPL/GMO anticipates the need for four (4) additional FTE.

2. Empire District Electric Company stated that they are providing a conservative estimate for the implementation of SB 376 as it relates to the Proposed Rule 4 CSR 240-3.164. Costs attributable to this rule include a potential study, benefit cost analysis and program development, and defense of demand-side savings levels achieved.

3. AmerenUE estimated that 100% of their costs related SB 376 should be applied to the Proposed Rule 4 CSR 240-20.094. However, AmerenUE notes that there will be additional costs in the programming, legal, accounting and regulatory departments that are hard to quantify at this time. AmerenUE will have to make additional filings, develop accounting systems and an additional line item will need to be placed on the post card bill.

Small Business Regulatory Fairness Board
Small Business Impact Statement

Date: 08-31-2010

Rule Number: 4 CSR 240-3.164

Name of Agency Preparing Statement: Public Service Commission

Name of Person Preparing Statement: Martha Wankum

Phone Number: 573-751-5803

Email: Martha.Wankum@psc.mo.gov

Name of Person Approving Statement:

Please describe the methods your agency considered or used to reduce the impact on small businesses *(examples: consolidation, simplification, differing compliance, differing reporting requirements, less stringent deadlines, performance rather than design standards, exemption, or any other mitigating technique).*

Not applicable, no small businesses impacted. Only directly impacts the four investor-owned utility companies in the state.

Please explain how your agency has involved small businesses in the development of the proposed rule.

Not applicable, no small businesses impacted. Only directly impacts the four investor-owned utility companies in the state. However, the MoPSC held three stakeholder workshops where any interested entity could participate in the process.

Please list the probable monetary costs and benefits to your agency and any other agencies affected. Please include the estimated total amount your agency expects to collect from additionally imposed fees and how the moneys will be used.

This proposed rule will not cost state agencies or political subdivisions more than $500 in the aggregate.

No additional fees will be collected specifically associated with this rulemaking.

Please describe small businesses that will be required to comply with the proposed rule and how they may be adversely affected.

Not applicable, no small businesses impacted. Only directly impacts the four investor-owned utility companies in the state.

Please list direct and indirect costs (in dollars amounts) associated with compliance.

Not applicable, no small businesses impacted. Only directly impacts the four investor-owned utility companies in the state.

Please list types of business that will be directly affected by, bear the cost of, or directly benefit from the proposed rule.

The four investor-owned electric utilities in the state.

Does the proposed rule include provisions that are more stringent than those mandated by comparable or related federal, state, or county standards?
Yes___ No_X_

If yes, please explain the reason for imposing a more stringent standard.

For further guidance in the completion of this statement, please see §536.300, RSMo.