**Robin Carnahan**
**Secretary of State**

**Administrative Rules Division**
## Rulemaking Transmittal Receipt

Rule ID: 12649
Date Printed: 3/14/2011
Rule Number: 4 CSR 240-3.163
Rulemaking Type: Final Order Rule
Date Submitted to Administrative Rules Division: 3/14/2011
Date Submitted to Joint Committee on Administrative Rules: 2/9/2011

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Name of Person to Contact with questions concerning this rule:

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Included with Rulemaking:

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|---|---|
| Cover Letter | 3/14/2011 |

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# Robin Carnahan

**Secretary of State**
**Administrative Rules Division**

**RULE TRANSMITTAL**

Administrative Rules Stamp

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ADMINISTRATIVE RULES

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Rule Number 4 CSR 240-3.163

Use a "SEPARATE" rule transmittal sheet for EACH individual rulemaking.

Name of person to call with questions about this rule:
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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:
Changes have been made to sections (1)(C), (1)(D), (1)(G), (1)(I), (1)(J), (1)(K), (1)(Q), (1)(R), (1)(S), (1)(T), (2), (2)(D), (2)(H), (9), (9)(A), and (9)(B) .
Section (1)(P) has been added.

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JOINT COMMITTEE ON
FEB 09 2011
ADMINISTRATIVE RULES

# *Missouri Public Service Commission*

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Honorable Robin Carnahan
Secretary of State
Administrative Rules Division
600 West Main Street
Jefferson City, Missouri 65101

Dear Secretary Carnahan:

**Re: 4 CSR 240-3.163 Electric Utility Demand-Side Programs Investment Mechanisms Filing and Submission Requirements**

**CERTIFICATION OF ADMINISTRATIVE RULE**

I do hereby certify that the attached is an accurate and complete copy of the order of rulemaking lawfully submitted by the Missouri Public Service Commission for filing.

Statutory Authority: Sections 393.1075, RSMo Supp. 2009, and 386.040 and 386.250, RSMo 2000.

If there are any questions, please contact:

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Morris L. Woodruff

Morris Woodruff
Chief Regulatory Law Judge

**Title 4 – DEPARTMENT OF ECONOMIC DEVELOPMENT**
**Division 240 – Public Service Commission**
**Chapter 3—Filing and Reporting Requirements**



## ORDER OF RULEMAKING

By the authority vested in the Public Service Commission under sections 393.1075, RSMo Supp. 2009, and 386.040 and 386.250, RSMo 2000, the commission adopts a rule as follows:

**4 CSR 240-3.163 is adopted.**

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on November 15, 2010 (35 MoReg 1610). Those sections with changes are reprinted here. This proposed rule becomes effective thirty (30) days after publication in the *Code of State Regulations*.

**SUMMARY OF COMMENTS:** A public hearing on this proposed rule was held December 20, 2010, and the public comment period ended December 15, 2010. The commission received a number of written comments from seventeen entities, many of which were duplicated or echoed from the various entities and involve the same sections or subsections of the proposed rule. Consequently, these comments have been consolidated into 10 central comments, which are addressed below. At the public hearing, seventeen (17) witnesses testified. The entities filing comments were: AARP, Union Electric d/b/a Ameren Missouri ("Ameren Missouri"), the Consumers Council of Missouri ("CCM"), The Empire District Electric Company ("Empire"), KCPL Greater Missouri Operations Company ("GMO"), Great Rivers Environmental Law Center ("GRELC"), Kansas City Power and Light Company ("KCPL"), the Missouri Department of Natural Resources ("MDNR"), the Missouri Energy Development Association ("MEDA"),[1] the Missouri Energy Group ("MEG"), the Missouri Industrial Energy Consumers ("MIEC"),[2] the National Resources Defense Council ("NRDC"), the Office of the Public Counsel ("OPC"), OPOWER, Inc. ("OPOWER"), Renew Missouri, the Staff of the Missouri Public Service Commission ("Staff"), the Sierra Club, Walmart Stores East, LP, and Sam's East.

All of the comments were generally in support of a rule to implement Demand-Side Programs and Demand-Side Programs Investment Mechanisms ("DSIMs"), but many had suggestions for specific changes to the proposed rule and raised concerns regarding the timing of authorizing DSIMs and whether those mechanisms could include recovery of lost revenues. It should be noted that this proposed rule operates in conjunction with proposed rules 4 CSR 240-3.164; 4 CSR 240-20.093 and 4 CSR 240-20.094. All of these rules were promulgated to implement Section 393.1075, RSMO, the Missouri Energy Efficiency Investment Act ("MEEIA"). Any comments directed towards 4 CSR 240-3.163 may be interrelated with these other proposed rules and the interplay between these proposed rules may need to be addressed in the context

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[1] The MEDA members include: KCPL, GMO, Empire and Ameren Missouri.

[2] MIEC members include: Anheuser-Busch Companies, Inc., BioKyowa, Inc., The Boeing Company, Doe Run, Enbridge, Ford Motor Company, General Motors Corporation, GKN Aerospace, Hussmann Corporation, JW Aluminum, MEMC Electronic Materials, Monsanto, Procter & Gamble Company, Nestlé Purina PetCare, Noranda Aluminum, Saint Gobain, Solutia and U.S. Silica Company.

of this order or rulemaking; however, this rule specifically addresses electric utility demand-side program and investment mechanism filing and submission requirements. It should also be noted that while comments were directed at specific sections and subsections of the rule, due to changes in the proposed rule those number citations may not match the final numbering of the sections and subsections of the rule.

**COMMENT # 1 - General Changes in Relation to Alleged Single-Issue Ratemaking:**

AARP, CCM, the MIEC, OPC, and Staff all believe that any section or subsection of this rule that allows a rate adjustment outside of a general rate case would constitute unlawful single-issue ratemaking. AARP, CCM and OPC state it is their belief that the legislature purposely deleted any language in SB 376 (the legislation ultimately codified as Section 393.1075, RSMo) that would have allowed for changes to a demand-side program investment mechanism in between general rate cases. The sections and subsection of this rule identified by these entities that would require change based upon this comment are: 4 CSR 240-3.163 - Purpose; (1)(F); (1)(G); (1)(I); (1)(J); (1)(K); (2)(A); (2)(C); (2)(F); (2)(J); (2)(K); (3); (4); (4)(B); (5)(A); (5)(B); (8)(A); (8)(B); (8)(C); (8)(D); (8)(E); (8)(F); (8)(G); (9)(A); (9)(B).

