MEMORANDUM

TO: Stephen C. Reed, Secretary

DATE: February 9, 2011

RE: Authorization to File Order of Rulemaking with the Office of Secretary of State

FILE NO: EX-2010-0368

The undersigned Commissioners hereby authorize the Secretary of the Missouri Public Service Commission to file the following Order of Rulemaking with the Office of the Secretary of State, to wit:

Proposed Rule 4 CSR 240-3.164 – Filing and Reporting Requirements

Robert M. Clayton III, Chairman

Jeff Davis, Commissioner

Terry M. Jarrett, Commissioner

Kevin D. Gunn, Commissioner

Robert S. Kenney

Robin Carnahan

Secretary of State
Administrative Rules Division

RULE TRANSMITTAL

Administrative Rules Stamp

Rule Number 4 CSR 240-3.164

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

Name of person to call with questions about this rule:
Content Harold Stearley Phone 573-522-8459 FAX
Email address harold.stearley@psc.mo.gov

Data Entry same Phone FAX
Email address

Interagency mailing address Public Service Commission, 9th Fl, Gov.Ofc Bldg, JC, MO

TYPE OF RULEMAKING ACTION TO BE TAKEN

☐ Emergency rulemaking, include effective date
☐ Proposed Rulemaking
☐ Withdrawal ☐ Rule Action Notice ☐ In Addition ☐ Rule Under Consideration
☒ Order of Rulemaking
Effective Date for the Order
☒ Statutory 30 days OR Specific date

Does the Order of Rulemaking contain changes to the rule text? ☐ NO

☒ YES—LIST THE SECTIONS WITH CHANGES, including any deleted rule text:
Changes have been made to sections (1)(A), (1)(M), (1)(R), (1)(V), and (1)(X).

Small Business Regulatory Fairness Board (DED) Stamp

JCAR Stamp

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 240-3.164 Electric Utility Demand-Side Programs 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 240-3.164 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 1629). 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 8 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 240-3.163; 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 240-3.164 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, in and of itself, this rule specifically addresses electric utility demand-side program 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 sections or subsections of the interrelated MEEIA rules (4 CSR 240-3.163; 4 CSR 240-20.093 and 4 CSR 240-20.094) allow 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. No specific sections and subsection of this rule were identified by these entities that would require change based upon this comment. However, to the extent that any of these provisions could be implicated by the language of the interrelated rules, the commission will again address this issue.

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 Demand-Side Programs and the associated 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 240-3.164(1)(L); (1)(M); and (1)(P).

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, should the commission include provisions for recovery of lost revenues, these entities debate how "lost revenues" should be defined.

Proposed Rule 4 CSR 240-3.164(1)(M) 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 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.

Staff's proposed change would apply to definition section 4 CSR 240-3.164(1)(Q) of this proposed rule and the following sections of the interrelated proposed rules: 4 CSR 240-3.163(1)(P), 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 – DEFINITIONS OF POTENTIALS

MDNR, NRDC, Sierra Club, Renew Missouri, GRELC believe the definition of "economic potential" in 4 CSR 240-3.0164(1)(H), "maximum achievable potential" in 4 CSR 240-3.0164(1)(N), "realistic achievable potential" in 4 CSR 240-3.164(1)(T) and "technical potential" in 4 CSR 240-3.164(1)(W) should be deleted and replaced with the nationally recognized definitions for technical, economic, achievable and program potential developed through a public-private partnership of experts and contained in the National Action Plan for Energy Efficiency ("NAPEE"). 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.

According to these stakeholders, the definitions of potential in the proposed rule, taken together, could significantly and adversely influence Commission review of progress toward the legislative goal of "achieving all cost-effective demand-side savings" as well as future utility conduct of potential studies. 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. This is in contrast to an assumption of an absolute distinction between "maximum" and "realistic" achievable potential that introduces an analytic weakness and which does not acknowledge that there can be many levels of "achievable potential" based on the level of funding and aggressiveness of implementation that the company elects to pursue. Estimates from a market potential study are highly variable, depending on the measures included in a study, the range of customer incentives considered in the study questionnaires, and the assumptions used to calculate energy savings forecasts. Using the current definitions in the proposed rule could result in the following adverse consequences: (1) the draft language could limit the Commission's view of the potential for cost-effective demand side savings to the level of funding and aggressiveness of implementation that the company elects to assume in its potential study; and (2) future utility potential studies could focus unduly on establishing a single level of "realistic" achievable potential, limiting their study of the range of options under different levels of program implementation. This would be most likely to occur if the rule requires the utility to conduct potential studies but fails to establish adequate standards for conducting them.

