MEMORANDUM

TO: Colleen M. Dale, Secretary

DATE: April 22, 2009

RE: Authorization to File Proposed Rules with the Office of Secretary of State

CASE NO: EX-2009-0252

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

Proposed Rule 4 CSR 240-3.162 – Electric Utility Environmental Cost Recovery Mechanisms Filing and Submission Requirements

– NO

Robert M. Clayton III, Chairman

by PM

Connie Murray, Commissioner

Jeff Davis, Commissioner

Terry M. Jarrett, Commissioner

Kevin D. Gunn by cr

Kevin D. Gunn, Commissioner

Robin Carnahan

Secretary of State
Administrative Rules Division

RULE TRANSMITTAL

Administrative Rules Stamp

Rule Number 4 CSR 240-3.162

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

Name of person to call with questions about this rule:
Content Morris Woodruff Phone 573-751-2849 FAX
Email address morris.woodruff@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:
4 CSR 240-3.162(1)(F)

Small Business Regulatory Fairness Board (DED) Stamp

JCAR Stamp

JOINT COMMITTEE ON
APR 23 2009
ADMINISTRATIVE RULES

Missouri Public Service Commission

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April 23, 2009

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

Dear Secretary Carnahan:

Re: Rule No. 4 CSR 240-3.162

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 on this 23rd day of April, 2009.

Statutory Authority: Sections 386.250, RSMo 2000, Section 386.266 Supp. 2008, and Section 393.140, RSMo 2000.

If there are any questions, please contact:

Morris L. Woodruff, Deputy Chief Regulatory Law Judge
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Morris L. Woodruff
Deputy 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 386.250, 386.266 and 393.140, RSMo 2000, the commission adopts a rule as follows:

4 CSR 240-3.162 is adopted.

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on February 3, 2009 (34 MoReg 187). A second notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on March 16, 2009 (34 MoReg 595). Relevant portions of those sections with changes are reprinted here. This proposed rule will become effective thirty (30) days after publication in the *Code of State Regulations*.

SUMMARY OF COMMENTS: The first public comment period ended March 4, 2009 and a public hearing on the proposed rule was held March 4, 2009. The second public comment period ended April 15, 2009 and a second public hearing was held the same day. Timely written comments were received from Union Electric Company d/b/a Ameren UE, the Missouri Industrial Energy Consumers, the Public Counsel ("OPC"), and the Staff of the Missouri Public Service Commission. In addition, Lena Mantle and Mark Oligschlaeger on behalf of the Staff, Ryan Kind on behalf of the OPC, and Mark C. Birk on behalf of AmerenUE testified at the hearing on March 4, 2009, and counsel to the commenters made substantive verbal comments at the hearing. Counsel for the Missouri Industrial Energy Consumers and for AmerenUE also offered comments at the April 15 hearing. The testimony and comments both opposed and supported the adoption of the rule and both opponents and supporters of the rule made specific recommendations for changes in the language and operation of the rule. Consumers and consumer groups opposed the rule, electric companies and the commission staff supported the rule.

COMMENT 1 (Public Interest): AmerenUE agrees with the commission's finding that these rules are necessary and with the commission's statement that in the current economic climate, these rules are necessary. Timely recovery of investment capital will be essential to financing environmental upgrades to existing power plants and hastening compliance with government mandates designed to improve the quality of the environment for all Missourians. With the

exception of AmerenUE's technical correction to the proposed rule, it finds the rule as proposed to be acceptable.

Staff believes that the presence of an Environmental Cost Recovery Mechanism (ECRM) is consistent with the public interest, because one presumes that the State Legislature acts in the broad public interest. Staff takes the position that the presence of an ECRM is neutral to ratepayers. However, if used properly, it may operate to improve capital flows or certainly cash flow, which could be translated into a benefit in ratemaking terms. It is possible to track or monitor a benefit to ratepayers of an ECRM, but Staff notes that it would be very difficult to do.

In response to questions, Staff commented that it supported adoption of the rule although the commission already allows a surcharge for infrastructure replacement. Staff opines that those procedures are not adequate to address the issues dealt with in an ECRM, in that the infrastructure replacement rules do not apply to both increases and decreases, and deal only with capital expenditures.