MEDA, MDNR, NRDC, Sierra Club, Renew Missouri, GRELC on the other hand, believe that the language in Section 393.1075.3 and 5 mandating the commission to provide timely cost recovery and timely earnings opportunities by developing cost recovery mechanisms without limitation allows the commission to establish and approve demand-side programs outside the framework of a general rate case. Section 393.1075.11 states the commission "may adopt rules and procedures . . . as necessary, to ensure that electric corporations can achieve the goals of this section." Additionally, these entities point out that Section 393.1075.13 requires the use of a separate line item for charges attributable to demand-side programs, which is consistent with other billing elements that are adjusted outside of a general rate case. Taxes, fuel adjustment clauses, purchased gas adjustments and infrastructure system replacement surcharges are all billed in this fashion. While language in original version of SB 376 providing for a "cost adjustment clause" was removed, the legislature added "timely cost recovery" broadening the commission's discretion with developing cost recovery mechanisms.

**RESPONSE:** The commission believes that the express language in Section 393.1075, RSMo unequivocally requires the commission provide timely cost recovery for utilities when effectuating the declared social policy of valuing demand-side investments equal to traditional investments in supply and delivery infrastructure. MEEIA contemplates non-traditional investments and mandates timely cost recovery. The language of the proposed rule does not establish any specific type of demand-side investment mechanism ("DSIM"). Instead the proposed rule allows the maximum latitude for creating DSIMs while allowing for periodic adjustments in conformity with the language in the statute. The argument that the proposed rule would in and of itself authorize single-issue ratemaking is unfounded and premature. Until an exact DSIM is established there is no way to claim that original implementation or any periodic adjustments would constitute single-issue ratemaking.

Additionally, the statutory language from which the prohibition against single-issue ratemaking is derived originates in Section 393.270.4. That subsection reads, in pertinent part: "In determining the price to be charged for . . ., electricity . . . the commission *may consider all facts which in its judgment have any bearing upon a proper determination* of the question . . ." The statute is permissive. It allows the commission the discretion to examine all facts that the commission believes are relevant. There is no set statutory requirement for how many or what

type of facts or factors the commission must consider when making its determination. Indeed, the legislature has delegated its authority to the commission, being the expert agency charged with making these determinations, to decide what factors must be examined when determining the price to be charged for electricity. The commission will make no changes to the language identified by these comments in the proposed rule or to any other language in the rule that would be related to the issue raised in these comments.

**COMMENT # 2 - LOST REVENUE RECOVERY:**

AARP, CCM, OPC, MIEC and Staff believe that the lost revenue recovery mechanism provisions of the draft rules are unlawful because those provisions are not authorized by statute. These entities believe that lost revenue does not fit in a cost category. The sections and subsection of this rule identified by these entities that would require change based upon this comment are: 4 CSR 240-3.163(1)(F); (1)(I); (1)(K); (1)(O); (1)(P); and (4)(C).

MDNR, NRDC, Sierra Club, Renew Missouri, GRELC comment that lost revenue recovery is not cost recovery or an earnings opportunity. These entities believe that under the mechanism for recovering lost revenues in the proposed rule, utilities would continue to see higher levels of revenue recovery with higher sales. Therefore, they believe the utility will find itself facing the same conflict it currently faces at the prospect of taking actions or supporting policies to save energy and thereby save their customers money, knowing that such actions would cause their shareholders to miss out on the earnings from higher sales. These entities refer to the incentive to maintain higher sales as the "throughput incentive." And believe this is a strong disincentive for utilities to invest in energy efficiency or to support energy saving policies and measures outside their control.

MEG, objects to any language that would allow a lost revenue recovery mechanism, not because it is unlawful, but because it believes that reduced costs associated with reduced sales will balance out. MEG also believes that a lost recovery mechanism is inconsistent with the way other charges are handled. According to MEG, a utility believes that energy efficiency programs will reduce sales and reduce contributions to fixed costs, but using that same reasoning, every time the utility adds a customer it increases sales and contributions to fixed costs. Consequently, MEG concludes, there should be a refund to customers in any class of ratepayers every time a customer is added. MEG also believes there is no way to determine the actual effect of the various energy efficiency programs.

In addition to the other comments made, Staff states that only eight other states allow recovery of lost revenues. According to Staff other states that have had such a recovery mechanism in the past have abandoned it. Staff claims that the movement away from direct reimbursement for lost revenues is likely due to several factors including: the fact that the approach is vulnerable to "gaming" by over-claiming savings; that it typically leads to very contentious reconciliation hearings as parties argue about the measurement of savings; and that it doesn't do anything to address the utility disincentive regarding broader energy efficiency policies beyond the specific program addressed with the mechanisms. Staff notes that other commissions have addressed this issue either through decoupling mechanisms and/or performance incentives." Staff recommends the "throughput incentive" be addressed through the utility incentive component of a DSIM.

MEDA believes that 393.1075.3 mandates recovery of all reasonable and prudent costs and requires the commission to 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 efficiency. MEDA members comment that unless a utility's lost revenues are included in the DSIM or other recovery mechanism, there will always be a financial bias against fully utilizing demand-side management programs that result in the reduction of a utility's revenues.

**RESPONSE:** Section 393.1075.3 requires the commission to "allow recovery of *all* reasonable and prudent costs of delivering cost-effective demand-side programs." Additionally, Section 393,1075.3(2) requires the commission to 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." Section 393.1075.5 states the commission "may develop cost recovery mechanisms to further encourage investment in demand-side programs . . ." Lost revenue is a cost of delivering cost-effective demand-side programs, and the proposed rule, in conjunction with the interrelated proposed rules, i.e. 4 CSR 240-3.164; 4 CSR 240-20.093 and 4 CSR 240-20.094, require evaluation, measurement and verification (EM&V"). Any request for recovery of lost revenue will have to be verified and approved by the commission prior to recovery.

At the rulemaking hearing on December 20, 2010, several participants commented that decoupling could prevent over and under-earning and that it might present a better long-term solution than allowing recovery of lost revenues. However, Section 393.1075.5 requires the commission to conclude a docket studying any rate design modification to those currently approved by the commission prior to promulgating an appropriate rule in that regard. Decoupling represents such a change in rate design and no docket has been opened at this time to fully explore this or other possible changes. The commission has been directed by the legislature to implement Section 393.1075, and while this proposed rule may ultimately be an intermediary step to decoupling or other changes in rate design models, promulgating a lost revenue recovery mechanism is authorized by MEEIA and with verification methods in place the potential for possible "gaming of the system" is minimized. The commission will make no changes to the language identified by these comments in the proposed rule or to any other language in the rule that would be related to the issue raised in these comments.

**COMMENT # 3 – DEFINITION OF LOST REVENUE:**

A number of participants raised an issue concerning the issue of how the proposed rule defines lost revenue. Thus, if the commission includes provisions for recovery of lost revenues, these entities debate how "lost revenues" should be defined.

Proposed Rule 4 CSR 240-3.163(1)(P) defines lost revenue as:

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 occurs 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.