RESPONSE: Substituting the current definitions of these terms would create a very material change to the current proposed MEEIA rules (specifically 4 CSR 240-20.094(2)(A)), because the NAPEE definition of achievable potential is equivalent to the current proposed MEEIA definition of maximum achievable potential. NAPEE defines these terms as follows:

Achievable potential is the amount of energy use that efficiency can realistically be expected to displace assuming the most aggressive program scenario possible (e.g., providing end-users with payments for the entire incremental cost of more efficiency equipment). This is often referred to as maximum achievable potential. Achievable potential takes into account real-world barriers to convincing end-users to adopt efficiency measures, the non-measure costs of delivering programs (for administration, marketing, tracking systems, monitoring and evaluation, etc.), and the capability of programs and administrators to ramp up program activity over time.

Program potential refers to the efficiency potential possible given specific program funding levels and designs. Often, program potential studies are referred to as "achievable" in contrast to "maximum achievable." In effect, they estimate the achievable potential from a given set of programs and funding. Program potential studies can consider scenarios ranging from a single program to a full portfolio of programs. A typical potential study may report a range of results based on different program funding levels.

The use of the NAPEE definitions will result in the most aggressive DSM program scenarios possible(e. g., "providing end-users with payments for the entire incremental cost of the most efficiency equipment") while maximum achievable potential in the current proposed MEEIA rules assumes " ... incentives that represent a very high portion of total programs cost and very short customer payback periods. Maximum achievable potential is considered the hypothetical upper boundary of achievable demand-side savings potential, because it presumes conditions that are ideal and not typically observed."

As noted in the NAPEE definition of achievable potential, changing the definitions assumes "the most aggressive program scenario possible". The commission believes substituting the definitions will result in an expectation of very high goals that are unrealistic or unattainable in the early stages of implementing the MEEIA. The commission will not substitute or change the current definitions of these terms.

Finally, the commission notes that subsection (7) 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 the current definitions require modification.

COMMENT # 5 – DEFINITION OF PROBABLE ENVIRONMENTAL COST

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 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 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 (7) 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 240.0164(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 – THE INTERPLAY BETWEEN THIS RULE AND 4 CSR 240-CHAPTER 22, ELECTRIC UTILITY RESOURCE PLANNING

MDNR, NRDC, Sierra Club, GRELC, and Renew Missouri have expressed concerns regarding the interplay between the proposed rules to implement MEEIA and the commission's Chapter 22 rules involving integrated resource planning ("IRP"). These concerns implicate proposed rules 4 CSR 240-3.164(2)(B)(3) (filing and submission requirements) and 4 CSR 240-20.094(3)(A)3 (demand-side programs). Consequently, the commission will address those comments in both rules.

MDNR, NRDC, Sierra Club, Renew Missouri, GRELC would like for proposed rules, 4 CSR 240-3.164(2)(B)(3) and 4 CSR 240-20.094(3)(A)3 to be eliminated. Rule 4 CSR 240-20.094(3)(A)3 says the PSC must approve programs that pass the Total Resource Cost Test, but it adds the following condition, that the programs: "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." However, the criterion of the MEEIA is the cost effectiveness of demand-side programs. § 393.1075.3–.4. Under the latest Chapter 22 rewrite, the primary criterion is the minimization of utility costs, but utilities may use other critical factors. 22.010(2). The most cost effective demand-side portfolio could fail the IRP tests if it were packaged with a bad set of supply-side resources.

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.

According to MDNR, NRDC, Sierra Club, Renew Missouri, GRELC, there is a 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. These include a minimally compliant demand-side plan (the "compliance benchmark"), an "aggressive" plan defined as maximum technical potential (which is an academic exercise), and an optimally compliant plan (minimal compliance with legal mandates but 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 in 22.060.

According to MDNR, NRDC, Sierra Club, Renew Missouri, GRELC, the status of the PRP is uncertain. 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.

According to MDNR, NRDC, Sierra Club, Renew Missouri, GRELC, MEEIA outranks Chapter 22. If the IRP rule is to perform that role, it must be modified to accommodate the MEEIA. 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).