MIEC notes that Section 386.266 RSMo Supp. 2008 provides the authority for the commission to promulgate regulations to implement, and that are consistent with, that section. The Legislature could have simply authorized utilities to implement an ECRM, but instead granted the commission discretion, under specific parameters, to authorize or withhold an ECRM.

OPC believes that, as presently proposed by the commission, the rule is not consistent with the public interest.

RESPONSE: The commission remains convinced that these rules are in the public interest. Other filings made by Missouri electric utilities to this commission indicate that those utilities are in the process of spending hundreds of millions, possibly billions of dollars to comply with new and proposed federal regulations. These regulations are a tool that can be used by the commission to help the company install new environmental upgrades while maintaining access to the capital markets to fund other necessary or desirable infrastructure investments and to do so in a manner that could ultimately lower costs to the ratepayer. Accordingly, with the exception of specific proposed changes, which are dealt with elsewhere in this order, these comments do not necessitate any change.

COMMENT 2 (Overearning): Staff believes that the rule creates a potential for a utility to earn more than its authorized rate of return. Staff does not believe that the ECRM creates any greater potential for overearning than another type of surcharge, such as a fuel adjustment clause. Absent the surcharge, the utility has to manage all of its costs and all of its revenues. To isolate a portion of operations and allow rate increases if that portion's expenses increase, removes down-side risk. Therefore, the possibility to overearn is enhanced. However, Staff notes that the inclusion of capital expenditure in an ECRM will not necessarily mean that a utility is overearning, even without any sharing mechanism, because to determine whether a utility is overearning, the commission must review all the operations, all its costs with a return on investment, taxes and all operating expenses and compare that with revenues to determine whether operations generate an appropriate return. The commission will do this in a general rate

proceeding in which an ECRM is sought. Although Staff believes this review is precluded between the rate cases, Staff believes that the surveillance data will significantly assist in its monitoring and reviewing process, and notes that the cap of 2.5% would serve to limit any overearnings, if they exist. Staff notes that it still is able to file a complaint if it believes a company is overearning.

OPC responds that a significant short-coming of the complaint process is the statutory limitation of potential complainants. Complainants face a resource-intensive undertaking and must begin it with limited information to predict the success of its efforts. Only Staff has sufficient resources to mount an earnings complaint. Workload considerations can prevent or delay a complaint and limit the investigation. The surveillance provisions of the rule may help determine when a complaint may be justified, but will not supply sufficient data and other resources necessary to successfully prosecute a complaint. Moreover, if the ECRM does lead to overearning, the utility will keep excess earnings generated between the time the overearning is discovered and the complaint is resolved. Further, there is no statutory time limit in which to decide a complaint case, so this creates an incentive to delay. In such a situation, customers bear both the risk of increasing and volatile costs and the risk of funding excess earnings without the possibility of refund.

MIEC asserts that the statute was intended to strike a balance between the interests of utilities and of consumers. MIEC agrees with both OPC and Staff that the Legislature did not intend to create a mechanism for utilities to overearn. However, MIEC believes the proposed rules tip the scale in favor of utilities. In MIEC's view, it is possible under the rules that an overearning utility will receive additional revenues under an ECRM, contrary to legislative intent. MIEC's proposed changes are designed to allow utilities to receive additional revenues for environmental costs only when necessary to achieve the authorized rate of return.

OPC also asserts that SB 179's creators clearly contemplated that the commission would protect consumers in its ECRM rules. While the law enhances a utility's ability to increase revenues, it does not alter fundamental "rate of return" regulation. The proposed rule allows the utility to protect and enhance its interests by deferring costs during a period of over-earning to a subsequent period. The proposed rules would allow utilities to manipulate their earnings to the detriment of the public. The utility has too much control over the timing of rate cases, filings under the rule, placing plant in service, and other matters. The proposed rules fail to safeguard consumers to the detriment of the public, without any cost of service justification.

Although AmerenUE conceded that it is possible for a utility to earn more than its authorized rate of return while an ECRM is in place, given the magnitude of the environmental investments that utilities face, along with other cost and revenue issues that are tracked closely by this commission, it is highly unlikely. AmerenUE noted that the statute's purpose is to give a utility an opportunity to earn a fair return. At any given snapshot in time the utility may earn more or less than that. The fact that a utility at a moment in time earns over its authorized return does not mean its rates are unjust and unreasonable or that it is

overearning. The statute does not attempt to prevent any circumstance where the utility at a given point could earn less or more than its authorized return. True overearning is systemic earnings so much in excess of the utility's cost of capital (which can change from the time of the rate case) from what was authorized, based on normalized conditions, that rates become unjust and unreasonable. It is not earning greater than the authorized return at a given moment.

