

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

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

**EMPIRE’S RESPONSE TO LEGAL BRIEFS**

COMES NOW The Empire District Electric Company (Empire or Company), and, in response to certain legal briefs in this file, states as follows to the Missouri Public Service Commission (Commission):

1. On September 14, 2010, several of the participants in this matter filed legal briefs concerning issues related to rules designed to implement Section 393.1075, RSMo (the Missouri Energy Efficiency Investment Act or MEEIA).

2. Some of those parties (Staff of the Commission (Staff), the Office of the Public Counsel (Public Counsel), and the Missouri Industrial Energy Consumers (MIEC)) allege that cost recovery for demand-side programs implemented as a result of the MEEIA may only be addressed within a general rate case in that recovery outside of a rate case would violate the prohibition against single-issue rate making. Empire disagrees.

3. The primary legal question in regard to this issue is whether the language of the MEEIA authorizes some sort of recovery mechanism outside a general rate case. The prohibition against single issue rate making is not a constitutional matter. It is a creature of statute having developed over time based on the language of Section 393.270.4, RSMo (“In determining the price to be charged for gas, electricity, or water the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, with due regard, among other things, to a reasonable average return upon capital actually expended and to

the necessity of making reservations out of income for surplus and contingencies.”). This statute is sometimes said to require the Commission to consider "all relevant factors" when setting rates. *State ex rel. Utility Consumers Council of Missouri, Inc. v. Pub. Serv. Comm’n*, 585 S.W.2d 41, 56 (Mo banc 1979).

4. Because the single issue rate making prohibition is based in statute, it can be changed by statute. This has been done by the Missouri General Assembly and the voters in recent years through the enactment of the fuel adjustment clause and environmental compliance recovery legislation (Senate Bill 179/ Section 386.266, RSMo), renewable energy standards initiative (Proposition C/ sections 393.1020 to 393.1030, RSMo) and the infrastructure system replacement charge (Section 393.1000 to 393.1015, RSMo).

5. Empire believes that the MEEIA similarly provides statutory language to support separate charges associated with MEEIA compliance. Because this is in the first instance a statutory question, the cases cited in opposition by several of the parties – *Hotel Continental v. Burton*, 334 S.W.2d 75 (Mo. 1960); *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41 (Mo. banc 1979); and *State ex rel. Midwest Gas Users’ Association v. Public Service Commission*, 976 S.W.2d 470 (Mo.App. 1998) – should have no import in this discussion.

6. The relevant language of the MEEIA in regard to this question is found in the following sections:

a. Section 393.1075.3, RSMo –

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).

b. Section 393.1075.13, RSMo –

*Charges attributable to demand-side programs under this section shall be clearly shown as a separate line item on bills to the electrical corporation's customers.*

(emphasis added).

7. The Missouri Supreme Court recently described the basic rules of statutory construction as follows:

The primary rule of statutory construction is to determine the legislature's intent by considering the plain and ordinary meaning of the words used in the statute and by giving each word, clause, sentence, and section of the statute meaning. *State ex rel. Womack v. Rolf*, 173 S.W.3d 634, 638 (Mo. banc 2005). . . . The legislature's intent is also determined by considering the whole act and its purposes and by seeking to avoid unjust or absurd results. *Id.* In determining the meaning of a particular statute, this Court may look to the established policy of the legislature as disclosed by a general course of legislation. *Id.* All consistent statutes relating to the same subject are construed together as though constituting one act, and "[t]he rule of construction in such instances proceeds upon the supposition that the statutes in question are intended to be read consistently and harmoniously in their several parts and provisions." *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. banc 1991).

*Neske v. City of St. Louis*, 218 S.W.3d 417, 424 (Mo. Banc 2007).

8. In this case, the references to “*timely cost recovery*” and “*timely earnings opportunities*” have no meaning if they are read as Staff, OPC and MIEC suggest. The general rate case process already exists in statute and provides a statutory time limit of approximately eleven months from tariff filing to the effective date of new rates. *See* Section 393.150, RSMo. That process was not changed by the MEEIA.

9. The only explanation for the use of the phrases “timely cost recovery” and “timely earnings opportunities” is that the legislature was authorizing a procedure for recovery on a different schedule than that of a general rate case. The use of the word “timely”<sup>1</sup> must modify the normal eleven month time period associated with the general rate case process as, presumably, the timeliness of a general rate proceeding is already established and required by statute. No modification to require compliance with an already existing statute would be necessary and reading the phrases in that manner would render their use meaningless.

10. This interpretation is further supported by Section 393.1075.13, RSMo, which requires the use of a separate line item on utility bills for “charges attributable to demand-side programs.” A separate line item is consistent with billing elements that are adjusted outside a general rate case. Taxes, the fuel adjustment clause, the purchased gas adjustment and the infrastructure system replacement surcharge are all billed in this fashion.

11. Considering the specific language of the MEEIA, as well as the Act as whole necessarily leads one to a conclusion that the Missouri General Assembly has authorized the Commission to establish a procedure for the recovery of costs related to demand-side programs outside the bounds of a general rate case.

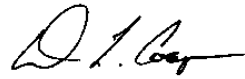
WHEREFORE, Empire respectfully requests the Commission consider this response and,

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<sup>1</sup> Timely – 1. happening, said, done, etc. at a suitable time; well-timed; opportune. 2. being in good time; early; as, the defendant had timely notice. 3. keeping time or measure. *Webster’s New Twentieth Century Dictionary*, Unabridged Second Edition.

thereafter, issue such orders as the Commission shall believe to be reasonable and just.

Respectfully submitted,



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### **CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing document was sent by electronic mail, on September 23, 2010, to the following:

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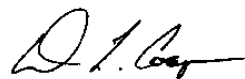
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