Proposed Rule 4 CSR 240-3.163(1)(K) defines DSIM utility lost revenue as:

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;

MEDA believes that if the commission is going to allow recovery of lost revenue, the definition of "lost revenue" should be modified to conform to the definition include in 4 CSR Chapter 22. Commission Rule 4 CSR 240-22.020(38) reads: "Lost margin or lost revenues means the reduction between rate cases in billed demand (kW) and energy (kWh) due to installed demand-side measures, multiplied by the fixed-cost margin of the appropriate rate component." MEDA sees no reason to have differing definitions in the commission's regulations.

Staff, on the other hand, does not believe that the Chapter 22 definition is appropriate because:

(1) The language as drafted is "permissive" in nature and provides for the opportunity for recovery of lost revenues, rather than a guarantee. The proposed MEDA language is more explicit regarding the ability to recover lost revenues.

(2) Staff opposes MEDA's proposed use of Chapter 22's definition of lost revenue, because the Chapter 22 definition is used exclusively to exclude lost revenues from the definitions of annualized costs for end-use measures, from the definition of costs for the utility cost test, and from the definition of costs for the total resource cost test. Chapter 22 does not contemplate the use of its definition of lost revenue for any other purposes and it should not be assumed to be an appropriate definition for the MEEIA rules.

(3) The MEDA language also removes the requirements for evaluation measurement and verification (EM&V) of DSM program results prior to recovery of lost revenue and, therefore, allows for recovery of lost revenues on a prospective basis without any measurement and verification of DSM program results by an independent evaluator. Staff believes that if recovery of lost revenue is included in the MEEIA rules, measurement and verification of lost revenues should be required and should only be accomplished through independent EM&V on a retrospective basis. Lost revenues are based on energy usage that did not occur. In Staff's opinion, it is not appropriate to increase customer's rates on guesses as to what the customers who participated in the programs would have used absent the programs without a rigorous EM&V conducted by an independent evaluator.

Staff makes the following recommendation for clarifying the definition of "lost revenues." Staff also proposes changes in the language of the interrelated rule, **4 CSR 240-20.093(2)(G).**

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 occurs when utility demand-side programs approved by the commission in accordance with 4 CSR 240-20.094 cause a drop in net <u>system</u> 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.

Staff's proposed change would apply to definition section 4 CSR 240-3.163(1)(Q) of this proposed rule and the following sections of the interrelated proposed rules: 4 CSR 240-3.164(1)(M), 4 CSR 240-20.093(1)(Y), and 4 CSR 240-20.094(1)(U).

**RESPONSE AND EXPLANATION OF CHANGE:** The Commission believes Staff's proposed revision to the current definition of lost revenue is appropriate and rejects MEDA's proposed revision for the reasons stated by Staff. The commission will modify 4 CSR 240-3.163(1)(Q), 4 CSR 240-3.164(1)(M), 4 CSR 240-20.093(1)(Y), and 4 CSR 240-20.094(1)(U) accordingly.

**COMMENT # 4 – INCONSISTENT DEFINITIONS FOR DESIGNATION OF UTILITY'S REQUEST FOR APPROVAL OF A DEMAND-SIDE PROGRAM:**

In order to clarify language in the interrelated rules related to filing a request for approval of a demand-side program, Staff recommends the following definition be included in 4 CSR_240-3.163, 4 CSR 240-20.093, and 4 CSR 240-20.094: "Filing for demand-side program approval means a utility's case filing for approval, modification or discontinuance of demand-side program(s) which may also include a simultaneous request for the establishment, modification or discontinuance of a DSIM."

After adopting this definition, the following inconsistent terms require clarification:

1) "utility's filing for demand-side program approval" found in 4 CSR 240-3.163(1)(I) and 4 CSR 240-20.093(1)(P).
2) "utility's filing for demand-side program approval proceeding" found in 4 CSR 240-3.163(1)(F), (G), (J), and (K); 4 CSR 240.20.093(1)(M), (N), (Q), (R) and (DD); and 4 CSR 240-20.094 (1) (J), (L), (M) and (N).
3) "demand-side program approval proceeding" found in 4 CSR 240-3.163(9), (9)(A) and (B); 4 CSR 240-20.093(1)(I), (DD); and 4 CSR 240-20.093(1) (I), (2), (2)(G)2, (3)(B), (4) and(10).
4) "application for demand-side program approval proceeding" found in 4 CSR 240-20.093(2)(B).

Due to the lack of a definition and the use of inconsistent terminology, it is unclear whether a "filing", "application" or "proceeding" is intended to occur. Therefore, Staff recommends that if this language remains in the proposed MEEIA rules, that the recommended definition for the phrase "filing for demand-side program approval" be utilized and that consistent terminology be used throughout the proposed MEEIA rules as indicated above.

**RESPONSE AND EXPLANATION OF CHANGE:** The commission agrees this language should be clarified, but it also believes that inclusion of the word "case" in Staff's recommended version could also add confusion. Consequently, the commission will adopt the following definition and clarify the identified terms:

<u>Filing for demand-side program approval means a utility's filing for approval, modification or discontinuance of demand-side program(s) which may also include a simultaneous request for the establishment, modification or discontinuance of a DSIM.</u>

The proposed rulemaking language for 4 CSR 240-3.163, 4 CSR 240-3.164, 4 CSR 240-20.093 and 4 CSR 240-20.094 have been modified accordingly. However, in 4 CSR 240-3.163(2) a similar inconsistency in language was corrected by removing the words "for the demand-side program filing" since a DSIM can be established at the same time as a demand-side program filing or as a separate DSIM filing.

**COMMENT # 5 – DEFINITION OF PROBABLE ENVIRONMENTAL COSTS:**

MDNR, NRDC, Sierra Club, Renew Missouri, GRELC state that the statutory definition of the Total Resource Cost Test ("TRC") includes "probable environmental compliance costs." § 393.1075.2(6). The proposed rules do not define or even use this term but incorporate instead the definition of "probable environmental costs" from the proposed IRP rule, 4 CSR 40-22.020(46). See 4 CSR 240-3.163(1)(Q), 4 CSR 240-3.164(1)(R), 4 CSR 240-20.093(1)(Y) and 4 CSR 240-20.094(1)(V). The proposed rule 4 CSR 240-22.040(2)(B) does not provide an adequate method of calculating environmental compliance costs. It is restricted to future 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 plainly means to include all costs, including present costs, and a more objective assessment, not one based on "subjective probability" in certain individuals' judgment. The commission needs to include a methodology in its rules for calculating these costs, which might include an environmental cost adder expressed in dollars or, as in Ohio, a percentage externality factor. Relying on the IRP rule to implement SB 376 has the effect of adding criteria such as the subjective judgment of utility decision makers that, as discussed above, are not in the statute.

Related to these concerns, OPC's proposed changes to the definition of the TRC as follows: Total resource cost test or TRC means the test that compares the avoided utility costs (including probable environmental compliance costs) 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.~~ The present value of the program avoided utility benefits shall be calculated over the projected life of the measures installed under the program.