OPC proposes that to guard against earnings in excess of the authorized rate of return, the commission should implement an "earnings test." According to OPC, any ECRM that would pass through environmental costs to ratepayers while the utility earns in excess of its authorized rate would abrogate the commission's obligations to ratepayers. The proposed rule requires the commission to find that an ECRM provides the opportunity to earn a fair rate of return whenever it decides to continue or modify an ECRM the utility has requested be discontinued. This same determination is just as necessary when the commission decides to implement an ECRM in the first place, but it is not required in the rule. Effectively, ratepayers have less ability to challenge the implementation of an ECRM than to challenge a commission decision to modify or continue an ECRM.

AmerenUE notes that Staff has said that there will be a study of a company's earnings in the general rate proceeding that establishes an ECRM, but that Staff is precluded from doing such a study between rate cases. AmerenUE asserts that this is the same conclusion reached by the commission in refusing to include similar earnings tests proposed by OPC and others in the FAC rulemaking proceedings.

RESPONSE: Use of the ECRM must be authorized by the commission inside a rate case where the commission reviews all revenue and expenses. In the event the commission authorizes an ECRM, the commission has the ability to track all of those revenues and expenses, and to take action accordingly. Therefore, the commission finds that the proposed rules do not necessarily cause utilities to overearn and, if a utility does overearn, there are sufficient remedies available. With the exception of specific proposed changes, which are dealt with elsewhere in this order, these comments do not necessitate any change.

COMMENT 3 (Effect on Environmental Projects):

AmerenUE does not believe that the presence of an ECRM will necessarily accelerate the completion of environmental projects. Environmental projects to be completed are regulatory requirements imposed on the utilities. The ECRM will allow utilities to meet those environmental requirements and still have access to necessary capital to invest in and maintain other plant assets over and above the environmental assets. The rule is designed to allow utilities to most effectively install environmental projects that are required. Without the rule, the environmental projects will be installed, but access to additional capital to perform other needed maintenance and equipment upgrades on the other plant will not exist. Other potential projects that will enhance reliability on existing generating that are not mandated will suffer.

AmerenUE notes that while the rule is not necessary to enforce environmental obligations, not having it may lead to higher costs to install environmental projects. If a utility is required to install environmental equipment, ultimately those costs will be passed on to ratepayers. Being able to recover those costs more quickly can lead to a lower overall cost for the installation of mandated equipment.

As to the timely completion of environmental projects, although Staff does not believe that more will be completed, some may be completed earlier than they would have otherwise. If an ECRM is approved, it could be used as a tool by the utilities if they determine that early implementation is a benefit to both the consumers and the company. In some cases, based on available labor, steel prices, etc., it may be beneficial for environmental equipment to be added early.

OPC has no reason to believe that the rule will accelerate the completion of environmental projects or that the rule will encourage more environmental projects than would otherwise occur.

RESPONSE: The commission finds that it is not necessary for the rule to operate in a way that will accelerate or enhance the completion of environmental projects. It is enough this rule has the ability to assist companies faced with large capital spending programs and lower the cost of financing projects of this nature, which will be of benefit to the company and the ratepayers. No change will be made as a result of this comment.

COMMENT 4 (Consumer Safeguards): Staff commented at length on the process of roundtables and other group efforts that created the draft ECRM rules and how the proposed ECRM relates to other rate adjustment mechanisms. As to safeguards in the rule, Staff noted that electric utilities will only be permitted to request an ECRM in a general rate proceeding where all relevant expenses, revenues and rate base items are considered. Parties to that proceeding can propose variations or alternative methodologies/mechanisms or can oppose the ECRM. The commission may approve, modify or reject any proposed ECRM. An ECRM cannot remain in effect for longer than four years without a new general rate proceeding and modification or extension of the ECRM.

