Robin Carnahan
Secretary of State

Administrative Rules Division
Rulemaking Transmittal Receipt

Rule ID: 12108
Date Printed: 10/4/2010
Rule Number: 4 CSR 240-20.093
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 240-20.093

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 240-20.093 Demand-Side Programs Investment Mechanisms

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: Sections 393.1075.11 and 393.1075.15, 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 240-20.093, is less than five hundred dollars in the aggregate to this agency, any other agency of state government or any political subdivision thereof.

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.

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 20 – Electric Utilities

PROPOSED RULE

4 CSR 240-20.093 Demand-Side Programs Investment Mechanisms

PURPOSE: This rule allows the establishment and operation of Demand-Side Programs Investment Mechanisms (DSIM), which allow periodic rate adjustments related to recovery of costs and utility incentives for investments in demand-side programs.

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

(A) Annual demand savings target means the annual demand savings level approved by the commission at the time of each demand-side program's approval in accordance with 4 CSR 240-20.094(3)(A). Annual demand-side savings targets are the baseline for determining the utility's demand-side programs' annual demand savings performance levels in the methodology for the utility incentive component of a DSIM.

(B) Annual energy savings target means the annual energy savings level approved by the commission at the time of each demand-side program's approval in accordance with 4 CSR 240-20.094(3)(A). Annual energy savings targets are the baseline for determining the utility's demand-side programs' annual energy savings performance levels in the methodology for the utility incentive component of a DSIM.

(C) Annual net shared benefits means the utility's avoided costs measured and documented through EM&V reports for approved demand-side programs less the sum of the programs' costs including design, administration, delivery, end-use measures, incentives, EM&V, utility market potential studies and technical resource manual on an annual basis.

(D) Annual report means a report of information concerning a utility's demand-side programs having the content described in 4 CSR 240-3.163(5).

(E) Approved demand-side program means a demand-side program or demand-side program pilot which is approved by the commission in accordance with 4 CSR 240-20.094 Demand-Side Programs.

(F) Avoided cost or avoided utility 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 cost savings and demand cost 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.

(G) Baseline demand forecast means a reference forecast of summer and winter demand at the class level 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.

(H) Baseline energy forecast means a reference forecast of energy at the class level 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.

(I) Cost recovery component of a DSIM means the methodology approved by the commission in a demand-side program approval proceeding to allow recovery of costs of approved demand-side programs with interest.

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

(K) Demand response means measures that decrease peak demand or shift demand to off-peak periods.

(L) 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.

(M) Demand-side programs investment mechanism or DSIM means a mechanism approved by the commission in a utility's filing for demand-side program approval to encourage investments in demand-side programs. The DSIM may include, in combination and without limitation:

1. Cost recovery of demand-side program costs through capitalization of investments in demand-side programs;
2. Cost recovery of demand-side program costs through a demand-side program cost tracker;
3. Accelerated depreciation on demand-side investments;
4. Recovery of lost revenues; and
5. Utility incentive based on the achieved performance level of approved demand-side programs.

(N) DSIM cost recovery revenue requirement means the revenue requirement approved by the commission in a utility's filing for demand-side program approval proceeding or a semi-annual DSIM rate adjustment case.

(O) DSIM rate means the charge on customers' bills for the portion of the DSIM revenue requirement assigned by the Commission to a rate class.

(P) DSIM revenue requirement means the sum of the DSIM cost recovery revenue requirement, DSIM utility lost revenue requirement and the DSIM utility incentive revenue requirement, if allowed by the Commission in utility's last filing for demand-side program approval.

(Q) DSIM utility incentive revenue requirement means the revenue requirement approved by the commission in a utility's filing for demand-side program approval proceeding to provide the utility with a portion of annual net shared benefits based on the achieved performance level of approved demand-side programs demonstrated through energy and demand savings measured and documented through EM&V reports compared to energy and demand savings targets.

(R) DSIM utility lost revenue requirement means the component of the utility's revenue requirement explicitly approved (if any) by the commission in a utility's filing for demand-side program approval proceeding to address the recovery of lost revenue.

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

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

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

(V) 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.

(W) General rate proceeding means a general rate increase proceeding or complaint proceeding before the commission in which all relevant factors that may affect the costs or rates and charges of the electric utility are considered by the commission.

