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 )

# APPLICATION FOR REHEARING OF THE CONSUMERS COUNCIL OF MISSOURI

COMES NOW the Consumers Council of Missouri (“CCM”), by and through counsel, and pursuant to Section 386.500 RSMo. 2000 and 4 CSR 240-2.160(1), respectfully applies for a rehearing and reconsideration of the Missouri Public Service Commission’s (“Commission’s”) Order of Rulemaking (“Order”), approved by a vote of 4-1 in the above-styled matter on February 9, 2011, bearing no specific effective date, and purporting to implement the Missouri Energy Efficiency Investment Act (the “MEEIA Law”)[[1]](#footnote-1) by promulgating new rules that could significantly impact electric rates: Rules 4 CSR 240-3.163, 4 CSR 240-3.163, Rule 4 CSR 240-20.093, and Rule 4 CSR 240-20.094 (collectively, the “Rules”).

CCM supports the MEEIA Law and its goal of promoting energy efficiency while treating all consumers fairly. CCM actively negotiated with electric utilities and other stakeholders in 2009 to ensure that the version of the MEEIA Law which passed the Missouri Legislature: 1) would not allow single-issue ratemaking, and 2) would not allow the “recovery” of “lost revenues” from consumers. Unfortunately, while the Order implements of the law correctly in many respects, it exceeds the authority granted to the Commission under Missouri law in those two respects.

Because the currently approved form of the Rules would significantly harm residential consumers of electricity, CCM strongly urges the Commission to rehear and reconsider its Order. In their currently written form, the Order and the rules approved by the Commission are unlawful, unjust, unreasonable, arbitrary, capricious, and unsupported by competent and substantial evidence on the whole record, as herein described.

Under Missouri 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 Commission’s Order of Rulemaking list Sections 393.1075, RSMo. Supp. 2009 (the new MEEIA Law), along with general supervisory statutes 386.040 and 386.250 RSMo. 2000, as authority for promulgation of the Rules. (“Certification of Administrative Rule”, submitted to the Missouri Secretary of State on February 9, 2011). None of these statutes permit the Commission to impose the single-issue mechanisms described in the Rules.

The Rules approved by the Order include a Demand-Side Program Investment Mechanism (DSIM) which would purportedly allow single-issue rate adjustments outside of a general rate case for regulated electric companies. The proposed DSIM is not specifically authorized in Section 393.1075 RSMo. (SB 376—2009), and thus is unlawful. The MEEIA does not mention any such mechanism. In fact, language specifically allowing such single-issue rate adjustments (“cost adjustment clause . . . outside of a 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. CCM opposed SB 376 until that offending language was removed from the bill. CCM chose not to oppose the final version of the legislation, but only after it was reassured by the supporters of SB 376 that the amended legislation would not permit single-issue mechanisms. The Commission’s Order of Rulemaking denies CCM the benefit of the understanding it received in those legislative negotiations.

Single-issue ratemaking (imposing a surcharge that can change outside of a general rate case review) is illegal in Missouri, absent specific statutory exemption. 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 has been specifically authorized in law, or is a direct charge such as gross receipts taxes, electric rates cannot be legally changed without consideration of “all relevant factors” through a general rate case (a complaint case or a file-and-suspend rate case). Id., pp. 56-58. UCCM is a fundamental controlling precedent on the Commission’s authority in Missouri, and yet the Order does not mention it. The Order does mention the statute that is interpreted by the UCCM case, by acknowledging that Section 393.270.4 RSMo. 2000 does set out the “prohibition against single-issue ratemaking”; however, the Commission inexplicably proceeds to state that this restriction upon its authority is “*permissive*”. Order, pp. 2-3. It is illogical and unreasonable for the Commission to exceed its authority in a manner that ignores the clearly mandatory limits on ratemaking placed upon it by the Missouri Supreme Court in the UCCM case.

On this point, the Commission ignores the legal interpretations of its own Staff, AARP, CCM, the Office of the Public Counsel, and the Missouri Industrial Energy Consumers. The Order adopts the strained argument of the electric utilities that the state legislature intended for the PSC to create a single-issue DSIM surcharge based merely on the words “timely cost recovery” in Subsection 393.1075.3(1). CCM contends that, absent clear authority to create an exception to the requirements of UCCM, an increase in electric rates can only be “timely” after it has been subjected to an “all relevant factors” review in a general rate case. This requirement ensures that all offsetting rate decreases have been credited to consumers.

Unlike several other recent laws that grant explicit exceptions to the legal prohibition against single-issue ratemaking,[[2]](#footnote-2) Section 393.1075 makes no such specific reference to rate changes outside of the rate case process. By purporting to allow surcharges to be imposed outside of a full rate case review, the Order ignores a fundamental Supreme Court mandate, based solely upon a broad interpretation of the word “timely”. The Commission’s interpretation of this word lacks any precedent, and is far from the detailed specificity required of past surcharges which have been exempted from the limits placed on the Commission’s ratemaking authority by the UCCM case.

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.”).[[3]](#footnote-3) 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 also failed. The Truly Agreed and Finally Passed version of SB 376 was adopted without that language, and thus was adopted in a format that was not opposed by CCM or by 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 CCM 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 legally afforded to Missouri ratepayers under the UCCM case.

Just as the Order exceeds the statutory authority granted the Commission with regard to the DSIM mechanism, it also exceeds statutory authority by allowing electric companies to adjust rates for “recovery” of so-called “lost revenues”. Order, pp. 3-6. As Commissioner Kenney notes, the MEEIA states that this new law’s purpose and policy is to “allow recovery of all reasonable and prudent *costs* of delivering cost-effective demand-side programs”. Section 393.1075.5 [emphasis added]. “Lost Revenue” is mentioned *nowhere* in the MEEIA and is neither a cost of providing service nor a cost of providing energy efficiency programs. Moreover, SB 376 as originally introduced included language that would have allowed for “recovery of lost sales attributable to approved energy efficiency programs” and “allowing the utility a fixed investment recovery mechanism to recover lost margins”. Ibid., as originally First Read to the Missouri State Senate on February 16, 2011. In the Finally Agreed and Finally Passed version of this legislation, those provisions were intentionally deleted.

WHEREFORE, CCM respectfully requests that the Commission rehear and reconsider its Order of Rulemaking, which is unlawful and unreasonable as discussed herein, so that it may adopt energy efficiency rules that can be legally authorized under the carefully limited wording of MEEIA Law, and which would protect consumers by adhering to the fundamental consumer protections contained in Missouri law.

Respectfully submitted,

 /s/ John B. Coffman

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 Attorney for the Consumers Council of Missouri

Dated: December 10, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the following this 10th day of March 2011:

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 /s/ John B. Coffman

1. Section 393.1075, RSMo. Supp. 2009. Senate Bill 376 (2009). [↑](#footnote-ref-1)
2. 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-2)
3. As introduced, these words were included under a 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 Truly Agreed and Finally Passed version of the legislation. [↑](#footnote-ref-3)