

In the Matter of the Consideration and Implementation)
of Section 393.1075, the Missouri Energy Efficiency) **File No. EX-2010-0368**
Investment Act)

COMES NOW Kansas City Power & Light Company (“KCP&L”), and KCP&L Greater
 Missouri Operations Company (“GMO”)(collectively “the Companies”) and hereby
 respond to the pleadings filed by various parties on September 7, 2010, including the *Staff*
Issue and Concern, Public Counsel’s Response To Order Directing Filing,
Response Of The Missouri Industrial Energy Consumers To Order Directing Filing, and
Response Of Legal Issues And Concerns Of MDNR, NRDC, GRELC, Renew Missouri . For their
 memorandum and response addressing various lists of issues and concerns raised by these
 participants, the Companies state as follows:

1. On September 7, 2010, several participants, including the Commission Staff, Office of the Public Counsel, Missouri Industrial Energy Consumers and MDNR, NRDC, Great Rivers Environmental Law Center, and Renew Missouri filed various pleadings that identified lists of issues and concerns related to the Commission’s latest draft rules to implement Section 393.1075 (“*The Missouri Energy Efficiency Act*”)(hereafter “*MEEA*”)

2. KCP&L and GMO have previously participated in the workshop docket, File No. EW-2010-0187 and filed pleadings addressing legal issues and concerns related to the proposed rules. However, at this stage of the proceedings, KCP&L and GMO wish to more specifically address the following two issues raised by the various participants in their

September 7th pleadings:

A. Does the *MEEIA* authorize cost-recovery outside a general rate case, as presently authorized by draft rule 4 CSR 240-20.093(4)?

B. Does the *MEEIA* authorize the recovery of lost revenues, as presently authorized by draft rule 4 CSR 240-20.093(1)(M)(4) and (2)(E) & (G)?

3. As explained herein, KCP&L and GMO strongly believe that these questions should be answered affirmatively.

**MEMORANDUM IN SUPPORT OF PORTIONS
OF PROPOSED DRAFT RULE**

A. The MEEIA Authorizes Cost-Recovery Outside A General Rate Case

In a decision affirming the lawfulness of the Purchased Gas Adjustment Clause (“PGA”), the Missouri Court of Appeals discussed the standard for determining whether the Commission has the statutory authority to utilize cost recovery mechanisms outside the context of rate cases:

Chapter 386 of the Missouri statutes provides for the creation of a Public Service Commission, or PSC, to regulate the operation of electric, gas and other utilities within the state. The basic powers and duties of the PSC are set forth in Chapter 393 of the Missouri statutes. As is evident from a review of this Chapter, the legislature has set out only the basic rules governing the PSC's regulation of gas and other utilities, and has left the details of that regulation to the PSC. Although the discretion granted to the PSC is thus broad, and does not specifically limit the PSC to use of a general rate case procedure as the only means of fixing utility rates, alternative methods of regulation adopted by the PSC must still fit within the parameters established by Section 393 and related statutes.

See State ex rel. Midwest Gas Users Association v. Public Service Commission, 976 S.W.2d 470, 477 (Mo.App. 1989).

Section 393.1075 of MEEIA provides that the policy of the state of Missouri is to value demand-side investments equal to traditional investments in supply and delivery infrastructure. The statute mandates that the Commission provide timely cost recovery for utilities as well as timely earnings opportunities associated with cost-effective measurable and verifiable efficiency savings. In particular, Section 393.1075(3) provides the explicit policy mandates underlying MEEIA when it states:

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. 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. (*Emphasis added*)

The Commission has developed methods to allow public utilities recovery of costs between rate cases for supply and delivery investments. Examples include the Fuel Adjustment Clause, Environmental Cost Recovery Mechanism, and the Purchased Gas Adjustment Clause for natural gas companies. Thus, if demand-side investments are to be treated equally to traditional investments in supply and delivery infrastructure, the statute requires that the Commission develop regulatory programs for timely recovery of demand-side investment costs between rate cases.

As for the details of how the Commission accomplishes its mandate, the MEEIA gives the Commission wide discretion. Section 5 of MEEIA provides the Commission with the authority to develop cost recovery mechanisms to encourage investments in demand-side

programs:

5. To comply with this section the commission may develop cost recovery mechanisms to further encourage investments in demand-side programs including, in combination and without limitation: capitalization of investments in and expenditures for demand-side programs, rate design modifications, accelerated depreciation on demand-side investments, and allowing the utility to retain a portion of the net benefits of a demand-side program for its shareholders. (*Emphasis added*)

The statute lists certain examples of regulatory practices which could be used by the Commission to encourage investments in demand-side programs, but it does not limit the Commission to the listed practices. Under this section, the Commission may authorize Demand-Side Program Investment Mechanisms (“DSIM”) that allow for rate adjustments between rate cases to ensure timely recovery of the associated costs of the programs.