(X) 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 delivered to jurisdictional customers 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.

(Y) 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.

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

(AA) 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.

(BB) Statewide technical reference manual means a document that is used by electric utilities to assess energy savings and demand savings attributable to energy efficiency and demand response.

(CC) Total resource cost test or TRC means the test of the cost-effectiveness of demand-side programs that compares the avoided utility costs and 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.

(DD) Utility incentive component of a DSIM means the methodology approved by the commission in a utility's demand-side program approval proceeding to allow the utility to receive a portion of annual net shared benefits achieved and documented through EM&V reports.

(EE) Utility market potential study means an evaluation and report by an independent third party of the energy savings and demand savings available in a utility's service territory broken down by customer class and major end-uses within each customer class.

(2) Applications to establish, continue, or modify a DSIM. Pursuant to the provisions of this rule, 4 CSR 240-2.060, and section 393.1075, RSMo, an electric utility shall file an application with the commission to establish, continue or modify a DSIM in a utility's demand-side program approval proceeding.

(A) The electric utility shall meet the filing requirements in 4 CSR 240-3.163(2) in conjunction with an application to establish a DSIM and 4 CSR 240-3.163(3) in conjunction with an application to continue or modify a DSIM.

(B) Any party to the application for demand-side program approval proceeding may support or oppose the establishment, continuation or modification of a DSIM and/or may propose an alternative DSIM for the commission's consideration including but not limited to modifications to any electric utility's proposed DSIM.

(C) The commission shall approve the establishment, continuation or modification of a DSIM and associated tariff sheets if it finds the electric utility's approved demand-side programs are expected to result in energy and demand savings and are beneficial to all customers in the customer class in which the programs are proposed, regardless of whether the programs are utilized by all customers and will assist the commission's efforts to implement state policy contained in section 393.1075, RSMo to:

1. Provide the electric utility with timely recovery of all reasonable and prudent costs of delivering cost-effective demand-side programs;

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/or verifiable energy and demand savings.

(D) In addition to any other changes in business risk experienced by the electric utility, the commission shall consider changes in the utility's business risk resulting from establishment, continuation or modification of the DSIM in setting the electric utility's allowed return on equity in general rate proceedings.

(E) In determining to approve, modify, or continue a DSIM, the commission shall consider, but is not limited to only considering, the expected magnitude of the impact of the utility's approved demand-side programs on the utility's costs, revenues and earnings, the ability of the utility to manage all aspects of the approved demand-side programs, the ability to measure and verify the approved program's impacts, any interaction among the various components of the DSIM that the utility may propose, and the incentives or disincentives provided to the utility as a result of the inclusion or exclusion of cost recovery component, utility lost revenue component and/or utility incentive component in the DSIM.

(F) Any cost recovery component of a DSIM shall be based on costs of demand-side programs approved by the commission in accordance with 4 CSR 240-20.094 Demand-Side Programs. Indirect costs associated with demand-side programs, including but not limited to costs of utility market potential study and/or utility's portion of statewide technical reference manual, shall be allocated to demand-side programs and thus shall be eligible for recovery through an approved DSIM. The commission shall order any DSIM approval simultaneously with the programs approved in accordance with 4 CSR 240-20.094 or in a semi-annual DSIM rate adjustment case.

(G) Any utility lost revenue component of DSIM shall be based on energy or 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.

1. The commission shall order any DSIM utility lost revenue requirement simultaneously with the programs approved in accordance with 4 CSR 240-20.094.

2. In a utility's demand-side program approval proceeding in which lost revenues are considered there is no requirement for any implicit or explicit lost revenue recovery or for a particular form of lost revenue component.

3. The commission may address lost revenues solely or in part, directly or indirectly, with a performance incentive mechanism.

4. Any explicit lost revenue component of DSIM shall be implemented on a retrospective basis and all energy and demand savings for claimed lost revenues must be measured and verified through EM&V prior to recovery.

(H) Any utility incentive component of a DSIM shall be based on the performance of demand-side programs approved by the commission in accordance with 4 CSR 240-20.094 Demand-Side Programs and shall include a methodology for determining the utility's portion of annual net shared benefits achieved and documented through EM&V reports for approved demand-side programs. Each utility incentive component of a DSIM shall define the relationship between the utility's portion of annual net shared benefits achieved and documented through EM&V reports, annual energy savings achieved and documented through EM&V reports as a percentage of annual energy savings targets, and annual demand savings achieved and documented through EM&V reports as a percentage of annual demand savings targets.

