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

RESPONSE OF THE MISSOURI INDUSTRIAL ENERGY CONSUMERS
TO ORDER DIRECTING FILING

COMES NOW the Missouri Industrial Energy Consumers (MIEC) and for its response to the Commission's August 25 *Order Directing Filing* states as follows:

Introduction

1. The Commission's proposed Rules implementing demand-side investment mechanism provisions and lost revenue recovery mechanism provisions are unlawful because their implementation would constitute single-issue ratemaking, a practice explicitly prohibited by Missouri law and by this Commission's own precedent. Specifically, the proposed rules constitute unlawful single-issue ratemaking because they would allow changes in customer rates based only on a single aspect of the numerous factors that must be considered in determining the revenue requirement for a regulated company.

2. Moreover, Missouri Revised Statutes section 393.1075 does not authorize the Commission to implement a single issue ratemaking mechanism, nor does it authorize the Commission to implement a mechanism that allows for recovery of lost revenues. As such, the Commission's proposed rules are unlawful as they are not authorized by statute.

3. Further, as stated in the joint letter submitted to the Commission on July 21, 2010 by AmerenUE ("the Company"), MIEC, Missouri Energy Group, and the Empire District Electric Company, the draft rules exceed the Commission's authority by setting demand-side savings targets not authorized by statute.

I. Single Issue Ratemaking

4. The Commission's proposed Rules implementing demand-side investment mechanism provisions and lost revenue recovery mechanism provisions constitute single-issue ratemaking, a practice explicitly prohibited by Missouri law and by this Commission's own precedent.

5. In 2001, this Commission rejected UtiliCorp United Inc.'s tariff to make changes on the interest paid on its customer's costs and fees, holding that such a tariff constituted unlawful single issue ratemaking. The Commission's language regarding the unlawful practice of single issue ratemaking merits an extended quote as it is precise and unambiguous:

> The law is quite clear that when the Commission determines the appropriateness of a rate or charge that a utility seeks to impose on its customers, it is obligated to review and consider *all* relevant factors, rather than just a single factor. To consider some costs in isolation might cause the Commission to allow a company to raise rates to cover increased costs in one area without recognizing counterbalancing savings in another area. Such a practice is justly considered to be single issue ratemaking.

In the Matter of UtiliCorp United Inc.'s Tariff, Case NO. GT-2001-484.

6. Similarly, the Supreme Court of Missouri rejected an electric utility's attempt to utilize a fuel adjustment clause because it would allow "one factor to be considered to the exclusion of all others in determining whether or not a rate is to be increased," and as such would "permit new 'rates' to go into effect without consideration of other factors and thus without a framework in which to determine if overall rates are reasonable." *State ex rel. Utility Consumers Council, Inc. v. Public Service Com.*, 585 S.W.2d 41, 56-57 (Mo. 1979). The Court held that such a practice would come "dangerously close to abdication by the commission of its power to set just and reasonable rates." *Id.*

7. The demand-side investment mechanism provision of the draft rules constitutes unlawful single-issue ratemaking, because like the tariff in *UtiliCorp* and the fuel

adjustment clause in *Utility Consumer Council*, the proposed provision allows rates to be changed on the basis of a single factor without consideration of all of the other relevant factors that must be considered, such as expenses, investment, cost of capital, revenues in a test period, etc. Similarly, the proposed lost revenue recovery mechanism constitutes unlawful single-issue ratemaking in that it, like the tariff and fuel adjustment clause referenced above, permits new rates to go into effect without consideration of other factors and thus without a framework in which the Commission may determine if overall rates are reasonable. The proposed rules would effectively curtail the Commission's power to set just and reasonable rates based on a consideration of all relevant factors.

