BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of a Proposed Rulemaking Regarding Revision of the Commission's Chapter 22 Electric Utility Resource Planning Rules	))))	**File No. EX-2010-0254**

COMMENTS OF RENEW MISSOURI AND GRELC

Renew Missouri and Great Rivers Environmental Law Center are pleased to have the opportunity to comment on the proposed order of rulemaking. Our focus is on the interplay between Chapter 22 and the Missouri Energy Efficiency Investment Act rules, 4 CSR 240-3.163, 3.164, 20.093 and 20.094. We have already commented on that interplay in the MEEIA rulemaking, Case No. EX-2010-0368. These comments examine the Chapter 22 IRP rule in more detail.

Summary of our major points

Our most fundamental request is this: If Chapter 22 is to play a role in the implementation of the MEEIA, it should do so by directing utilities to assemble comprehensive demand-side portfolios that are then passed on for approval and cost recovery under the MEEIA. It should not subject these portfolios to integration, which uses criteria not found in the MEEIA. The portfolios should also be immune from the vagaries of fortune that can invalidate preferred resource plans.

In the following major respects, Chapter 22 does not serve the MEEIA either because it is inconsistent with the MEEIA or is designed to serve different purposes:

- Chapter 22 subjects demand-side programs to criteria not in the MEEIA;

- Alternative resource plans under 22.050 do not treat demand-side resources comprehensively;
- There is no clear path from the ARPs of 22.060 to the PRP of 22.070;
- PRPs are not binding on the utilities and are subject to change at any time.

MEEIA and Chapter 22

The MEEIA (also known as SB 376 and § 393.1075, RSMo) compels the PSC to permit electric utilities to implement demand-side programs with a goal of achieving all cost-effective demand-side savings. Before recovery of costs and incentives can be had, the PSC must approve the programs and they must result in energy or demand savings and be beneficial to all customers in the relevant class. Cost-effectiveness is measured primarily by the TRC test. § 393.1075.4, RSMo. The instruments of SB 376 are timely cost recovery, alignment of utility and customer incentives, and earnings opportunities

Chapter 22 is a long-range planning exercise using different criteria. While it calls for equal treatment of demand-side and supply-side resources, it has historically resulted in little demand-side investment. SB 376 was intended to change this by giving the utilities incentives to invest on the demand side. It speaks not of equal treatment but of equal **valuation** of demand-side and supply-side resources. § 393.1075.3, RSMo.

The proposed MEEIA rule, in 4 CSR 240-20.094(3)(A)3, says the PSC must approve programs that pass the TRC, but it adds the following condition, that the programs:

> 3. Are included in the electric utility's preferred plan or have been analyzed through the integration process required by 4 CSR 240-22.060 to determine the impact of the demand-side programs and program plans on the net present value of revenue requirements of the electric utility.

We argued in EX-2010-0368 that the proposed IRP rule meshes imperfectly with the MEEIA rule, and that where there is conflict, the MEEIA must prevail because it, and not the IRP rule, is a legislative directive.

The potential for conflict begins with 22.020(27), the definition of "legal mandates":

> Legal mandates include applicable state and federal executive orders, legislation, court decisions, and applicable state and federal administrative agency orders, rules, and regulations affecting electric utility loads, resources, or resource plans.

This definition is so broad that it includes Chapter 22 itself, but the only thing that Chapter 22 legally mandates is a filing; it is an internal, procedural rule only. It cannot be allowed to override the substantive legislative mandate of SB 376.

SB 376 is a delegation of specific rulemaking authority to achieve the MEEIA's purposes. § 393.1075.11. Chapter 22, by contrast, has no specific legislative authority. Its status as an internal Commission rule is reflected in the limited, procedural nature of the Commission's review of utility IRPs: only deficiencies in Chapter 22 compliance are reviewable, not the substance of the plans. 22.080 (7, 8, 16).

If the Commission subordinates the MEEIA to Chapter 22, it will be imposing criteria not prescribed by the legislature. The MEEIA rules will be invalid if they go beyond the statutorily conferred authority or attempt to modify or extend the statute. *PharmFlex Inc. v. Division of Employment Security,* 964 S.W.2d 825, 829 (Mo.App. WD 1997).