1. Annual energy and demand savings targets approved by the commission for use in the DSIM utility incentive component are not necessarily the same as the incremental annual energy and demand savings goals and cumulative annual energy and demand savings goals specified in 4 CSR 240-20.094(2).

2. The commission shall order any DSIM utility incentive revenue requirement simultaneously with the programs approved in accordance with 4 CSR 240-20.094.

(I) If the DSIM proposed by the utility includes adjustments to DSIM rates between general rate proceedings, the DSIM shall include a provision to adjust the DSIM rates every six (6) months to include a true-up for over- and under-collection of the DSIM revenue requirement as well as the impact on the DSIM cost recovery revenue requirement as a result of approved new, modified or deleted demand-side programs.

(J) If the commission approves a DSIM utility incentive component, such utility incentive component shall be binding on the commission for the entire term of the DSIM, and such DSIM shall be binding on the electric utility for the entire term of the DSIM, unless otherwise ordered or conditioned by the commission when approved.

(K) The Commission shall apportion the DSIM revenue requirement to each customer class.

(3) Application for discontinuation of a DSIM. The commission shall allow or require a DSIM to be discontinued or any component of a DSIM to be discontinued only after providing the opportunity for a hearing.

(A) The electric utility shall meet the filing requirements in 4 CSR 240-3.163(4).

(B) Any party to the demand-side program approval proceeding may oppose the discontinuation of a DSIM or any component of a DSIM.

(C) In addition to any other changes in business risk experienced by the electric utility, the commission may take into account any change in business risk to the electric utility resulting from discontinuance of the DSIM in setting the electric utility's allowed return on equity in a general rate proceeding.

(D) If the utility requests that cost recovery be discontinued, in its notice to customers, the electric utility shall include a commission-approved description of why it believes the cost recovery component of the DSIM should be discontinued.

(4) Requirements for semi-annual adjustments of DSIM rates, if the commission approves adjustments of DSIM rates between general rate proceedings. Semi-annual adjustments to DSIM rates between general rate proceedings shall only include adjustments to the DSIM cost recovery revenue requirement and shall not include any adjustments to the DSIM utility lost revenue requirement or the DSIM utility incentive revenue requirement. Adjustments to the DSIM cost recovery revenue requirement may reflect new and approved demand-side programs, approved program modifications and/or approved program discontinuations. When an electric utility files tariff sheets to adjust its DSIM rates between general rate proceedings, the staff shall examine and analyze the information filed by the electric utility in accordance with 4 CSR 240-3.163(8) and additional information obtained through discovery, if any, to determine if the proposed adjustments to the DSIM cost recovery revenue requirement and DSIM rates are in accordance with the provisions of this rule, section 393.1075, RSMo and the DSIM established, modified or continued in the most recent demand-side program approval proceeding. The staff shall submit a recommendation regarding its examination and analysis to the commission not later than thirty (30) days after the electric utility files its tariff sheets to adjust its DSIM rates. If the adjustments to the DSIM cost recovery revenue requirement and DSIM rates are in accordance with the provisions of this rule, section 393.1075, RSMo, and the DSIM established, modified or continued in the most recent demand-side program approval proceeding, the commission shall issue an interim rate adjustment order approving the tariff sheets and the adjustments to the DSIM rates shall take effect sixty (60) days after the tariff sheets were filed. If the adjustments to the DSIM cost recovery revenue requirement and DSIM rates are not in accordance with the provisions of this rule, section 393.1075, RSMo, or the DSIM established, modified or continued in the most recent demand-side program approval proceeding, the commission shall reject the proposed tariff sheets within sixty (60) days of the electric utility's filing and may instead order the filing of interim tariff sheets that implement its decision and approval.

(A) An electric utility with a DSIM shall file to adjust its DSIM rates once every six (6) months.

(B) The semi-annual adjustments to the DSIM rates shall reflect a comprehensive measurement of both increases and decreases to the DSIM cost recovery revenue requirement established in the most recent demand-side program approval proceeding or semi-annual DSIM rate adjustment case plus the change in DSIM cost recovery revenue requirement which occurred since the most recent demand-side program approval proceeding or semi-annual DSIM rate adjustment case.

