Robin Carnahan
Secretary of State

Administrative Rules Division
Rulemaking Transmittal Receipt

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Included with Rulemaking:

Cover Letter	4/03/2008

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SECRETARY OF STATE
ADMINISTRATIVE RULES

Rule Number 4 CSR 240 - 3.162

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

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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:
(1)(D); (1)(F),(1)(F)1. and 2.; (1)(G)and(H); (2)(L); (3)(L); (4)(B); (5)(C),(D) and(E); and (7)(A)1D,E,F

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Missouri Public Service Commission

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April 3, 2008

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

Dear Secretary Carnahan:

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

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 3rd day of April, 2008.

Statutory Authority: Sections 386.250, and 393.140 RSMo 2000, and 386.266 RSMo Supp. 2007.

If there are any questions regarding the content of this order of rulemaking, please contact:

Colleen M. Dale, Secretary
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BY THE COMMISSION

Colleen M. Dale
Secretary
Missouri Public Service Commission

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SECRETARY OF STATE
ADMINISTRATIVE RULES

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 and 393.140, RSMo 2000 and 386.266, RSMo Supp. 2006, 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 December 3, 2007 (32 MoReg 2340). 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 public comment period ended January 2, 2008 and a public hearing on the proposed rule was held January 17, 2008. Timely written comments were received from Union Electric Company d/b/a Ameren UE, Kansas City Power & Light, Aquila, and the Missouri Energy Development Association (of which all four investor-owned electric companies are members), the Missouri Industrial Energy Consumers,the Missouri Energy Group, the Public Counsel, AARP and the Staff of the Missouri Public Service Commission. Noranda Aluminum filed written comments one day late, but reiterated those comments as prepared testimony of its witness, Steve Feeders. In addition, Lena Mantle and Greg Meyer on behalf of the Staff, Russell Trippensee and Ryan Kind on behalf of the OPC, John Coffman on behalf of AARP, Diana Vuylsteke and Maurice Brubaker on behalf of the Missouri Energy Group, Jesse Todd on behalf of ACORN and Mark C. Birk on behalf of AmerenUE testified at the 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: The language "federal, state or local environmental law, regulation or rule" is too general and that the rule should be more specifically define what could be recovered in the environmental cost recovery mechanism ("ECRM"). The Staff responded that attempts to do so resulted in definitions that appeared at odds with statutory language.
RESPONSE: This language is drawn directly from the statute. No change will be made.

COMMENT: The proposed rule does not contain sufficient consumer protections, effectively authorizes an electric utility to achieve excess earnings, and does not adequately assure that utilities will act in a prudent manner with respect to expenditures

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ADMINISTRATIVE RULES

related to environmental costs as defined by the rule. The rule should be amended to ensure that ratepayers are protected from imprudent expenditures and large rate increases and should provide incentives to make the necessary investments to comply with environmental rules in the most economic manner and to operate facilities reasonably.

Revise the definition of "environmental cost" to clarify that an ECRM cannot be used to recover prudently incurred compliance costs if the utility is over-earning without using ECRM. In addition, limit recovery to unanticipated costs that could not have been addressed in a prior general rate case. The proposed rule should be modified to recognize the Commission's authority to limit deferrals in its discretion as needed to protect ratepayers. This could be accomplished by specifying that any deferred costs be subject to the test that the utility did not earn in excess of its authorized return on equity during the period when the deferred costs were incurred; and that any costs passing this test be collected over the life of the capital addition which gave rise to the cost deferral.

There is a potential for a company to earn more than it is authorized to earn. Whether the ECRM may cause it or not is unknown, but the potential is there. Any time you have a mechanism that adjusts rates in between rate cases, the possibility that a utility can overearn is enhanced. Absent the clause, the utility has to manage all of its costs and all of its revenues. If a portion of its operations re segregated and the company can increase its rates between rate cases to cover those expenses, there is no down side risk to that. It enhances the possibility to overearn.