A chronologically later statute creating a specific statutory scheme prevails over earlier, more general laws. *Control Technology and Solutions v. Malden R-1 SD*, 181 S.W.3d 80, 83 (Mo.App. ED 2005). Therefore the Commission cannot use its general rulemaking powers under §§ 386.250(6) and 393.140(11) to make rules inconsistent with the MEEIA. To do so would be to

exercise a legislative function in violation of the separation of executive from legislative powers. Mo. Constitution Article II, § 1; *Missouri Coalition for the Environment v. JCAR*, 948 S.W.2d 125, 132–4 (Mo. 1997); *State ex rel. Rothrum v. Darby*, 345 Mo. 1002, 137 S.W.2d 532, 536–7 (Mo. 1940).

Inconsistencies do exist between the proposed rule and the MEEIA. Any portions of the proposed rule that impair the implementation of the MEEIA are unlawful.

4 CSR 240-22.020, Definitions

"Demand-side program" is defined in 22.020(10) as a "process" to deliver a portfolio of end-use measures.

"End-use measure" is defined in 22.020(17) as an energy efficiency measure or energy management measure.

"Energy-efficiency measure" is defined in 22.020(19) as anything that "makes it possible to deliver an adequate level and quality of end-use energy service while using less energy than would otherwise be required." This encompasses measures on the utility side of the meter.

"Energy management measure" is defined by 22.020(20) as anything that "makes it possible to alter the time pattern of electricity usage so as to require less generating capacity or to allow the electric power to be supplied from more fuel-efficient generating units;" it is supposed to be synonymous with demand response. This definition also applies on the utility side of the meter and includes measures that only affect time of use. It was carried over into the MEEIA rule as the definition of "measure" in 3.164(1)(O).

"Demand-side rate" is defined in 22.020(11) to include rates that only modify time of consumption, while "demand-side resource" is defined by 22.020(12) as programs and rates that modify net consumption (not merely time of use). These definitions are inconsistent.

The MEEIA, § 393.1075.2(3), by contrast, defines "demand-side program" as a program conducted "to modify the net consumption of electricity on the retail customer's side of the meter."

The proposed rule is inconsistent with the MEEIA where it allows (a) efficiency measures on the utility side of the meter, or (b) measures that merely shift time of use, to qualify as demand-side resources that supposedly comply with the legal mandate of SB 376. (Admittedly there is an inconsistency within the MEEIA, because the definition of demand-side program expressly includes demand response, which is defined in 393.1075.2(2) to include peak-shifting, which does not modify net consumption.)

Wherever possible, Chapter 22 should incorporate the definitions in the MEEIA, which include demand response, demand-side program, energy efficiency, and the total resource cost test. All definitions must be consistent with the MEEIA.

Probable environmental costs. The SB 376 statutory definition of the TRC includes "probable environmental compliance costs." § 393.1075.2(6).

The proposed IRP rule defines "probable environmental cost" as "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." 4 CSR 40-22.020(45).

This definition, as implemented by 22.040(2)(B), does not provide an adequate method of calculating environmental compliance costs for purposes of the MEEIA. It is restricted to costs associated with a selected list of pollutants which, in the judgment of utility decision makers, could have a significant effect on rates.

SB 376 is not a planning exercise. It plainly means to include all environmental costs and contemplates a more objective assessment, not one based on "subjective probability" in certain individuals' judgment.

If SB 376 and Chapter22 are to be integrated, it must be on the terms of SB 376. Chapter 22 cannot lawfully impose non-statutory criteria on SB 376, such as (a) a selected list of pollutants (b) determined by subjective judgment, which (c) meet a threshold level of significance in the opinion of utility decision makers.

The MEEIA explicitly says that the content of the TRC test is to be "defined by the commission in rules." § 393.1075.2(6). Plainly this means rules adapted to the purposes of the MEEIA, not IRP. Since there is a conflict, importing the IRP version of the TRC rules into the MEEIA rules was unlawful. If the IRP rules are to be used to fulfill the MEEIA, then MEEIA rules on the subject should be incorporated into Chapter 22, not the other way round.

Realistic achievable potential is defined differently in 22.020(47):

> Realistic achievable potential of a demand-side candidate resource option or portfolio is an estimate of the load impact that would occur if that resource option or portfolio were implemented in amounts consistent with the most aggressive cost-effective implementation of the resource option or portfolio considered by the utility;

and in 3.164(1)(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.

The IRP definition characterizes RAP as "aggressive," whereas in the MEEIA rule it is "realistic." Apparently RAP serves the same function in Chapter 22 as "maximum achievable potential" in the MEEIA rule (a term not defined in Chapter 22).