(C) The electric utility shall be current on its submission of its Surveillance Monitoring Reports as required in section (9) and its annual reports as required in section (8) in order to increase the DSIM rates.

(D) If the staff, Public Counsel or other party receives information which has not been submitted in compliance with 4 CSR 240-3.163(8), it shall notify the electric utility within ten (10) days of the electric utility's filing of an application or tariff sheets to adjust DSIM rates and identify the information required. The electric utility shall submit the information identified by the party, or shall notify the party that it believes the information submitted was in compliance with the requirements of 4 CSR 240-3.163(8), within ten (10) days of the request. A party who

notifies the electric utility it believes the electric utility has not submitted all the information required by 4 CSR 240-3.163(8) and as ordered by the commission in a previous proceeding and receives notice from the electric utility that the electric utility believes it has submitted all required information may file a motion with the commission for an order directing the electric utility to produce that information, i. e., a motion to compel. While the commission is considering the motion to compel, the processing timeline for the adjustment to increase DSIM rates shall be suspended. If the commission then issues an order requiring the information be submitted, the time necessary for the information to be submitted shall further extend the processing timeline for the adjustment to increase DSIM rates. For good cause shown the commission may further suspend this timeline. Any delay in submitting sufficient information in compliance with 4 CSR 240-3.163(8) or a commission order in a previous proceeding in a request to decrease DSIM rates shall not alter the processing timeline.

(5) Implementation of DSIM. Once a DSIM is approved, modified or discontinued by the commission, the utility shall use deferral accounting using the utility's latest approved weighted average cost of capital until the utility's next general rate proceeding. At the time of filing the general rate proceeding subsequent to DSIM approval, modification or discontinuance the commission shall use an interim rate adjustment order to implement the approved, modified or discontinued DSIM.

(A) Duration of DSIM. Once a DSIM is approved by the commission, it shall remain in effect for a term of not more than four (4) years unless the commission earlier authorizes the modification or discontinuance of the DSIM, although an electric utility shall submit proposed tariff sheets to implement interim semi-annual adjustments to its DSIM rates between general rate proceedings.

(B) If the utility has an implemented DSIM, the electric utility shall file a general rate proceeding within four (4) years after the effective date of the commission order implementing the DSIM, assuming the maximum statutory suspension of the rates so filed.

(6) Disclosure on customers' bills. Regardless of whether or not the utility requests adjustments of its DSIM rates between general rate proceedings, any amounts charged under a DSIM approved by the commission, including any utility incentives allowed by the commission, shall be separately disclosed on each customer's bill. Proposed language regarding this disclosure shall be submitted to and approved by the commission before it appears on customers' bills.

(7) Evaluation, measurement and verification (EM&V) of the process and impact of demand-side programs. Each electric utility shall hire an independent contractor to perform and report EM&V of each commission-approved demand-side program in accordance with 4 CSR 240-20.094 Demand-Side Programs. The commission shall hire an independent contractor to audit and report on the work of each utility's independent EM&V contractor.

(A) Each utility's EM&V budget shall not exceed five percent (5%) of the utility's total budget for all approved demand-side program costs.

(B) The cost of the commission's EM&V contractor shall:

1. Not be a part of the utility's budget for demand-side programs; and
2. Be included in the Missouri Public Service Commission Assessment for each utility.

(C) EM&V draft reports from the utility's contractor for each approved demand-side program shall be delivered simultaneously to the utility and to parties of the case in which the demand-side program was approved.

(D) EM&V final reports from the utility's contractor of each approved demand-side program shall:

1. Be completed by the EM&V contractor on a schedule approved by the commission at the time of demand-side program approval in accordance with 4 CSR 240-20.094(3); and

2. Be filed with the commission and delivered simultaneously to the utility and the parties of the case in which the demand-side program was approved.

(E) Electric utility's EM&V contractors shall use, if available, a commission approved statewide technical reference manual when performing EM&V work.

(8) Demand-side program annual report. Each electric utility with one or more approved demand-side program shall file an annual report by no later than sixty (60) days after the end of each calendar year in the form and having the content provided for by 4 CSR 240-3.163(5), and serve a copy on each party to the case in which the programs were last established, modified or continued. Interested parties may file comments with the commission concerning the content of the utility's annual report within sixty (60) days of its filing.