Once you include an asset in the revenue requirement calculations, every day subsequent to that calculation, the investment lessens in value, barring no addition to the investment. After a rate base is established, that rate base is lower the next day, so that the earnings are greater. However, they may not go beyond the authorized return, because not all relevant factors are known. This is studied in the general rate proceeding to determine whether an ECRM is appropriate. If Staff finds an overearning, it can file a complaint. In addition, information is submitted to OPC and others as provided in Sections (9) through (11). The statute does provide that the Commission may take into account any change in business risk to the corporation resulting from the implementation of the adjustment mechanism in setting the corporation's allowed return in any rate proceeding, in addition to other changes in business risk experienced by the corporation, and that is in the rule also. There is also the ability to "share" the ECRM, by assigning a percentage to the utility to not be recovered and a portion to recover through the ECRM.

The proposed rule nets both increases and decreases. It takes into consideration depreciation and property tax, other things that may have decreased versus other parties who have other opinions on what that should be. So that netting of cost could benefit the consumer also.

RESPONSE: The rule contains many ratepayer safeguards, all of which appear to be appropriate, and none of which appear to be unreasonable or overly burdensome to the utilities. No changes will be made.

COMMENT: ECRMs shift the burden of increased costs of compliance with environmental rules between rate cases to customers, and removes most incentives for utilities to act with restraint and make prudent decisions. In order to maintain a financial incentive to behave prudently, inclusion of the phrase "some or all" in several sections

will articulate the Commission's discretion to approve an ECRM that permits only a portion of the changes in allowable costs to be included and recovered in the ECRM.
RESPONSE: The Commission believes that it is clear already in the rule that the Commission has the discretion to allow some, all or none of the costs associated with environmental compliance into an ECRM.

COMMENT: A new section entitled "Incentive Mechanism or Performance-Based Program" is recommended, consistent with 4 CSR 240-20.090(11). Add a "threshold test" that establishes a sufficient need prior to obtaining and using an ECRM, in which the utility must establish that it cannot earn its authorized rate of return without an ECRM. An after-the-fact complaint process is insufficient to protect ratepayers. The proposed rule, as written, allows utilities to manipulate timing of filings to manipulate their earnings to the detriment of the public.
RESPONSE: The Commission disagrees; no changes will be made.

COMMENT: Section 386.322 gives the Commission discretion to allow utilities to implement an ECRM, and to promulgate rules governing such mechanisms. It does not encourage or require the Commission to do so. Section 386.322 should not be viewed as embodying a legislative mandate or endorsement of ECRMs, rather it reflects the Legislature's deference to the Commission regarding a controversial and technical regulatory issue. If the Commission chooses to exercise that authority, it is crucial that essential consumer protections be included in these rules, rather than being left for later decision in individual rate cases. To the extent that particular cost items are singled out for separate recovery outside of general rate proceedings, there is a high likelihood that the utility will over-earn. It is imperative that the Commission put in place a mechanism to review the utility's earnings and limit the pass-through of costs in the ECRM if the utility is experiencing countervailing decreases in other cost elements. MIEC proposes to add the following language to the proposed rule:

> In establishing, continuing or modifying the ECRM, the Commission shall consider whether the presence of the ECRM is likely to allow the utility to earn in excess of its authorized return on equity. If the Commission finds this to be the case, it may include in the ECRM procedures designed to periodically examine the utility's earnings (on a regulatory basis), and appropriately limit the collection of costs under the ECRM to the extent necessary to prevent the utility from earning in excess of its authorized return on equity as a result of revenues received through the ECRM.

However, another commenter notes that Missouri's electric utilities along with electric utilities across the country are at the beginning of a major infrastructure building period. This infrastructure is necessary to provide the increasing amounts of energy customers are demanding and to meet stricter environmental requirements mandated by state and federal law. The increasing cost of this infrastructure and the increasing expenses of utility operations have already caused electric utility rates to increase and will cause additional rate increases in the short and long term.A combination of steel prices and fuel prices and the federal mandates to reduce air pollution will make this building very costly. The price projections on fossil fuels peaks out at the same time there is the biggest hit from pollution controls. Senate Bill 179 provides a reasonable but

by no means easy mechanism to address a portion of the environmental compliance expenditure aspect of this situation. The provisions in these rules are extensive and complicated. Many of them are designed to protect customers while providing electric utilities a means to see more timely recovery of prudently incurred environmental compliance costs.