**RESPONSE AND EXPLANATION OF CHANGE:** The concerns raised by these stakeholders regarding the definitions and relationships between the terms TRC, avoided cost or avoided utility cost and probable environmental compliance cost are inter-related to OPC's concerns with the definition of TRC echoed in Comment 17 to proposed rule 4 CSR 240-20.094. Consequently, the commission will address both of these concerns in its response to each comment.

The current proposed rules 4 CSR 240-3.163(1); 4 CSR 240-3.164(1); 4 CSR 240-20.093(1) and 4 CSR 240-20.094(1) have the following definitions:

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 savings and demand 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;

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's 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;

Total resource cost test, or TRC, means the test of the cost-effectiveness of demand-side programs that compares the avoided utility costs plus 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.

Section 393.1705 (6) defines "Total resource cost test", as a test that compares the sum of avoided utility costs and avoided probable environmental compliance costs to the sum of all incremental costs of end-use measures that are implemented due to the program, as defined by the commission in rules.

The commission believes the following redline revisions to the definitions in 4 CSR 240-3.163(1)(C),(R), and (T); 4 CSR 240-3.164(1)(A), (R) and (X); 4 CSR 240-20.093(F), (Z) and (DD); and 4 CSR 240-20.094(1)(D), (W), and (Y) address the concerns expressed by OPC and by MDNR, NRDC, Sierra Club, Renew Missouri, and GRELC:

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 demand-side programs' energy savings and demand savings associated with generation, transmission, and distribution facilities including avoided probable environmental compliance costs. The utility shall use the same methodology used in its most recently-adopted preferred resource plan to calculate its avoided costs;

Probable environmental compliance 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's decision-makers, may be imposed at some point within the planning horizon which would result in environmental 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~~;

Total resource cost test, or TRC, means the test of the cost-effectiveness of demand-side programs that compares the avoided utility costs ~~plus 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~~.

Additionally, the commission chooses to not include a methodology in its MEEIA rules for calculating probable environmental compliance costs. The commission notes that subsection (12) of the proposed rule requires the commission to complete a review of the effectiveness of this rule no later than four years after the effective date at which time it may initiate rulemaking proceeding to revise the rule. Upon review, the commission will have the opportunity to revisit

this issue to determine if it is appropriate to include a methodology. The commission's actions on the definitions of avoided cost, probable environmental compliance cost and total resource cost test are consistent with the commission's actions regarding the interaction between this rule and 4 CSR 240-22 Electric Utility Resource Planning.

**COMMENT # 6 – DEFINITION OF STAFF:**

Staff believes that the word 'Staff" in 4 CSR 240.0163(1) is too broadly defined in the proposed rule. The term Staff is currently defined as, "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." The definition of Staff in each of the draft rules would include attorneys in the Office of the General Counsel other than the General Counsel who are not in the Office of the Staff Counsel. Staff is not certain that result is intended. The definitions appear at 4 CSR 240-3.163(1)(S), 4 CSR 240- 3.164(1)(V), 4 CSR 240-20.093(1)(BB) and 4 CSR 240-20.094(1)(X).

**RESPONSE AND EXPLANATION OF CHANGE:** The commission agrees with Staff. Not only did the commission not intend to include attorneys in the Office of the General Counsel other than the General Counsel who are not in the Office of the Staff Counsel, but the commission will conform the definition of "Staff" to that being formulated in the commission's Chapter 2 revisions in order to maintain consistency throughout all of its rules. "Staff" will be defined as:

Staff means all personnel employed by the commission, whether on a permanent or contract basis, except: commissioners, commissioner support staff including technical advisory staff, personnel in the secretary's office, and personnel in the general council's office including personnel in the adjudication department. Employees in the staff's counsel's office are members of the commission's staff.

**COMMENT # 7 - ESTIMATES OF THE EFFECT OF THE DSIM ON CUSTOMER RATES**

MDNR, NRDC, Sierra Club, Renew Missouri, GRELC express concerns regarding the language in 4 CSR 240-3.163(2)(D). Currently, the supporting information required to be filed with a DSIM under 4 CSR 240-3.163(2) includes: "(D) Estimates of the effect of the DSIM on customer rates and average bills for each of the next three (3) years for each rate class."

These entities request that this period be revised to "(D) Estimates of the effect of the DSIM on customer rates and average bills over the life of each measure." The lives of many efficiency measures are much longer than three years. As implementation proceeds and these measures approach saturation, the system benefits realized by all customers and the bill savings realized by direct participants will increase.

**RESPONSE AND EXPLANATION OF CHANGE:** The commission appreciates the concerns expressed by these stakeholders and will modify 4 CSR 240-3.163(2)(D) as follows to provide a longer view of the estimated impact of the proposed DSIM upon customers' rates and average bills: "(D) Estimates of the effect of the DSIM on customer rates and average bills for at least each of the next ~~three (3)~~ five (5) years for each rate class." The commission notes that a demonstration of cost-effectiveness and overall rate impact for each demand-side program and

for the total of all demand-side programs of the utility is required in the current proposed rule 4 CSR 240-3.164(2)(B)3: "The impacts on annual revenue requirements and net present value of annual revenue requirements as a result of the integration analysis in accordance with 4 CSR 240-22.060 over the twenty (20)-year planning horizon." The requirements of 4 CSR 240-3.164(2)(B)3 should provide information similar to that requested by these stakeholders and makes it unnecessary to provide the estimated impact of the proposed DSIM upon customers' rates and average bills over the life of each measure. The Commission further notes that 5 years should be sufficient given that most of these programs are expected to have a life of 3 to 5 years.

**COMMENT # 8 – INTERVENTION STATUS**

MEDA believes that the language in 4 CSR 240-3.163(9)(A) should be removed because its members believe that intervention status in any subsequent related periodic rate adjustment proceeding should not be automatic for persons or entities granted intervention in a prior demand-side program approval proceeding.

**RESPONSE:** The commission rejects MEDA's proposal. This provision is designed to ensure due process for those entities claiming a substantive right in association with these proceedings. The utilities' rights are ensured by the requirement that "such person or entity shall file a notice of intention to participate within the intervention period." Thus, no entity involved in a prior proceeding can sleep on its claimed rights.

**COMMENT # 9 – SPECIFIC FILING REQUIREMENTS**

During the rulemaking hearing, OPC, incorporated by reference its "red-lined" version of the proposed rules and stated it supported all of the recommended changes contained in that July 23, 2010 filing. In that filing OPC proposed several changes to 4 CSR 240.3.163 (not already addressed) as follows:

OPC proposes the following change to 4 CSR 240-3.163(2)(F):

(2)(F) Estimates of the effect of the DSIM utility incentive on utility earnings and key credit metrics for each of the next three (3) years which shows the level of earnings and credit metrics expected to occur for each of the next three (3) years with and without the DSIM utility incentive;

~~*(F) If the utility proposes to adjust the DSIM cost recovery revenue requirement between general rate proceedings, a complete explanation of how the DSIM rates shall be established and adjusted to reflect over-collections or under-collections;*~~

OPC proposes the following change to 4 CSR 240-3.163(5)(A):

(5) (A) A list of all approved demand-side programs and the following information for each approved demand-side program:

1. Actual amounts expended by year, including customer incentive payments;

2. Peak demand and energy savings impacts and the techniques used to estimate those impacts;

3. A comparison of the estimated actual annual peak demand and energy savings impacts to the level of annual peak demand and energy savings impacts that were projected when the program was approved.