OPC believes the proposed rules do not contain adequate consumer protections and do not adequately ensure that utilities will act prudently with respect to environmental expenditures. It is reasonable to assume the Legislature would only have granted the commission authority to allow an ECRM in the belief that the commission's rules would protect ratepayers. Regulatory procedures should address the needs of both ratepayers and utilities (safe and adequate service at just and reasonable rates that provide a utility an opportunity to earn a fair rate of return). The rules should apply incentives to the utility, so it makes necessary environmental investments economically and so it operates those facilities reasonably. Timelines should be set out in the rule to ensure ratepayers are not faced with unreasonably large rate increases.

OPC opines that an ECRM shifts the risk of changes in the cost of environmental compliance from the utility to its customers and that this shift removes incentives for utilities to exercise due diligence and to develop and

implement prudent environmental compliance strategies. This greatly changes the regulatory paradigm in Missouri, which has fostered low rates while maintaining reasonable returns for investors. Adequate consumer protections must be added to the proposed rules to compensate for the shifting risk, if the commission is to adequately perform its statutory duties. The allowance of an ECRM is not mandatory, but the proposed rules do not provide any guidance for determining whether an ECRM is appropriate. A "threshold test" of the necessity of an ECRM for the utility to earn its authorized return is needed, and should assess the likelihood the ECRM would cause it to overearn. The utility must be required to submit adequate financial data, accessible to all parties in the rate case, as part of its application.

MIEC agrees that it is crucial that consumer protections be included in the rule, rather than being left to rate cases. Key principles should be included in rules, because industrial consumers must be allowed to plan for their impact. Providing protections in the rules ensures predictability for consumers and utilities alike, and leads to fair application of the rules.

MIEC asserts that although section 386.266 does authorize the commission to grant ECRMs, the statute is replete with consumer protections, such as the prudence requirement, the 2.5% annual cap, the ECRM creation rate case requirement, the "fair return" finding, the annual true-up, the no longer than four-year rate case cycle, regular prudence reviews. Failure to adhere to these consumer protections could render such an ECRM unlawful.

AmerenUE and Staff are of the opinion that the consumer protections contained in SB 179 are already in the proposed rules.

RESPONSE: The commission finds that the necessary consumer protections, including the several consumer protections reflected in Section 386.266, RSMo, are already contained in the rule and are sufficient. No change will be made as a result of this comment.

COMMENT 5 (Sharing Mechanisms): OPC advocates for a process to align the interests of ratepayers and shareholders. OPC would change language to allow approval of an ECRM that allows recovery of "some or all" of the costs, to provide an incentive mechanism in which the utility could only collect, 90 or 95 percent of the change in environmental costs. In addition, OPC would include a new section that specifically aligns the interests of ratepayers and shareholders, similar to performance-based language in the fuel adjustment clause rules. OPC remains skeptical that an ECRM could ever benefit ratepayers. For there to be a benefit, positive aspects would need to overcome the large detriment created by a flow-through mechanism for cost recoveries. The proposed rule, without the additional consumer protections OPC proposes, would be detrimental to ratepayers.

OPC believes that a financial incentive (gains or losses) is a critical consumer protection. To pass through 100 percent of the cost significantly diminishes any incentive to prudently manage the annual cost of environmental compliance and to minimize long-run costs. Regulators cannot review transactions in real time, as the utility does. The utility should have to justify recovery of environmental compliance costs in a prudence review subsequently,

using information gleaned during the recovery period. The electric industry is highly complex. A "fix" in one area can cascade through the rest of the system. A regulatory model that does not recognize this fact is inferior.

Staff counters that section 386.266 allows incentives for rate adjustment mechanism, but there is no similar statutory provision for incentives for ECRMs. Section 386.266 restricts the annual amount of revenue collected by an ECRM to not more than two and one-half percent of the revenues of the electric utility, but allows the electric utility to defer costs not recovered as a result of this restriction. The language in the rule mirrors the language in the statute.

RESPONSE: The commission finds that Staff is correct, in that subsection 1 of section 386.266, which deals with rate adjustment mechanisms for fuel and purchased power costs, contains language permitting incentive plans, but subsection 2, pertaining to environmental cost recovery, does not. Subsection 8, cited by OPC in its comments, does not provide authority for incentive mechanisms; rather it states in part, "This subsection shall not be construed to authorize or prohibit any incentive- or performance-based plan." No change will be made as a result of this comment.