The are potential benefits to consumers with an ECRM rule in place. While the ECRM does provide for increases in surcharge amounts, the statute and the rules are explicit that decreases may be reflected as well [examples were given]. However, it is likely that if there were an expectation that the surcharge amount would change, it would more likely be an increase than a decrease.

Fewer rate cases and lower administrative costs to the State and the different parties with rate cases. Also, smoother rate increases as opposed to bringing blocks of expense and capital changes in that rate case. If there were a multi-year period between rate cases, the ECRM could provide for bringing those in smaller bites [example given].

This removes some disincentives to invest in infrastructure sooner and clean the air sooner. It provides more financial stability to utilities, may help with access to lower cost of capital. It doesn't provide some sort of an additional revenue lag or some sort of an enhancement to revenues beyond what the general rate case process would provide, but without the ECRM mechanism, a disincentive to spend money well in advance of when you might be doing a general rate case otherwise. A lot of different dominoes must fall at the right time to make you hit a particular time line on a project. This is one you remove, and you're making less of a disincentive to not do it.

RESPONSE: The Commission believes this rule, in its final form, strikes an appropriate balance between the challenges facing the utilities and the constraints on consumers. As noted elsewhere in the comments, sufficient safeguards are in place to allow the Commission to monitor and guard against rampant overearning. Therefore, no changes will be made as a result of these comments.

COMMENT: The ECRM rules are silent on the rate design of the ECRM. Parties to the general rate case setting the ECRM can propose cost allocation methodologies and rate design proposals to the Commission. These positions may be a methodology based on energy consumption, coincident peak demand, a combination of energy and demand or whatever other type of allocation methodology a party may choose to support. The rules as proposed are not prescriptive and leave it to the Commission as to the determination of which allocation method should be used including any methods in which voltage levels are taken into account. For this reason, the Staff recommends that there be no rate design language included in the ECRM rules.

RESPONSE: No change is necessary as a result of this comment.

COMMENT: Depreciation of environmental infrastructure in calculating ERCM adjustments is not adequately treated in rule. This rule should be modeled on ISRS treatment, and similarly recognize that utilities can only operate for a few years without a general rate case and any party can file a complaint if over-earnings are suspected.

Adjustments to the ECRM will be largely based on large capital investments, which will be depreciated over time. The proposed rules require that the ECRM reflect the net increases and decreases in an electric utility's environmental costs (4 CSR 240-

3.162(1)(D)). Net increases and decreases will take into account the depreciation of these large capital investments that accumulates as a reduction to rate base over time. Net increases and decreases will also capture changes in environmental expenses from those allowed in the general rate case that are replaced with another type of environmental expenses.
RESPONSE: No change is necessary as a result of this comment.

COMMENT: It is problematic to divide rate base into "environmental" and "non-environmental" categories, in that most facilities have at least some relation to environmental concerns. Staff disagrees. It is not the intention of the rule to require a utility to identify a pump or a fan as a compliance investment. The Staff suggests a materiality limit in dollars or specific investment types could be included in the rate base. Whatever agreed-to conditions are imposed on the environmental rate base should also apply to the utility when it seeks an ECRM periodic adjustment.
RESPONSE: The language of paragraph (7)(A) 1. has been changed to attempt to clarify the true intent of the provision.

COMMENT: Concerning the definition of "environmental cost," the Staff is confident that the parties to the general rate proceeding will present to the Commission their positions on which cost items in the electric utilities books and records should be collected in a rate adjustment mechanism and which should be collected in an ECRM. The Commission will have the opportunity to ensure that environmental costs are not improperly classified as fuel and purchased power costs to circumvent the 2½% cap.
RESPONSE: The Commission added a new definition "environmental revenue requirement," now at subsection (1)(F), that should help to clarify.

COMMENT: The initial filing requirements should be amended to add information to enable analysis of the necessity of the utility's use of an ECRM to earn a fair return on equity.
RESPONSE: As noted above, the Commission declines to modify the rule to utterly preclude the possibility of overearning, believing necessary safeguards are in place. No change will be made as a result of this comment.