4. For market transformation programs, a quantitative and qualitative assessment of the progress being made in transforming the market.

5. A comparison of actual and budgeted program costs, including an explanation of any increase or decrease of more than 10% in the cost of a program.

63. The avoided costs and the techniques used to estimate those costs;

74. The estimated cost-effectiveness of the demand-side program and a comparison to the estimates made by the utility at the time the program was approved;

85. The estimated net economic benefits of the demand-side program;

96. For each program where one or more customers have opted out of demand-side programs pursuant to Section 393.1075.7, RSMo, a listing of the customer(s) who have opted out of participating in demand-side programs;

107. A copy of the EM&V report for the most recent annual reporting period; and

11.8 Demonstration of relationship of the demand-side program to demand-side resources in latest filed 4 CSR 240-22 compliance filing.

**RESPONSE:** When OPC filed these proposed changes it stated in its filing: "Many of these changes are self-explanatory (e.g. to provide clarity or consistency with the language in MEEIA) and some are described in the comments below." The commission addressed the specific comments where OPC provided an explanation in other portions of this order, or in the orders of the interrelated MEEIA rules.

Perhaps OPC has not re-visited its comments from July, 23, 2010, but the current version of the proposed rule adopted language in 4 CSR 240-3.163(2)(E) and 4 CSR 240-3.163(5)(A) that is virtually identical, if not completely identical, to the OPC proposed language. Finding there is no distinction between the current language and the proposed changes, the commission will not amend the current language.

**COMMENT # 10 – CROSS REFERENCE WITH COMMENT 12 IN INTER-RELATED RULE 4 CSR 240-20.093: REQUIREMENTS FOR SEMI-ANNUAL ADJUSTMENTS OF DSIM RATES**

The MEDA stakeholders express concerns over the language in 4 CSR 240-20.093(4)(A)-(D). The language, according to MEDA, sets forth the requirements for semi-annual adjustments of DSIM and it should be modified to apply not only to the cost recovery component of the DSIM, but also to all components of the DSIM, i.e. cost recovery, lost margins or lost revenues and

incentive. The MEDA stakeholders recommend that in order to comply with the intent of the MEEIA, in particular timely cost recovery to utilities, aligning utility financial incentives with helping customers use energy efficiently, and providing timely earnings opportunities associated with cost-effective energy efficiency -- adjustments of DSIM rates between general rate proceedings should apply to all components of the DSIM. These three components must be addressed in concert to provide a sustainable business model for utilities to pursue DSM programs and both benefit customers and satisfy shareholders.

**RESPONSE AND EXPLANATION OF CHANGE:** These proposed changes for 4 CSR 240-20.093, created a ripple effect with 4 CSR 240-3.163 that the commission must address in this proposed rule. The commission will not modify the language in 4 CSR 240-20.093(4) as proposed by MEDA to allow adjustments to the DSIM utility lost revenue requirement or to the DSIM utility incentive revenue requirement during the semi-annual adjustment to DSIM rates. The commission notes determination of the DSIM utility lost revenue requirement and the DSIM utility incentive revenue requirement are dependent upon measurement and verification performed by an EM&V contractor and documented in EM&V reports. Such EM&V reports will be performed in accordance with EM&V plan for each demand-side program and demand-side program plan required by 4 CSR 240-3.164(2)C)13 and will likely be published no more frequently than annually and will not be available semiannually. However, the DSIM cost recovery revenue requirement is not dependent upon measurement and verification performed by an EM&V contractor and documented in EM&V reports but rather depends upon the contemporaneous accounting records of each electric utility.

In the process of reviewing this issue the commission noticed some internal inconsistencies and finds it is necessary to make changes to language contained in 4 CSR 240-20.093(1) and (2). Similarly, six definitions in 4 CSR 240-3.163(1) and (2) must be changed to maintain conformity throughout the MEEIA rules. These changes should provide clarification to this issue. These changes include:

(1)(D) Demand means the rate of electric power use ~~measured~~ over an hour measured in kilowatts (kW);

(1)(G) 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 to provide the utility with cost recovery of demand-side program costs based on the approved cost recovery component of a DSIM;

(1)(I) DSIM revenue requirement means the sum of the DSIM cost recovery revenue requirement, DSIM utility lost revenue requirement, and DSIM utility incentive revenue requirement, ~~if allowed by the commission in utilities' last filing for demand-side program approval~~;

(1)(J) DSIM utility incentive revenue requirement means the revenue requirement approved by the commission ~~in a utility's filing for demand-side approval proceeding~~ to provide the utility with a portion of annual net shared benefits based on the approved utility incentive component of a DSIM ~~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~~;

(1)(K) 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~~ provide the utility with recovery of lost revenue based on the approved utility lost revenue component of a DSIM;

(2)(H) A proposal for how the commission can determine if any ~~DSIM~~ utility incentives component of a DSIM are aligned with helping customers use energy more efficiently.

## Title 4—DEPARTMENT OF ECONOMIC DEVELOPMENT
## Division 240—Public Service Commission
## Chapter 3—Filing and Reporting Requirements

### 4 CSR 240-3.163 Electric Utility Demand-Side Programs Investment Mechanisms Filing and Submission Requirements

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

(C) 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 demand-side programs' energy savings and demand savings associated with generation, transmission, and distribution facilities including avoided probable environmental compliance costs. The utility shall use the same methodology used in its most recently-adopted preferred resource plan to calculate its avoided costs;

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

(G) DSIM cost recovery revenue requirement means the revenue requirement approved by the commission in a utility's filing for demand-side program approval or a semi-annual DSIM rate adjustment case to provide the utility with cost recovery of demand-side program costs based on the approved cost recovery component of a DSIM;

(I) DSIM revenue requirement means the sum of the DSIM cost recovery revenue requirement, DSIM utility lost revenue requirement, and DSIM utility incentive revenue requirement;

(J) DSIM utility incentive revenue requirement means the revenue requirement approved by the commission to provide the utility with a portion of annual net shared benefits based on the approved utility incentive component of a DSIM;

(K) DSIM utility lost revenue requirement means the revenue requirement explicitly approved (if any) by the commission to provide the utility with recovery of lost revenue based on the approved utility lost revenue component of a DSIM;

(P) Filing for demand-side program approval means a utility's filing for approval, modification or discontinuance of demand-side program(s) which may also include a simultaneous request for the establishment, modification or discontinuance of a DSIM.