COMMENT 6 (Eligible Costs): Staff envisions that both capital expenditures and associated items that are normally expensed would be recoverable through an ECRM, the larger portion of which would be the capital expenditures. As to truly one-time expenses, if the expense qualified for the adjustment, it would be put in then come out in subsequent true-up periods.

Staff has not compiled a list of items to be included or not included in an ECRM and does not recommend that the rule further define "federal, state, or local environmental law, regulation, or rule." The commission should determine in the proceeding in which an ECRM is established or modified exactly what costs are prudently incurred to comply with a "federal, state, or local environmental law, regulation, or rule" and should be recovered in an ECRM. This issue was discussed at length in the workshops on the rule, but the participants found it difficult to define without being either too broad or too restrictive. Staff concludes that it is best left to the discretion of the commission. For example, a utility might purchase a higher priced coal to meet environmental requirements, but not have a fuel adjustment clause. There may be an argument that the higher priced coal should not be in an environmental cost mechanism but would be more properly reflected in a fuel adjustment clause. It also is possible that the commission might find that a utility does not qualify for a fuel adjustment clause and then would have to address whether an increase in coal expense for compliance purposes should be included in the ECRM.

OPC comments that as the commission exercises its discretion in determining what types of costs are eligible for recovery, it should look at the volatility of the costs to be included and the extent to which the costs are directly related to compliance with environmental regulations.

RESPONSE: The commission finds that examining whether the costs are directly related to environmental compliance is inconsistent with the statutory standard set forth in the statute of "prudently incurred costs, whether capital or

expense, to comply with [environmental requirements]." The commission finds the inclusion of the volatility of the costs into its consideration to be irrelevant. The ECRM is limited to 2.5% of a utility's Missouri gross jurisdictional revenues. This will serve to mitigate such volatility as may exist. Further, the commission may include a consideration of volatility, and is not precluding such a review by failing to include it here. Inclusion would require the commission to always consider volatility, even in those instances in which it is irrelevant. The commission agrees that a listing of eligible costs would be counter-productive, in that any attempt at such a list would likely be either too narrow or too broad. No change will be made as a result of this comment.

COMMENT 7 (3.162(1)(F)1. and 2.): AmerenUE notes a drafting problem with the segregation of each utility's pre-existing revenue requirement into "environmental" and "non-environmental" components so that changes in the environmental revenue requirement can be tracked through the ECRM. The proposed rules remain ambiguous.

Since depreciation and taxes associated with capital projects are expensed under standard accounting practices, the language in the proposed rules arguably suggests that depreciation and taxes fall under paragraph (1)(F)1, which in turn may lead some to argue that depreciation and taxes for all capital projects, not just major projects whose primary purpose is to comply with environmental standards, must be included in the existing "environmental revenue requirement." This would mean that depreciation and taxes associated with every environmental capital item, no matter how minor, would have to be identified, calculated and included in the environmental revenue requirement, which would be difficult if not impossible. Given the commission's adoption of the major project/primary purpose concept, it appears that the intent is to include in the environmental revenue requirement only those capital-related costs associated with major items whose primary purpose is environmental compliance.

There are three costs associated with environmental capital projects: the cost of capital (return); depreciation; and taxes. The commission need only modify the proposed rules as follows:

> 1. All expensed environmental costs <u>(other than taxes and depreciation associated with capital projects)</u> that are included in the electric utility's revenue requirement in the general rate proceeding in which the ECRM is established; and
>
> 2. The ~~required return on~~ costs <u>(i.e., the return, taxes and depreciation)</u> of any major capital projects whose primary purpose is to permit the electric utility to comply with any federal, state or local environmental law, regulation or rule. Representative examples of such capital projects to be included (as of the date of adoption of this rule) are electrostatic precipitators, fabric filters, nitrous oxide emissions control equipment and flue gas desulfurization equipment. The costs of such capital projects shall be those identified on the electric utility's books and

records as of the last day of the test year, as updated. utilized in the general rate proceeding in which the ECRM is established.

Staff supports AmerenUE's changes. No commenters opposed them or provided alternative language.

RESPONSE AND EXPLANATION OF CHANGE: The commission finds the rule as written is unclear and it will make the changes proposed by AmerenUE and supported by Staff as noted in the comment and as fully set forth below.

