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.	)))	**File No. EX-2010-0368**

STAFF BRIEF OF LEGAL ISSUE

COMES NOW the Staff of the Missouri Public Service Commission and, in response to the Commission's August 25, 2010 *Order Directing Filing* with which it ordered parties to fully brief their legal issues or concerns with the current draft rules for implementation of Section 393.1075, RSMo. Supp. 2009 (the "Missouri Energy Efficiency Investment Act"), states:

1. Staff has the following legal issue with the current draft rules it filed on August 26, 2010 at the Commission's direction:

- The Commission does not have the requisite statutory authority to authorize or permit changes to the rates of a demand-side investment mechanism outside of a general rate case proceeding.

2. Following is Staff's legal briefing of the foregoing issue.

DEMAND-SIDE INVESTMENT MECHANISM APPROVAL AND RATE CHANGES

In setting utility rates, the Commission is required to consider all relevant factors, and single-issue ratemaking is prohibited. §392.240.1; *State ex rel. Missouri Water Company,* 308 S.W.2d 704, 718-19 (Mo. 1957); *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission,* 585 S.W.2d 41, 56-58 (Mo. banc 1979). Missouri courts have articulated that the rationale behind the prohibition on single-issue ratemaking is to prevent the Commission from allowing a utility to "raise rates to cover increased costs in one area without realizing there were counterbalancing savings in another area." *State ex rel. Midwest Gas Users' Association v. Public Service Commission of Missouri,* 976 S.W.2d 470, 480 (Mo. App. 1998).

In circumstances where a cost is readily ascertainable and the utility has little or no control over that cost, Missouri courts have found the prohibition against single-issue ratemaking inapplicable to the pass through of that cost to customers. Examples include the pass through of taxes (*Hotel Continental v. Burton, 334 S.W.2d 75 (Mo. 1960)*) and the pass through of natural gas costs by use of a purchased gas adjustment (PGA) clause, related actual cost adjustment (ACA) clause and gas costs incentive mechanism to calculate natural gas rates (*State ex rel. Midwest Gas Users' Association v. Public Service Commission of Missouri*, 976 S.W.2d 470 (Mo. App. 1998)).

Unlike the pass through of taxes in *Hotel Continental* and natural gas costs in *Midwest Gas Users' Association* Missouri courts found are not prohibited single-issue ratemaking, the development, implementation, evaluation and other costs of demand-side programs are well within the control of the utilities who administer them. Therefore, unless the Legislature has created an exception, passing them through in rates is impermissible single-issue ratemaking.

The most direct support for the proposition the Commission has authority to authorize or permit changes to the rates of a demand-side investment mechanism outside of a general rate case proceeding is the language of section 393.1075.3(1) & (3), RSMo Supp. 2009 which directs the Commission to "[p]rovide timely cost recovery for utilities" and "[p]rovide timely earnings opportunities associated with cost-effective measurable and verifiable efficiency savings." When the Legislature provides a definition for a word or phrase, that definition is authoritative and to be read into the statute where that word or phrase appears as a part of the statute itself. *State ex rel. Exchange Bank of Richmond v. Allison*, 155 Mo. 325, 56 S.W. 467 (1900); *State v. Brushwood*, 171 S.W.3d 143 (Mo. App. 2005). However, in the absence of such a definition, "[w]ords and phrases shall be taken in their plain or ordinary and usual sense, but technical

words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import." Section 1.090, RSMo 2000. Neither "[p]rovide timely cost recovery for utilities nor "[p]rovide timely earnings opportunities associated with cost-effective measurable and verifiable efficiency savings" is a technical phrase having a peculiar and appropriate meaning in law. Nor is either phrase, or any word or subpart of either phrase, defined in section 393.1075 RSMo Supp. 2009. The nonarchaic dictionary definition of "timely" is "occurring at a suitable time; seasonable; opportune; well-timed: a timely warning."[1] Notably, it does not mean "contemporaneously" or even necessarily near in time. With few exceptions, rate changes are timely only when the Commission approves them as the result of a general rate proceeding. Review of the cost recovery mechanisms listed in section 393.1075.5 RSMo Supp. 2009 reveals that all are mechanisms available, and used, in general rate proceedings: "capitalization of investments in and expenditures for demand-side programs, rate design modifications, accelerated depreciation on demand-side investments, and allowing the utility to retain a portion of the net benefits of a demand-side program for its shareholders"; therefore, this part of the statute does not support that recovery of these costs only through rates established in a general rate proceeding is untimely.

When the Legislature, or voters by initiative petition, have viewed cost recovery through rates from a general rate case to be untimely or inopportune they have expressly provided for recovery of those costs outside of a general rate proceeding. There are two recent examples of this pertaining to electrical corporations. In 2005 the Legislature passed Senate Bill 179 which became law and is now codified at section 386.266 RSMo 2009. Senate Bill 179 allows the recovery of fuel and purchased-power costs, and costs of compliance with environmental laws

[1] *Dictionary.com Unabridged*. Random House, Inc. 03 Sep. 2010. <Dictionary.com http://dictionary.reference.com/browse/timely>.

and regulations, by means of "rate schedules authorizing periodic rate adjustments outside of general rate proceedings." By initiative in 2008, voters passed Proposition C ("Renewable Energy Standard"), which is codified at sections 393.1020 to 303.1030 RSMo Supp. 2009. Proposition C required the Commission to make rules to enforce the renewable energy standard, including "recovery outside the context of a regular rate case" of the costs the utility incurs and the benefits to its customers of its compliance with the renewable energy standard. Section 393.1030.2(4) RSMo Supp. 2009. The Commission did so by rules 4 CSR 240-3.161, 4 CSR 240-3.162, 4 CSR 240-20.090 and 4 CSR 240-20.091.

Additionally, the Legislature, in 2003, established for water and gas utilities regulated by the Commission, infrastructure system replacement surcharges to allow recovery, through rates outside of a general rate proceeding, of certain costs associated with replacing or extending the life of existing infrastructure that were not considered when the utility's general rates were last established. Section 393.1000 to 1015, RSMo Supp. 2009.

The Commission simply does not have statutory authority from the Missouri Energy Efficiency Investment Act to change or determine any rates of electrical corporations outside of a general rate proceeding; thus, demand-side investment mechanisms must be approved in general rate cases, as must rate recovery from customers of the costs and incentives associated with them.

Respectfully submitted,

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I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or emailed to all counsel of record this 14th day of September 2010.

/s/ Nathan Williams