While in recent years there have been frequent electric rate cases in Missouri, in the more distant past, electric companies went years between filing rate cases. If the Commission is to meet the mandates of the MEEIA statute under an environment with less frequent rate cases, it will need to have a mechanism, such as the DSIM it has included in the draft rule, to allow for timely recovery of the costs between major rate cases. KCP&L and GMO believe that the Commission has the statutory authority and discretion it needs to permit timely recovery of DSM costs between rate cases.

B. The MEEIA Authorizes Recovery Of Lost Revenues

Similarly, the MEEIA authorizes the Commission to include lost revenues in the DSIM as a mechanism to ensure that the Commission meets the mandated goals and purposes of MEEIA. The MEEIA mandates that the Commission adopt a DSIM mechanism that “[e]nsures 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.” Section 393.1075(3)(2). Following this statutory mandate, the Commission should modify its regulatory policies to align utility incentives with the delivery of cost-effective energy efficiency and modify ratemaking practices to promote energy efficiency investments.

As explained in “*Making The Business Of Energy Efficiency Both Scalable And Sustainable*,”¹ it is critically important that lost revenues are recovered to meet this goal:

Given the structure of today’s electric rates, recovery of the lost revenues to cover fixed costs (including earnings or profits for investor-owned utilities) due to the energy-efficiency induced drop in electricity sales is important. Otherwise utilities have limited incentives to invest significantly in energy efficiency. Regulated utilities typically recover their fixed costs based on a throughput formula. Therefore, if sales fall below the estimated levels used to set rates, the utility will not collect sufficient revenue to match its revenue requirement (a combination of fixed and variable costs including approved earnings) and fixed costs may not be totally recovered. In such cases, the component of fixed costs that will decline is typically a utility’s earnings or profits; hence, recovery of lost revenue is sometimes called “lost margin” or “lost profit” recovery.

As also detailed in “*National Action Plan for Energy Efficiency*,”² it is also critically important that regulation play a key role in addressing these issues:

There are real financial disincentives that hinder all utilities in their pursuit of energy efficiency as a resource, even when it is cost-effective and would lead to a lower cost energy system. Regulation, which is a key source of these disincentives, can be modified to remove these barriers.

Unless a utility’s lost revenues are included in the DSIM or other recovery mechanism, there will always be a financial bias against fully utilizing demand-side management programs that result in the reduction of a utility’s revenues. As a result, the mandates of MEEIA will not be met. Therefore, if MEIAA’s statutory mandates are to be achieved, then lost revenues must be included in the recovery mechanism and recovered in a

¹L. Wood & R. Risser, “*Making The Business Of Energy Efficiency Both Scalable And Sustainable*,” Energy Security Initiative at Brookings, Policy Brief 09-01, p. 5 (April 2009)

²The U.S. Department of Energy and U.S. Environmental Protection Agency, “*National Action Plan for Energy Efficiency*,” p. 2-16 (June 2006)

timely manner.

WHEREFORE, KCP&L and GMO respectfully request that the Commission accept for filing this pleading as its legal memorandum in response to the Commission's Order Directing Filing which was issued on August 25, 2010.

Respectfully submitted,

/s/James M. Fischer

James M. Fischer, MO Bar # 27543

FISCHER & DORITY, P.C.

101 Madison Street, Suite 400

Jefferson City, MO 65101

Tele: (573) 636-6758

Fax: (573) 0383

jfischerpc@aol.com

Roger W. Steiner, MO Bar #39586

Kansas City Power & Light Company

1200 Main Street, 16th Floor

Kansas City, Missouri 64105

Telephone: (816) 556-2791

Facsimile: (816) 556-2992

[E-mail: Roger.Steiner@KCPL.com](mailto:Roger.Steiner@KCPL.com)

**ATTORNEYS FOR KANSAS CITY POWER
& LIGHT COMPANY AND KCP&L
GREATER MISSOURI OPERATIONS
COMPANY**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served either by electronic mail or by first class mail, postage prepaid, on this 14th day of September, 2010 to counsel for all parties on the Commission's service list in this docket.

/s/James M. Fischer

James M. Fischer