COMMENT 8 (3.162(2)(E)): MIEC and OPC propose a similar modification to paragraph (2)(E). OPC proposes the following language: A complete explanation of how the proposed ECRM is reasonably designed to provide the electric utility a sufficient opportunity to earn a fair return on equity but not in excess of a fair return on equity. MIEC proposes slightly different language: A complete explanation of how the proposed ECRM is reasonably designed to provide the electric utility a sufficient opportunity to earn a fair return on equity, but not by use of the ECRM in excess of a fair rate of return on equity;

AmerenUE responds that this additional language is not consistent with SB179, for all the reasons set forth above in Comment 2. The addition of such a requirement would be impracticable and essentially disable the use of the mechanism. The enabling statute does not contain such a requirement, rather it requires only that the mechanism needs to be reasonably designed to provide a fair opportunity to earn a reasonable return. There is nothing about earnings tests between rate cases. An ECRM is established only in a rate case and reviewed in a subsequent rate case. If excess earnings are suspected between rate cases upon review of the extensive surveillance and reporting, a complaint can be filed.

OPC responds that the inclusion of this language does not pertain to earnings reviews between cases. This provision pertains only to establishment of an ECRM. This language insertion really has nothing to do with periodic adjustments.

RESPONSE: The commission finds that the language change is not necessary. The language proposed by OPC and MIEC, on its face, seems to question the validity of an ECRM if the utility earns in excess of its authorized rate of return at any point in time, which is not consistent with the statute. If the language is inserted only to remind the commission of its duty to balance the interests of ratepayers and shareholders, then it is redundant. No change will be made as a result of this comment.

COMMENT 9 (3.162(2)(P)and (Q)): As discussed in Comment 2 above, MIEC believes the proposed rules favor utilities. An overearning utility could receive additional revenues under an ECRM, contrary to legislative intent. OPC also asserts that the proposed rule allows a utility to protect and enhance its interests by deferring costs during a period of overearning to a subsequent period and would allow utilities to manipulate their earnings to the detriment of the public. The utility has such control over the timing of rate cases, filings under the rule, placing plant in service, and other matters that it allows the utility to "manage" its earnings. The proposed rule fails to reflect that fact and fail to safeguard

consumers. Therefore, MIEC and OPC propose the inclusion of the following paragraphs in subsection (2):

(P) A five year annual history in electronic spreadsheet format of the rate base, capitalization, income statement, jurisdictional allocations and out of period adjustment items in a format consistent with the Surveillance Monitoring Report set out in section (6) of this regulation; and

(Q) A forecast of the annual jurisdictional revenue requirements and supporting workpapers including capital budget data. The forecast period shall be of a length to fully include four years of operation of the proposed ECRM. The forecast shall quantify any rate increases necessary to preserve the rate of return requested by the utility, under each of the following alternative assumptions:

1. ECRM as proposed by the utility, and
2. No ECRM.

AmerenUE responds that the language in (P) essentially asks for data on a backwards-looking basis. In a rate case subsequent to the case that established the ECRM, in which the utility seeks to continue the ECRM or recover deferrals in excess of the cap, this language would enable a party to look at a revenue requirement in each year of the ECRM's duration, in addition to the test year in the rate case. This language is inconsistent with the commission's use of a normalized test year, for all the same reasons stated by AmerenUE in Comments 2 and 8 above. The commission is not empowered to apply an earnings test each year to adjustments under the ECRM.

AmerenUE adds that the forecast in item (Q) attempts to look forward over a four or five-year period and impose an earnings test at the front end. Forecasts Forecasts over such a period of time become less reliable as circumstances change quickly. This goes beyond the "reasonably designed to allow a fair opportunity to earn a fair return on equity." The rules cannot go beyond the statute.

Finally, AmerenUE notes that, nothing in SB 179 requires the commission to reconstruct earnings or discern what earnings might be in the future. OPC proposes to require an examination of the revenue requirement in the historic test year and in any year in which there is a deferral. The language proposed by OPC and MIEC should not be adopted.

RESPONSE: The commission finds that the language change is not necessary. As noted above, an ECRM is not to be rendered invalid if the utility earns in excess of its authorized rate of return at any point in time, because that would be inconsistent with the statute. The rule already requires the submission of extensive reports and surveillance information; requiring this additional information would burden both the utilities and the Staff.

