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

Terry M. Jarrett, Commissioner

Submitted this 28th day of September, 2010