(Q) 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 occurs when utility demand-side programs approved by the commission in accordance with 4 CSR 240-20.094 cause a drop in net system 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;

(R) Probable environmental compliance 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's decision-makers, may be imposed at some point within the planning horizon which would result in environmental compliance costs that could have a significant impact on utility rates.;

(S) Staff means all personnel employed by the commission, whether on a permanent or contract basis, except: commissioners, commissioner support staff including technical advisory staff, personnel in the secretary's office, and personnel in the general council's office including personnel in the adjudication department. Employees in the staff's counsel's office are members of the commission's staff;

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

(2) When an electric utility files to establish a DSIM as described in 4 CSR 240-20.093(2), the electric utility shall file the following supporting information as part of, or in addition to, its direct testimony. Supporting workpapers shall be submitted as executable versions in native format with all formulas intact.

(D) Estimates of the effect of the DSIM on customer rates and average bills for each of the next five (5) years for each rate class.

(H) A proposal for how the commission can determine if any utility incentives component of a DSIM are aligned with helping customers use energy more efficiently.

(9) Party status and providing to other parties affidavits, testimony, information, reports, and workpapers in related proceedings subsequent to the utility's filing for demand-side program approval establishing, modifying, or continuing a DSIM.

(A) A person or entity granted intervention in a utility's filing for demand-side program approval in which a DSIM is approved by the commission shall be a party to any subsequent related periodic rate adjustment proceeding without the necessity of applying to the commission for intervention; however, such person or entity shall file a notice of intention to participate within the intervention period. In any subsequent utility's filing for demand-side program approval, such person or entity must seek and be granted status as an intervenor to be a party to that proceeding. Affidavits, testimony, information, reports, and workpapers to be filed or submitted in connection with a subsequent related semi-annual DSIM rate adjustment proceeding or

utility's filing for demand-side program approval to modify, continue, or discontinue the same DSIM shall be served on or submitted to all parties from the prior related demand-side program approval proceeding and on all parties from any subsequent related periodic rate adjustment proceeding or utility's filing for demand-side program approval to modify, continue, or discontinue the same DSIM, concurrently with filing the same with the commission or submitting the same to the manager of the energy resource analysis section of the staff and public counsel.

(B) A person or entity not a party to the utility's filing for demand-side program approval in which a DSIM is approved by the commission may timely apply to the commission for intervention, pursuant to 4 CSR 240-2.075(2) through (4) of the commission's rule on intervention, respecting any related subsequent periodic rate adjustment proceeding, or, pursuant to 4 CSR 240-2.075(1) through (5), respecting any subsequent utility's filing for demand-side program approval to modify, continue, or discontinue the same DSIM.

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

| | | |
|---|---|---|
| In the Matter of the Chairman's Request for A Status Report Regarding Energy Efficiency Advisory Groups and Collaboratives | ) ) ) | File No. AO-2011-0035 |
| In the Matter of the Consideration and Implementation of Section 393.1075, RSMo., The Missouri Energy Efficiency Investment Act | ) ) ) ) | File No. EX-2010-0368 |

## CHAIRMAN CLAYTON'S CONCURRENCE TO FINAL ORDER OF RULEMAKING AND RESPONSE TO STAFF'S REPORT

Issue Date: February 9, 2011

This Commissioner files this opinion in support of the Final Order of Rulemaking in File No. EX-2010-0368, regulations formulating future efforts in energy efficiency investments for Missouri investor-owned utilities. Additionally, this opinion sets out this Commissioner's response to the Staff Report on energy efficiency programs, filed in Case No. AO-2011-0035. These two cases demonstrate the new commitment to energy efficiency in Missouri in empowering utility customers to take control of their energy bills.

In response to my request, the Staff of the Commission filed a report on September 15, 2010, describing the work of each energy efficiency advisory group and collaborative currently addressing the energy efficiency issues facing Missouri's investor-owned electric and natural gas utilities. The report is an impressive compilation of material summarizing the changes in Missouri's efforts at improving the efficient delivery and use of energy. As our nation faces an uncertain future with regard to energy-related priorities, the compilation of material demonstrates the Commission's new commitment to assisting customers and utilities in better managing our energy usage through efficiency programs.

The report highlights that in the past several years, Missouri utilities have gone from a few efficiency programs inconsistently scattered among varying sectors to a comprehensive offering of programs with relatively consistent goals among all utilities. Collaboratives or stakeholder groups have been established for each utility to collect input and formulate policy involving diverse groups, associations and agencies with many people effectively engaged. Program offerings are considered, funded and implemented through the collaboratives, with joint recommendations made to the Commission for approval or rejection in a rate case. Procedures are now in place for resolution of disputes among parties and more information is being distributed to more utility customers than ever before with a wide array of opportunities to reduce energy bills.

The concept of energy efficiency is being embraced as never before. Utilities are now recognizing the benefits of efficient use through reduced demand and energy charges and with less urgency in identifying new sources of electric generation or natural gas acquisition. With increased efficiency of energy use, customers are less vulnerable to natural gas price volatility. Utilities are able to delay or avoid costly new energy sources. Demand Response programs are in place in some territories in attempts to avoid the use of costly gas "peaker plants" in times of high demand, which demonstrate that utilities and customers can benefit from reducing power generation costs. Efficiency programs, in general, are smoothing increases in overall demand with more manageable growth, while avoiding the difficulties of securing new, costly baseload generation.

Customers have much to gain from efficient use of energy. While customers benefit from lower utility costs, customers also receive the direct benefit education and training in learning how energy is used, how it is priced and how they can find ways to reduce consumption, thereby , reducing their monthly energy bills. Customers must have greater options through utility programs in evaluating appliance purchases, understanding heating

and cooling needs, learning about new technologies, and learning that one's quality of life does not have to decrease when energy is used more efficiently. To customers, effective energy efficiency programs translate into empowerment to take control of their energy bills. Rebates, incentives and education provide customers with the necessary tools to change behavior and change how energy decisions are made.

The Commission has recognized that these new programs require adequate funding to be effective. In 2000, total funding for efficiency programs focused primarily on weatherization in the amount of $875,000, involving a couple of utilities. In 2010, funding levels have increased to $53 million, including all 8 utilities. The Commission has determined that natural gas utilities should strive for the target of EE funding at a minimum of .5% of their gross revenues, and all large gas utilities are moving toward this policy target. Electric utilities are taking similar steps at developing and delivering a comprehensive offering of efficiency programs with sufficient funding levels.

