BEFORE THE PUBLIC SERVICE COMMISSION

**OF THE STATE OF MISSOURI**

In the Matter of the Consideration and )

Implementation of Section 393.1075, the ) **Case No. EX-2010-0368**

Missouri Energy Efficiency Investment Act )

# COMMENTS OF THE CONSUMERS COUNCIL OF MISSOURI

COMES NOW the Consumers Council of Missouri (“Consumers Council” or “CCM”), by and through counsel, pursuant to Commission Rule 4 CSR 240-2.180(5), and respectfully submits the following comments regarding the rules proposed to implement the Missouri Energy Efficiency Investment Act (proposed Rules 4 CSR 240-3.163, 4 CSR 240-3.163, Rule 4 CSR 240-20.093, and Rule 4 CSR 240-20.094).

Consumers Council is a non-governmental, nonpartisan, nonprofit membership organization that is dedicated to educating and empowering consumers statewide and to advocating for their interests. Consumers Council supports energy efficiency as an important part of a balanced resource planning strategy, and supports the goals of the proposed rule. However, Consumers Council believes that the prohibition against single-issue ratemaking is one of the most important consumer protections afforded Missourian ratepayers—a principle that cannot and should not be ignored.

Consumers Council’s primary objection to the proposed rules is that these rules include a Demand-Side Program Investment Mechanism (DSIM) which would allow single-issue rate adjustments outside of a general rate case. The proposed DSIM is not authorized by Section 393.1075 RSMo. In fact, language *specifically* *allowing* such single-issue rate adjustments outside of a general rate case was *intentionally* *deleted* from the legislation in Senate Bill 376 (SB 376) before it was passed by the Missouri General Assembly in 2009. Consumers Council opposed SB 376 until that offending language was removed from the bill. Consumers Council chose not to oppose the final version of the legislation only after it was reassured by supporters of SB 376 that the legislation would not permit single-issue mechanisms. If the Public Service Commission (“Commission” or “PSC”) approves a rule that includes the DSIM, then Consumers Council will have lost the benefit of the understanding it received in legislative negotiations.

Single-issue ratemaking is illegal in Missouri, absent specific statutory authorization. The seminal Missouri Supreme Court case of State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission (UCCM), 585 S.W.2d 41 (Mo. banc 1979) makes it clear that, unless a surcharge is specifically authorized in law, or is a direct charge such as gross receipts taxes, then electric rates cannot be legally changed without consideration of “all relevant factors” through a general rate case (complaint case or file-and-suspend rate case). Id., pp. 56-58.

Under the law, the Commission’s powers are limited to those expressly provided or clearly implied by statute. Utilicorp United Inc. v. Platte-Clay Elec. Co-op., Inc., 799 S.W.2d 108, 109 (Mo. App. W.D. 1990). The proposed DSIM is not specifically authorized in Section 393.1075 RSMo. (SB 376), and thus would be unlawful. Unlike several other recent laws that grant clear exceptions to the legal prohibition against single-issue ratemaking,[[1]](#footnote-1) Section 393.1075 makes no reference to such a surcharge.

In this situation, the electric utilities make the strained argument that the state legislature intended for the PSC to create a single-issue DSIM surcharge based on the words “timely recovery” in Subsection 393.1075.3(1). Consumers Council contends that rate increase recovery is only “timely” after it has been subjected to an all relevant factors review, in order to ensure that all offsetting rate decreases have been credited to consumers.

Legislative history bears out the intent of SB 376. As introduced, this legislation specifically authorized the DSIM adjustment (“a cost adjustment clause for collection of costs associated with energy efficiency programs.”).[[2]](#footnote-2) The Senate Committee on Commerce, Consumer Protection, Energy and the Environment, recognizing how controversial this provision would be, and how much opposition it had drawn, wisely chose to remove this language from SB 376 before it was passed out of committee. Although there was an attempt to amend similar language on in the House of Representatives, that effort failed. The Finally Agreed and Finally Passed version of SB 376 was adopted without that language, and thus in a format that was not opposed by Consumers Council and other consumer advocates.

If the Commission adopts the DSIM provisions of the rules proposed in this case, it will be exceeding its authority under the law, denying Consumers Council the benefit of its successful advocacy on behalf of utility consumers during legislative negotiations, and engaging in single-issue ratemaking which is contrary to the consumer protections generally afforded to Missouri ratepayers.

WHEREFORE, Consumers Council respectfully requests that the Commission only adopt rules that can be legally authorized under the limited wording of Missouri Energy Efficiency Investment Act.

Respectfully submitted,

/s/ John B. Coffman

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Attorney for Consumers Council

Dated: December 15, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the following this 15th day of December 2010:

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/s/ John B. Coffman

1. Fuel Adjustment Clause (Section 393.1000 RSMo.—2006); Environmental Cost Recovery Mechanism (Section 386.266—2008); Infrastructure System Recovery Surcharge (Section 393.292—2000). [↑](#footnote-ref-1)
2. As introduced, under section labeled “393.1124.3” and similar phrases were included in different sections of later versions of the bill. However, this clause was not present in the version voted upon by the full Senate, and these words did not wind up in the Finally Agreed and Finally Passed version of the legislation. [↑](#footnote-ref-2)