In comments we filed jointly with MDNR, NRDC and the Sierra Club in EX-2010-0368, we recommended that the Commission adopt the nationally recognized definitions of technical, economic, achievable and program potential in the National Action Plan for Energy Efficiency. Those definitions are found on pages 2–4 of the document entitled "Guide for Conducting Energy Efficiency Potential Studies," found here: http://www.epa.gov/cleanenergy/documents/suca/potential_guide.pdf. The core distinction in NAPEE's Guide is between "achievable potential" and "program potential." As NAPEE uses the terms, "achievable potential" takes expected program participation into account and is the reference point for considering various levels of "program potential" that are based on different levels of utility funding and implementation.

If the Commission chooses not to adopt the NAPEE definitions, the MEEIA and IRP rules still need to be consistent if they are to work together as the Commission intends. The IRP definition of RAP is closer to the MEEIA definition of maximum achievable potential in 3.164(1)(N); that definition of MAP should be incorporated in Chapter 22 and made an objective of utility planning.

22.050, Demand-side Analysis

The list of demand-side resources includes, at 22.050(1)(A)4, renewable energy and distributed generation. This is inconsistent with the MEEIA definitions of "demand-side program," which reduces "net consumption of electricity;" and "energy efficiency," which means "measures that reduce the amount of electricity required to achieve a given end use." Therefore we suggest that 22.050(1)(A)4 be deleted.

The method of 22.050 is to assemble demand-side programs (22.050(3)) and rates (22.050(4)), each directed at a particular market segment, and subject them to the TRC (22.050(5)). Programs and rates that pass become candidate resource options and must be included in at least one alternative resource plan (ARP). 22.050(6). The utility "may" bundle options into portfolios (22.050(6)(A)), but otherwise it appears to us that the result is a random distribution among ARPs of market-segment-specific programs that does not meet the MEEIA's statutory goals of encouraging demand-side investments (393.1075.5), broadly targeting customer classes, and achieving all cost-effective demand-side savings (393.1075.4).

We believe that Chapter 22 cannot serve these goals unless a comprehensive demand-side portfolio emerges from the IRP process. A couple of possible amendments to the proposed rule, indicated by strikethroughs and underlining, might help accomplish this:

22.050(1) The utility shall identify a set of potential demand-side ~~resources~~ measures from which demand-side ~~candidate resource options~~ programs will be ~~identified~~ assembled for the purposes of ~~developing the alternative resource plans required by 4 CSR 240-22.060(3)~~ meeting the goal of all cost-effective demand-side savings set in Section 393.1075.4. ~~A potential demand-side resource consists of a demand-side program designed to deliver one (1) or more energy efficiency and energy management measures or a demand-side rate.~~

22.050(6) Potential demand-side programs and potential demand-side rates that pass the total resource cost test including probable environmental compliance costs ~~shall be considered as demand-side candidate resource options and~~ must be included in ~~at least one (1)~~ all alternative

resource plans developed pursuant to 4 CSR 240-22.060(3) and [or] in the preferred resource plan.

ARPs and the PRP, 22.060 and 22.070

A preferred resource plan is supposed to "[u]tilize demand-side resources to the maximum amount that comply with legal mandates…" 22.070(1)(C). Unfortunately, we don't see how the process outlined in 22.050 and 22.060 necessarily leads to this result.

Chapter 22 uses criteria not in the MEEIA. The primary criterion for approval of demand-side programs under the MEEIA is cost-effectiveness. § 393.1075.3–.4.

Under the proposed Chapter 22 rule, the primary criterion is the minimization of utility costs, but utilities may use other critical factors. 22.010(2). The utility assesses alternative resource plans against a number of performance measures. 22.060(2). Alternative resource plans (ARPs) are mixtures of demand-side and supply-side resources. 22.060(3). The most cost-effective demand-side portfolio could fail the IRP tests if it were packaged with a bad set of supply-side resources.

ARPs must "meet at least the projected load growth and resource retirements," 22.060(3). This is not enough to ensure full implementation of SB 376. Instead, ARPs should be required to meet the "all cost-effective" goal of SB 376. An "all cost-effective" demand side portfolio will do more than offset load growth and may **cause** retirement of supply-side resources. This scenario must be part of an IRP.

Selection of a preferred resource plan (PRP) is contingent on the policy objectives and performance measures and also on the judgment of utility decision-makers. 22.070(1). While it would appear from 22.070(1)(C) that a PRP will maximize demand-side resources, it is not clear how the winnowing of ARPs assembled under 22.060 will automatically yield a PRP with the most cost-effective demand-side portfolio; the minimally compliant ARP of 22.060(3)(A)1 and the optimally compliant ARP of 22.060(3)(A)5 could both fail during the analysis prescribed in 22.060(4)–(7). Furthermore even the demand-side component of the PRP is subject to the judgment of utility decision-makers; they decide whether the PRP is in the public interest and achieves state energy policies. 22.070(1)(C).