8. Further, the lost revenue recovery mechanism would allow the Company to automatically change its rates to customers to compensate for any lost revenue, without allowing the Commission to consider the causes of lost revenue, and whether the Company took adequate steps to recover lost revenue. Under such a proposal, the Company would not be encouraged to implement revenue capturing mechanisms when it knows that the losses it incurs as a result of lost revenue will immediately flow through to its customers. This Commission condemned a similar provision in *Re Union Electric Co.*, 92 P.U.R. 3d 254, 262 (Mo. 1971), reasoning:

> The company has proposed that a fuel rider, heretofore only applied to industrial customers, be now applied to all its customers' sales other than street and dawn to dusk lighting sales. Under such a tariff, the company would automatically change its rates to its customers to compensate the company for any increase in fuel costs. In this instance, the fuel costs for company are basically a result of the cost of coal delivered to its generating plants. This commission would have no authority to investigate or determine if such price changes in coal were warranted. Furthermore, under such a proposal, management would not be encouraged to bargain for the lowest coal rates possible when it would know any increase would be immediately "flowed through" to customers. Also, many other factors, other than cost of fuel, affect this company's rate of return. We do not feel it is good regulation to set aside this one element of expenses for special

treatment while ignoring the total overall picture of expenses and resultant rate of return.

9. Like the fuel rider in *Re Union Electric Co.*, the revenue savings mechanism proposed here is not good regulation as it does not encourage the Company to recover lost revenues, except by increasing rates. As such, the draft rules implementing RSMo § 393.1075 are unlawful as they constitute single-issue ratemaking, and should not be implemented.

II. Lack of Authority Under RSMo § 393.1075

10. The proposed rules are unlawful as they exceed the power granted to the Commission under RSMo § 393.1075. The Commission is "purely a creature of statute." *Utility Consumers Council*, at 49. As such, its "powers are limited to those conferred by . . . statute[], either expressly, or by clear implication as necessary to carry out the powers specifically granted. *Id. See also, Shewmaker v. Laclede Gas Company*, Case No. GC-2006-0549. Thus . . . neither convenience, expediency or necessity are proper matters for consideration in the determination of whether or not an act of the commission is authorized by the statute" *Utility Consumers Council*, at 49. (internal citations omitted).

11. Nothing in RSMo § 393.1075 authorizes the Commission, expressly or by clear implications as necessary to carry out the powers specifically granted, to implement a single issue ratemaking mechanism; nor does it authorize the Commission to implement a mechanism that allows for recovery of lost revenues. Had the legislature intended to confer upon the Commission the regulatory authority to implement such mechanisms, it would have done so expressly as it did in House Bill No. 208 and Senate Bill No. 179 when it authorized the establishment of ISRS, the Environmental Surcharge and the FAC. That the legislature failed to include such language in RSMo §393.1075 demonstrates that the legislature did not intend to confer upon the Commission the regulatory authority to implement any single issue

ratemaking or lost revenue recovery mechanisms, pursuant to this statute. As such, the Commission's proposed rules are unlawful as they overreach the authority conferred on the Commission by statute.

III. Lack of Authority for Demand-Side Savings Targets

12. Similarly, the proposed rules are unlawful in that they exceed the statutory authority conferred on the Commission by setting demand-side savings targets. As discussed in Section II, the Commission is a creature of statute and its powers are limited to those conferred by statute, either expressly, or by clear implication as necessary to carry out the powers specifically granted.

13. Rules 4 CSR 240-20.094(2)(A) and (B) are unlawful because these two sections set demand-side savings targets without any statutory authority. Missouri Revised Statutes section 393.1075 contains no express or implied authority for the imposition of any standard savings targets. While it may be argued that the language "achieving all cost-effective demand-side savings" provides this authority, such an interpretation would lead to unreasonable results, which violates basic rules of statutory construction. For example, if the intent of the statute was to merely impose a set amount of demand-side savings, entire sections of the statute would not be necessary. Such an interpretation is untenable. As such, Rules 4 CSR 240-20.094(2)(A) and (B) are unlawful as they exceed the authority conferred on the Commission by statute.

Conclusion

14. For the foregoing reasons, the above referenced rules should not be implemented. The MIEC reserves the right to raise or respond to additional legal issues in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand-delivered, transmitted by e-mail or mailed, First Class, postage prepaid, this 14th day of September, 2010, to all parties on the Commission's service list in this case.

/s/Diana Vuylsteke