Lastly, as Missouri ramps up its efficiency programs, its investments and its increase in knowledge and action for customers, this Commission and future Commissions must be prepared to address an evolving utility industry. If load growth is curtailed, there will be pressure to reevaluate how rates are set. Utilities will push for equal or greater returns on efficiency investments and new models of incentives for utility performance in meeting Commission goals and priorities. Utilities will demand fair treatment if downward pressure is applied to their efforts at increasing sales for greater revenue. On the other hand, consumers will demand that the Commission apply close supervision to new programs, carefully scrutinize new rate making requests and cautiously evaluate any modification to the traditional rate of return regulatory compact. This and future Commissions will be faced with balancing these potentially competing positions to ensure that programs are cost-effective,

deliver benefits to both customers and utilities, and do not inequitably shift risk or cost. These are complicated challenges in a new world of energy delivery.

The Commission is prepared to tackle these issues and has taken additional steps to gather information and set policy. First, the Commission continues its statewide energy efficiency study with a partnering agency, the Missouri Energy Center. It is this Commissioner's hope that realistic, achievable goals can be identified to provide greater assistance to those working on Missouri's energy future. Secondly, the Commission has concluded the formal rulemaking process with regulations stemming from Senate Bill 376, the Missouri Energy Efficiency Act. Through these rules, the Commission addresses a number of significant policy questions to provide clarity and certainty for current and future efficiency programs. The Commission has developed the rules with an eye towards flexibility and the understanding that incentive mechanisms will require careful planning and design. The Commission will need several "attempts" at determining the large-scale benefits and costs upon all stakeholders. Lessons learned from those efforts will provide future commissions with the knowledge to develop programs effectively. The rules certainly contemplate a changing world where the regulator may no longer demand greater sales of energy, but rather strive for decreased usage. How does a utility reduce its sales but maintain profitability? The rules are designed to consider this conundrum.

In conclusion, this Commissioner commends and thanks the staff of the Commission for its efforts in working through challenging and potentially controversial issues. Most Missourians are unaware of the work of the Public Service Commission and even fewer know the dedication, the expertise and the significant work ethic of the PSC staff. This report illustrates the giant steps taken in recent years and the future work that lies ahead. It is my hope and request that a similar report be prepared annually, in a format for easy

consumption, so that the public and Commissioners may understand what we are doing on critically important issues and how those issues evolve in the future.

Therefore, it is my request that the Staff prepares an annual update to its report, in a format acceptable to Staff, every September 15th, and makes that update available to the Commission and the public.

For the foregoing reasons, this Commissioner concurs.

Respectfully submitted,

Robert M. Clayton III
Chairman

**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 ROBERT S. KENNEY

I write to dissent from the majority's Final Orders of Rulemaking regarding the Missouri Energy Efficiency Investment Act.[1] I specifically dissent as it relates to those Rules allowing utilities to recover lost revenue. I dissent because the Missouri Energy Efficiency Investment Act (the "MEEIA" or the "Act"), the statute under which the Commission has authority to promulgate these Rules, does not authorize recovery of lost revenue; I dissent because authorizing recovery of lost revenues does nothing to remove the disincentive it is ostensibly designed to remove; and I dissent because authorizing recovery of lost revenues does not serve the interests of Missouri citizens.

I believe in energy efficiency as a least-cost way of reducing carbon emissions. Along with greater deployment of renewable resources, nuclear energy, and new technologies such as carbon capture and sequestration, energy efficiency measures are a certain and cost-effective way of reducing carbon emissions. Equally as important, energy efficiency measures give utility customers an opportunity to realize savings in their bills.

The MEEIA is the product of Senate Bill No. 376, which was first read February 16, 2009. As with most pieces of legislation, SB 376 as introduced differed from the Senate Substitute for Senate Committee Substitute for SB 376, which was the Truly

[1] 4 CSR 240-3.163; 4 CSR 240-3.164; 4 CSR 240-20.093; and 4 CSR 240-20.094 (collectively the "Rules").

Agreed To and Finally Passed bill as signed by Governor Nixon. I will discuss the relevance of this fact later. Governor Nixon signed SB 376 in July 2009. It is codified at Section 393.1075 of the Missouri Revised Statutes.

The MEEIA is a laudable piece of legislation. And the rules we have drafted in support of the MEEIA represent the hard work of our staff and numerous stakeholders. They are to be commended for their efforts. But the issue of lost revenue recovery is of such significance that including provisions allowing for the recovery of lost revenues damages the rules as a whole.

**1. The MEEIA does not authorize recovery of lost revenue**

The MEEIA sets forth the state's policy "to value demand side investment equal to traditional investment in supply and delivery infrastructure and allow recovery of all reasonable and prudent *costs* of delivering cost-effective demand-side programs." Mo. Rev. Stat. § 393.1075.3 (2010) (emphasis supplied). The MEEIA further provides that "the [C]ommission may develop *cost* recovery mechanisms to further encourage investments in demand side programs[.]" Mo. Rev. Stat. § 393.1075.5 (2010) (emphasis supplied).

The Commission is instructed to support the state's policy by providing timely cost recovery for utilities; by ensuring 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 by providing timely earnings opportunities associated with cost effective measurable and verifiable efficiency savings. Mo. Rev. Stat. § 393.1075.3 (1) – (3) (2010).

There is no language in the language I have cited or anywhere else in the statute that authorizes the recovery of lost revenue. Lost revenue is neither a *cost* of providing service nor a *cost* of providing energy efficiency programs.

The absence of any such language is telling. What is also telling is that the introduced version of SB 376 included language allowing for "recovery of lost sales attributable to approved energy efficiency programs" and "allowing the utility a fixed investment recovery mechanism to recover lost margins[.]" See Senate Bill No. 376, First Regular Session, 95th General Assembly, Read First Time February 16, 2009.

In the Truly Agreed To and Finally Passed version of the bill, signed by the Governor and codified at Section 393.1075, this language is conspicuously absent. While this absence is not dispositive of the General Assembly's intent, it is instructive. Had the General Assembly intended to authorize recovery of lost revenues, it certainly could have kept the language that appears in the introduced version of SB 376. In certain circumstances, such as this one, "omissions should be understood as exclusions." See, Angoff v. M and M Mgmt. Corp., 897 S.W.2d 649, 655 (Mo. Ct. App. 1995)

**2. Allowing for recovery of lost revenue does not solve the problem**

Encouraging energy efficiency, on the one hand, requires the utility to act counter to its financial interests. So, some form of lost revenue recovery mechanism is necessary, proponents assert, in order to remove this disincentive. But allowing for recovery of lost revenues does nothing to remove the incentive to increase revenues by increasing sales.

The lost revenue recovery mechanism is supposed to ameliorate the effects of any lost revenues specifically tied to measured and verified energy efficiency programs. The

problem, however, is that the evaluation, measurement, and verification program will likely lead to increased contention as parties litigate the accuracy of the evaluation, measurement, and verification program. Moreover, every indication is that measuring and verifying lost revenues associated with specific energy efficiency programs is a highly imprecise undertaking. In addition to leading to more contentious rate cases, this imprecision allows opportunity for mischief in measuring and verifying the savings associated with a particular program. This is particularly true where, as is the case with the Rules, the utility is charged with evaluating, measuring, and verifying its own program.