According to MDNR, NRDC, Sierra Club, Renew Missouri, GRELC, MEEIA, if the commission subordinates the MEEIA to Chapter 22, it will be imposing criteria not prescribed by the legislature and will be unlawful. 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. Chapter 22 and the MEEIA can only be harmonized by ensuring that a demand-side portfolio that satisfies the criteria of the MEEIA automatically becomes part of the preferred resource plan, not the other way around.

The Staff of the Missouri Public Service Commission responded to these concerns in the following manner:

Various groups expressed opposition regarding the requirement that proposed demand-side programs be analyzed through the integration analysis process required by Chapter 22 Electric Utility Resource Planning. Some of the concerns expressed by these stakeholder organizations were that the process is a burdensome requirement and that it may not result in a set of demand-side resources that are adequate to meet a MEEIA goal of achieving all cost-effective demand-side savings; therefore, the results of the Chapter 22 integration analysis process

should not be a limiting factor in the approval of the demand-side programs submitted under the proposed 4 CSR 240-20.094 rule. These stakeholder groups contend that the Total Resource Cost (TRC) test should be an adequate measure, by itself, to determine which demand-side programs are proposed and approved. Staff does not agree with the concerns of these stakeholder groups.

According to Staff, Missouri's Chapter 22 Electric Utility Resource Planning rules are expected to continue to result in an ongoing and dynamic electric utility resource planning process to "optimize" both supply-side resources and demand-side resources at the lowest cost to electricity ratepayers while taking into consideration risk and uncertainty associated with critical uncertain factors such as: future customer loads (for energy and for demand), future fuel and purchased power prices, future economic conditions, future legal mandates, and new technology. Simply using the TRC test to determine which demand-side programs are proposed and approved does not give any consideration to risk and uncertainty associated with critical uncertain factors. Proposed rule 4 CSR 240-20.094(3)(A) requires that proposed demand-side programs, "Are included in the electric utility's preferred [resource] -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." Staff supports this requirement as it places demand-side resources on an equal basis with supply-side resources. Section 393.1075.3 RSMo Supp. 2009, states that, "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." The requirement that proposed demand-side programs be analyzed through the integration analysis process is consistent with MEEIA. Moreover, the requirement in proposed rule 4 CSR 240-20.094(3)(A) indicates that the integration analysis should be completed and filed as required by 4 CSR 240-3.164(2)(B)3, but does not state that the results would necessarily be a limiting factor in the approval of demand-side programs.

Finally, Staff would like to clarify for the Commission that should the electric utility determine that it wants to propose demand-side programs or program plans which are not included in the electric utility's preferred resource plan, a completely new Chapter 22 analysis and new preferred resource plan are not necessary. The only requirement of 4 CSR 240-20.094(3)(A) is that demand-side programs and program plans, "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." Further, such integration analysis to determine the impact of individual demand-side programs on the net present value of revenue requirements of the electric utility have been requested by Staff during 2010 on several occasions for demand-side programs which were not in the preferred resource plans of the individual electric utilities. The electric utilities performed the integration analysis, reported the incremental change to the net present value of revenue requirements, and communicated to Staff that the integration analysis was not burdensome taking no more than a day or two to set up and run the integration analysis with the proposed demand-side program.

RESPONSE: The commission agrees with its Staff. MEEIA states: "The commission shall consider the total resource cost test "a" preferred cost-effectiveness test." MEEIA does not state the total resource cost test shall be "the" cost-effectiveness test or even (as stated in the formal comments of the stakeholder group) "the primary" cost-effectiveness test. So, clearly there is additional opportunity for the commission to choose a more comprehensive process to

determine what demand-side resources constitute all cost-effective demand-side savings than simply using the total resource cost test. If the Commission stops with the results of the TRC, then demand-side analysis is given preferential treatment over supply-side analysis which is contrary to the MEEIA.