Lowest PVRR, IRP policy objectives, performance measures, critical uncertain factors and decision-makers' judgment are all criteria absent from the MEEIA.

Disconnect between 22.060 and 22.070. 4 CSR 240.22.060(3)(A)1–5 prescribes a special set of alternative resource plans for renewable and demand-side resources:

> "The utility shall examine cases that—
>
> 1. Minimally comply with legal mandates for demand-side resources, renewable energy resources, and other mandated energy resources. This constitutes the compliance benchmark resource plan for planning purposes…
>
> 3. Utilize only demand-side resources, up to the maximum technical potential of demand-side resources in each year of the planning horizon, if that results in more demand-side resources than the minimally-compliant plan. This constitutes the aggressive demand-side resource plan for planning purposes…
>
> 5. Optimally comply with legal mandates for demand-side resources, renewable energy resources, and other targeted energy resources. This constitutes the optimal compliance resource plan, where every legal mandate is at least minimally met, but some resources may be optimally utilized at levels greater than the mandated minimums …"

A minimally compliant demand-side plan (the "compliance benchmark") clearly will not be part of a PRP that must comply with the MEEIA to the maximum. 22.070(1)(C).

The “aggressive” plan defined as maximum technical potential is by definition not cost-effective; technical potential is, as described in 4 CSR 240-3.164(1)(W), a “theoretical construct.” This ARP is an academic exercise that cannot be part of a real-world plan and should therefore be deleted.

The “optimally compliant plan” does not achieve maximum compliance either, but only minimal compliance with legal mandates and maybe something more.

It’s unclear what happens to these plans. They must go through the analysis of 22.060(4)–(7). The preferred resource plan must use demand-side resources to the “maximum” amount that complies with legal mandates. 22.070(1)(C). This differs from both the minimal compliance benchmark ARP and the “optimal” ARP. Indeed, 22.070 does not even say that the PRP must be one of the ARPs from 22.060.

Uncertain status of the PRP. The PRP is a moving target. It can change at any time and be replaced by a contingent plan if the PRP ceases to be appropriate for any reason. 22.070(4). The PRP can become obsolete if it ceases to be consistent with the utility’s business plan or acquisition strategy. 22.080(12). A utility can get variances from the rule. 22.080(13). A utility may request action in other cases that is inconsistent with the PRP as long as it provides a detailed explanation. 22.080(17).

Under the MEEIA rule, 20.094(3)(A)3, the utility can disregard the PRP, but whatever programs it offers must first go through 22.060 integration, which still involves all the criteria itemized above that are not in the MEEIA.

The remedy we suggested above on page 8 applies here. As we just noted, however, including an MEEIA-compliant demand-side portfolio in the PRP still leaves it vulnerable to

alteration at any time and for any reason. This may do no harm, since once the demand-side portfolio is passed on to the MEEIA process it should be immune to such changes (except for possible modification or discontinuation under SB 376). It might be best, therefore, to have a demand-side portfolio that has passed the correct TRC test under 22.050 be passed directly to the program approval process of SB 376 without being made part of the PRP. While this may seem to subvert the equal treatment principle of Chapter 22, leaving the PRP a supply-side-only exercise, the MEEIA must take precedence.

EM&V, 22.070(8)

The evaluation, measurement and verification plans required by 22.070(8) differ substantially from the EM&V provisions in 4 CSR 240-3.163(7) and 20.093(7). In particular, the Chapter 22 EM&V plans aren't required to be conducted by an independent contractor, which is required by § 393.1075.11 and 20.093(7).

We surmise that 22.070(8) was designed to serve planning purposes different from the purposes of the MEEIA. Utilities could do both EM&V processes. Nevertheless, the two rules should be aligned as closely as possible to avoid redundant or conflicting requirements, especially if needless expense is to be avoided.

Conclusion

The MEEIA outranks Chapter 22. For all the reasons given above, Chapter 22 in its present form is not the right vehicle for identifying cost-effective demand side programs under the MEEIA. If the IRP rule is to perform that role, it must be modified to accommodate the MEEIA.

Chapter 22 and the MEEIA can only be harmonized by ensuring that a demand-side portfolio that satisfies the criteria of the MEEIA, and nothing more, automatically proceeds to the program approval and DSIM processes of the MEEIA rules.