Only eight states currently use some form of lost revenue recovery mechanism.[2] More states are looking to some form of revenue decoupling as a preferred method of addressing the disincentives associated with promoting energy efficiency. I do not, at this time, express an opinion about the desirability of decoupling. I only note that it provides a more certain means of removing the so-called "throughput incentive," that is the incentive to increase revenues by increasing sales. Additionally, performance incentives are another effective alternative for addressing the disincentives associated with promoting energy efficiency.

Lost revenue recovery mechanisms are also difficult to administer as the ability to properly implement such mechanisms depends to a significant degree on robust evaluation, measurement, and verification. And since any recovered lost revenues are

[2] Colorado, Kentucky, Montana, North Carolina, Ohio, Oklahoma, South Carolina, and Wyoming. Utah is considering a lost revenue recovery mechanism. As of this writing, the status of that mechanism is uncertain. See The Edison Foundation's Institute for Electric Efficiency, "State Electric Efficiency Regulatory Frameworks," July 2010, accessed at http://www.electric-efficiency.com/issueBriefs/IEE_StateRegulatoryFrame_0710.pdf, on February 7, 2011.

only those directly attributable to the energy efficiency program, the utility continues to have the incentive to increase revenues through increased sales.

In addition to the difficulty associated with administering an effective evaluation, measurement, and verification program, the use of the lost revenue recovery mechanism gives rise to many other questions. How are revenues attributable to energy efficiency programs distinguished from decreased sales attributable to any other factor? How are potential off-system sales taken into account that are realized as a result of any energy efficiency programs? Will customers reap the benefits of increased energy efficiency and decreased consumption in the way of lower bills if the "lost revenues" are ultimately recovered? Will customers' incentives to use energy more efficiently be sustained or enhanced, as instructed by the MEEIA? There are too many unanswered questions to leave one comfortable that allowing for recovery of lost revenues will advance the overarching goals of promoting energy efficiency or inure any great benefits to ratepayers.

**3. Conclusion**

Energy efficiency measures are to be encouraged and implemented to the greatest degree possible. Energy efficiency is a proven, cost-effective means of addressing many problems: global climate change caused by green house gas emissions; air quality issues; consumption and depletion of finite fossil fuel resources; and energy independence and security.

The policy of the state is to value demand side investments equal to other investments. Utilities' financial incentives are to be aligned with helping customers use

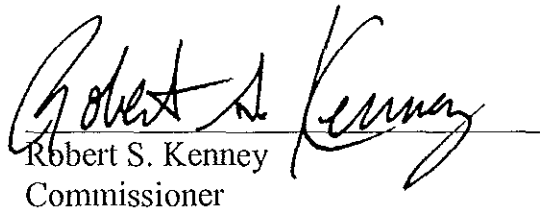
energy more efficiently and in a manner that sustains and enhances their incentives to use energy more efficiently. The MEEIA makes these pronouncements and charges the commission with drafting rules in support of these worthy goals. The MEEIA gives the commission latitude in promulgating rules supportive of its goals. But the MEEIA does not authorize recovery of lost revenues.

Moreover, recovery of lost revenues does not address the problem that it sets out to resolve. While it provides revenue stability for the utility, it does not remove the incentive to promote increased sales. Finally, it is hard to see how allowing for recovery of lost revenues supports or enhances the customers' incentives to use energy more efficiently.

I wholeheartedly and enthusiastically support the overarching principles of the MEEIA. And I recognize the need to align utilities' financial incentives with helping customers decrease consumption of their product. But I do not believe that allowing for recovery of lost revenues achieves this alignment.

For all of the foregoing reasons I dissent.

Respectfully submitted,



Robert S. Kenney
Commissioner

Dated this 9th day of February 2011,
at Jefferson City, Missouri

FIRST REGULAR SESSION

# SENATE BILL NO. 376

95TH GENERAL ASSEMBLY

INTRODUCED BY SENATORS LAGER AND CALLAHAN.

Read 1st time February 16, 2009, and ordered printed.

TERRY L. SPIELER, Secretary.

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## AN ACT

To amend chapter 393, RSMo, by adding thereto one new section relating to energy efficiency investments by electric and gas corporations.

*Be it enacted by the General Assembly of the State of Missouri, as follows:*

Section A. Chapter 393, RSMo, is amended by adding thereto one new section, to be known as section 393.1124, to read as follows:

**393.1124. 1. This section shall be known as the "Missouri Residential and Small Business Energy Efficiency Investment Act".**

**2. The public service commission shall permit electric and gas corporations to implement commission-approved energy efficiency programs proposed pursuant to this section. Such programs shall be beneficial to all customers in the customer class in which the program is proposed, regardless of whether the program is utilized by all customers.**

**3. The commission shall develop cost recovery mechanisms that value energy efficiency investments equal to or better than traditional supply side investments. Such mechanisms shall include the capitalization of investments in and expenditures for energy efficiency programs and a recovery of lost sales attributable to approved energy efficiency programs. The commission may also develop cost recovery mechanisms to further encourage investments in energy efficiency including, in combination and without limitation: an incentive rate of return higher than the rate of return on other investments, accelerated depreciation on energy efficiency investments, allowing the utility to retain a portion of the net benefits of an energy efficiency program for its shareholders, allowing the utility a fixed investment recovery mechanism to recover lost margins and a cost adjustment clause for**

collection of costs associated with energy efficiency programs.

4. The commission may reduce or exempt allocation of energy efficiency expenditures to low income classes, as defined in an appropriate rate proceeding, as a subclass of residential service. No customer in any rate class shall pay more than five thousand dollars a month to support programs authorized under this section. Notwithstanding any other statute or commission rules, this section explicitly provides the commission authority to approve low income tariffs.

5. The commission shall provide oversight and may adopt rules and procedures and approve corporation-specific settlements and tariff provisions, as necessary, to ensure that electric and gas corporations can achieve the goals of this section. Any rule or portion of a rule, as that term is defined in section 536.010, RSMo, that is created under the authority delegated in this section shall become effective only if it complies with and is subject to all of the provisions of chapter 536, RSMo, and, if applicable, section 536.028, RSMo. This section and chapter 536, RSMo, are nonseverable and if any of the powers vested with the general assembly pursuant to chapter 536, RSMo, to review, to delay the effective date, or to disapprove and annul a rule are subsequently held unconstitutional, then the grant of rulemaking authority and any rule proposed or adopted after August 28, 2009, shall be invalid and void.

6. Each electric and gas corporation shall submit an annual report to the commission describing the energy efficiency programs implemented by the utility in the previous year. The report shall document program expenditures, including incentive payments, peak demand and energy savings impacts and the techniques used to estimate those impacts, avoided costs and the techniques used to estimate those costs, the estimated cost-effectiveness of the energy efficiency programs, and the net economic benefits of the energy efficiency programs.

✓