While "a" goal of MEEIA is to achieve all cost-effective demand-side savings, the stated fundamental objective of the proposed Chapter 22 rules is to provide the public with energy services that are safe, reliable and efficient, at just and reasonable rates, in a manner that serves the public interest. This objective further enhances the MEEIA, and is also consistent with sound public policy. This objective requires that the utility:

A. Consider and analyze demand-side resources and supply-side resources on an equivalent basis;

B. Use minimization of the present worth of long-run utility costs as the primary selection criterion in choosing the preferred resource plan; and

C. Explicitly identify and, where possible, quantitatively analyze any other considerations which are critical to meeting the fundamental objective of the resource planning process, but which may constrain or limit the minimization of the present worth of expected utility costs. ... These considerations shall include, but are not necessarily limited to, mitigation of risks associated with critical uncertain factors (such as future electricity loads, future economic conditions, future fuel and purchased power prices, and future legal mandated including environmental regulations). Finally, Chapter 22 risk analysis also considers the mitigation of rate increases associated with alternative resource plans.

The stakeholder group is suggesting that the total resource cost test is the only analysis needed to determine all cost-effective demand-side savings. The TRC may use as few as a single avoided cost amount for a year. Chapter 22 uses the total resource cost test to screen demand-side resources. Chapter 22 then requires further analysis of all resources that have passed screening analysis (both supply-side resources and demand-side resources) through integration analysis. The integration process required by Chapter 22 requires the utilities to look at all 8,760 hours of the year. The demand-side and supply-side resources that best meet the load requirements of all 8,760 hours each year are included in the preferred resource plan. The integration process is followed by risk analysis and finally strategy selection by the utility's decision makers. The programs that survive this rigorous screening should be the programs for which the utilities' request the Commission's approval and receive "non-traditional" rate making treatment. These programs are also the most likely to be the best use of the rate payers' money.

While this stakeholder group asserts that it is inappropriate that the judgment of utility decision makers be used for the determination of all cost-effective demand-side savings for its utility, ultimately, it is the utility decision makers who decide which alternative resource plan best meets the Chapter 22 objective for its utility. The utility decision makers (and not the total resource cost test) decide which DSM programs and demand-side programs investment mechanisms are proposed to the Commission. And these same utility decision makers will be accountable for the delivery and performance of their utility's Commission-approved DSM programs.

Finally, as the Staff clarifies, should the electric utility determine that it wants to propose demand-side programs or program plans which are not included in the electric utility's preferred

resource plan, a completely new Chapter 22 analysis and new preferred resource plan are not necessary. The only requirement is that the programs and program plans be analyzed through the integration process required by 4 CSR 240-22.060.

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 # 8 – 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 240.3.164 (not already addressed). OPC states that this additional language should be added to 4 CSR 240-3.164 to provide clarity and consistency with the statutory language in MEEIA.

OPC recommends the following addition of 4 CSR 240-3.164(2)(C)(12):

12. Any market transformation elements included in the program and and an EM&V plan for estimating, measuring and verifying the energy and capacity savings that the market transformation efforts are expected to achieve.

OPC recommends the following changes to 4 CSR 240-3.164(2)(E) and the addition of 4 CSR 240-3.164(2)(F):

~~(E) Identification of demand-side programs which are supported by the electric utility and at least one (1) other electric or gas utility (joint demand-side programs).~~

(E) Demonstration and explanation of efforts made by the utility to include initiatives that are expected to achieve substantial program participation by hard to reach customers.

(F) Demonstration and explanation of efforts made by the utility to increase the cost effectiveness of, and/or level of participation in, its programs through coordinated or jointly delivered programs with other electric and gas utilities.

RESPONSE:

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 240-3.164(2)(C)(12) that is completely identical to the OPC's proposed language. Finding there is no distinction between the current language and the proposed changes, the commission will not amend that subsection.

With regard to the other proposed amendments, 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 notes that while it appreciates OPC's suggestions, the provisions addressing hard-to-reach customers was simply not fully developed at the time of this rulemaking and the commission declines to add this language at this time. It is possible that the commission will

amend this rule in the future to include this and/or other changes. Indeed, 4 CSR 240-3.164(7) mandates a complete review of the effectiveness of this rule no later than four years after the effective date. The Utility-Specific and State-Wide Collaboratives to be mandated in 4 CSR 240-20.094 will be invited to make any suggested modifications during the review process.

With regard to the suggested changes relating to coordinating programs between gas and electric utilities, MEEIA applies to electric utilities and the commission does not believe it is appropriate to require the level of analysis suggested in OPC's proposed change.

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

4 CSR 240-3.164 Electric Utility Demand-Side Programs Filing and Submission Requirements

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

(A) 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;

(M) 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;

(V) 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;

(X) 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;