(9) Submission of Surveillance Monitoring Reports. Each electric utility with an approved DSIM shall submit to staff, Public Counsel and parties approved by the commission a Surveillance Monitoring Report in the form and having the content provided for by 4 CSR 240-3.163(6).

(A) The Surveillance Monitoring Report shall be submitted within fifteen (15) days of the electric utility's next scheduled United States Securities and Exchange Commission (SEC) 10-Q or 10-K filing with the initial submission within fifteen (15) days of the electric utility's next scheduled SEC 10-Q or 10-K filing following the effective date of the commission order establishing the DSIM.

(B) If the electric utility also has an approved environmental cost recovery mechanism or a fuel cost adjustment mechanism, the electric utility shall submit a single Surveillance Monitoring Report for all mechanisms.

(C) Upon a finding that a utility has knowingly or recklessly provided materially false or inaccurate information to the commission regarding the surveillance data prescribed in 4 CSR 240-3.163(6), after notice and an opportunity for a hearing, the commission may suspend a DSIM or order other appropriate remedies as provided by law.

(10) Prudence reviews. A prudence review of the costs subject to the DSIM shall be conducted no less frequently than at twenty-four (24)-month intervals.

(A) All amounts ordered refunded by the commission shall include interest at the electric utility's short-term borrowing rate.

(B) The staff shall submit a recommendation regarding its examination and analysis to the commission not later than one hundred eighty (180) days after the staff initiates its prudence audit. The timing and frequency of prudence audits for DSIM shall be established in the utility's demand-side program approval proceeding in which the DSIM is established. The staff shall file notice within ten (10) days of starting its prudence audit. The commission shall issue an order not later than two hundred ten (210) days after the staff commences its prudence audit if no party

to the proceeding in which the prudence audit is occurring files, within one hundred ninety (190) days of the staff's commencement of its prudence audit, a request for a hearing.

1. If the staff, Public Counsel or other party auditing the DSIM believes that insufficient information has been supplied to make a recommendation regarding the prudence of the electric utility's DSIM, it may utilize discovery to obtain the information it seeks. If the electric utility does not timely supply the information, the party asserting the failure to provide the required information must timely file a motion to compel with the commission. While the commission is considering the motion to compel the processing timeline shall be suspended. If the commission then issues an order requiring the information to be provided, the time necessary for the information to be provided shall further extend the processing timeline. For good cause shown the commission may further suspend this timeline.

2. If the timeline is extended due to an electric utility's failure to timely provide sufficient responses to discovery and a refund is due to the customers, the electric utility shall refund all imprudently incurred costs plus interest at the electric utility's short-term borrowing rate.

(11) Tariffs and regulatory plans. The provisions of this rule shall not affect:

(A) Any adjustment mechanism, rate schedule, tariff, incentive plan, or other ratemaking mechanism that was approved by the commission and in effect prior to the effective date of this rule; and

(B) Any experimental regulatory plan that was approved by the commission and in effect prior to the effective date of this rule.

(12) Nothing in this rule shall preclude a complaint case from being filed, as provided by law.

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

(14) 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 $905,000 in year one, $342,500 in year two, $455,000 in year three and $455,000 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 20 - Electric Utilities**

Rule Number and Title:	4 CSR 240-20.093 Demand-Side Programs Investment Mechanisms
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	$905,000	$1,252,500

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 240-3.164 and 4 CSR 240-20.094) will enact the provisions of the Missouri Energy Efficiency Investment Act established by SB 376 (2009).

This rule allows the establishment and operation of Demand-Side Programs Investment Mechanisms (DSIM), which allow periodic rate adjustments related to recovery of costs and utility incentives for investments in 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 analysis and filings to adjust DSIM rates (every 6 months), energy efficiency costs shown as a line item on customer's bills, annual reporting requirements, and annual Evaluation, Measurement and Verification (EM&V). In addition, KCPL/GMO anticipates the need for four (4) additional FTE and a data collection and tracking system.

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 240-20.093. Costs attributable to this rule include litigation and outside consultants, EM&V (Utility and Missouri Public Service Commission outside consultant), technical reference manual and prudence reviews.

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 240-20.093

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.