COMMENT 10 (3.162(3)(E)): MIEC and OPC propose a similar modification to paragraph (3)(E): OPC proposes the following language: A complete explanation of how the proposed ECRM is reasonably designed to provide the electric utility a sufficient opportunity to earn a fair return on equity but not in excess of a fair return on equity. MIEC proposes slightly different language: A complete explanation of how the proposed ECRM is reasonably designed to provide the

electric utility a sufficient opportunity to earn a fair return on equity, but not by use of the ECRM in excess of a fair rate of return on equity;

This proposed change is identical to that discussed in Comment 8. All the same comments apply.

RESPONSE: For the reasons discussed in Comment 8, no change will be made as a result of this comment.

COMMENT 11 (3.162(3)(P)and (Q)): OPC proposes the insertion of paragraph (3)(P) and both MIEC and OPC propose the insertion of paragraph (3)(Q):

(P) A five (5) year annual history in electronic spreadsheet format of the rate base, capitalization, income statement, jurisdictional allocations and out of period adjustment items in a format consistent with the Surveillance Monitoring Report set out in section (6) of this report;

(Q) A forecast of the annual jurisdictional revenue requirements and supporting workpapers including capital budget data. The forecast period shall be of a length to fully include four years of operation of the proposed ECRM. The forecast shall quantify any rate increases necessary to preserve the rate of return requested by the utility, under each of the following alternative assumptions:

1. ECRM as proposed by the utility
2. No ECRM, and

This proposed change is identical to that discussed in Comment 9. All the same comments apply.

RESPONSE: For the reasons discussed in Comment 9, no change will be made as a result of this comment.

COMMENT 12 (3.162(4)(C)): MIEC and OPC propose a similar modification to paragraph (4)(C): OPC proposes the following language: A complete explanation of how the proposed ECRM is reasonably designed to provide the electric utility a sufficient opportunity to earn a fair return on equity but not in excess of a fair return on equity. MIEC proposes slightly different language: A complete explanation of how the proposed ECRM is reasonably designed to provide the electric utility a sufficient opportunity to earn a fair return on equity, but not by use of the ECRM in excess of a fair rate of return on equity;

This proposed change is identical to that discussed in Comment 8. All the same comments apply.

RESPONSE: For the reasons discussed in Comment 8, no change will be made as a result of this comment.

COMMENT 13 (3.162(5) and (6)): Staff supports the language of these sections, noting that a utility using an ECRM is required to comply with monthly and quarterly reporting requirements. Care was taken in the drafting of the reporting requirements of the proposed ECRM rules to make them consistent, as much as possible, with the reporting requirements of the rate adjustment mechanism (RAM) rules. As required by SB 179, and consistent with the RAM rules, the ECRM rules require true-ups at least every twelve months, prudence reviews at

least every eighteen months, and separate identification of the ECRM on customers' bills.

The Staff supports the surveillance reporting requirements, as this will provide sufficient data for the Staff to evaluate the earnings of a utility with an ECRM and determine whether it has cause to file a complaint that the utility is overearning. Staff notes that it reviews both net increases and decreases. This allows Staff to consider such factors as decreases in depreciation or property tax. Netting the costs could benefit consumers.

RESPONSE: These comments do not necessitate any change.

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

4 CSR 240-3.162 Electric Utility Environmental Cost Recovery Mechanisms Filing and Submission Requirements

(1)(F) The environmental revenue requirement shall be comprised of the following:

1. All expensed environmental costs (other than taxes and depreciation associated with capital projects) that are included in the electric utility's revenue requirement in the general rate proceeding in which the ECRM is established; and

2. The costs (i.e., the return, taxes and depreciation) of any major capital projects whose primary purpose is to permit the electric utility to comply with any federal, state, or local environmental law, regulation, or rule. Representative examples of such capital projects to be included (as of the date of adoption of this rule) are electrostatic precipitators, fabric filters, nitrous oxide emissions control equipment, and flue gas desulfurization equipment. The costs of such capital projects shall be those identified on the electric utility's books and records as of the last day of the test year, as updated, utilized in the general rate proceeding in which the ECRM is established;