COMMENT: Accounting for net changes is not unduly burdensome, but manageable. For example, the utility could identify specific environmental cost and revenue items on its books and records that would be considered in adjusting its ECRM. This would allow the utility to define the scope of the accounts and records necessary to track the environmental costs included in its ECRM.
RESPONSE: No change is necessary as a result of this comment.

COMMENT: MEDA proposes removing the monthly submission requirement in 3.162(5)(C), based on its belief that it duplicates subsection (5)(E). Subsection (5)(C) requires the utility to provide the electric utility's actual environmental compliance costs and revenues allocated by rate class and voltage level as applicable consistent with the most recent Commission approved allocation methods and rate design. Subsection (5)(E) requires the utility to provide the difference by rate class and voltage level as applicable

between the total environmental revenues collected through base rates and the ECRM and the environmental compliance revenues received and costs incurred. Subsection (5)(C) requests information on environmental costs and environmental cost revenues and how those costs are allocated to the rate classes for that month. Subsection (5)(E) requests information on the difference between the revenues billed and the revenues projected for each month. Changing subsection (5)(E) may reduce the confusion.
RESPONSE AND EXPLANATION OF CHANGE: The wording of this subsection will be changed as more fully set forth below.

COMMENT: ACORN adamantly opposed adoption of rules that would allow AmerenUE to request for an environmental cost surcharge and thereby allow it to raise rates. The rule allows then to recover environmental costs, but those costs may increase while their other costs may decrease. The end effect will be to allow companies charge customers more and increase their profits because of this surcharge. This is an outrage. This is greed and places unnecessary financial hardship on customers.

With very low usage customers and certain low income customers, the demand is inelastic. Using electricity particularly to heat your home and do some very basic things is a very basic human need, but there are some signals that could be sent through rate design that are positive and would encourage energy efficiency.
RESPONSE: The Commission is aware of the hardships increased rates places on low-income and fixed-income customers. As noted elsewhere, the Commission believes sufficient safeguards are in place to protect consumers from unreasonable and unwarranted increases.

COMMENT: The utilities argue that the investment currently associated with environmental compliance should be treated identically to the procedures outlined in the infrastructure system replacement surcharge or ISRS rules. The Staff and OPC do not agree with this argument. Senate Bill 179 and Section 386.266.2 clearly authorizes periodic rate adjustments outside of general rate proceedings to reflect increases and decreases in its prudently incurred costs, whether capital or expense, to comply with any federal, state or local environmental law, regulation or rule. Section 393.1012.1, which establishes the ISRS, makes no mention of increases or decreases in expense. In fact, the language in that section states, a gas corporation providing gas service may file a petition and proposed rate schedules with the Commission to establish or change ISRS rate schedules will allow for the adjustment of the gas corporation's rates and charges to provide for the recovery of costs eligible infrastructure system replacement, as well as other significant differences in the operation of the processes.
RESPONSE: The Commission agrees that the two processes have different goals and procedures. Wholesale adoption of the ISRS procedure in theses rule would be inappropriate and unworkable. No change will be made based on this comment.

COMMENT: The Commission failed to correctly state all of its rulemaking authority in proceeding with these rules. Although it cited its general rulemaking authority, section 386.250 RSMo 2000, it should also have cited 386.266 RSMo Supp. 2007.

RESPONSE: The rules as published cited as authority Sections 386.250 and 393.140 RSMo 2000 and 386.266 RSMo Supp. 2006. No change is necessary as a result of this comment.

COMMENT: The Commission should carefully weigh the impact of this surcharge and should limit the amounts to be recovered under it to those costs that could not have been anticipated during the last rate case. If the Commission can foresee an environmental cost coming, it should do all in its power to address that in base rates during the rate case, by adjusting factors within its discretion to a higher level, to promote stability in rates.
RESPONSE: No change is required by this comment.

COMMENT: There is a dispute among some of the parties about the number of filings should be made each year. The rule as it stands today allows two filings each year, one which is essentially a true-up and one that the utility can file at its discretion. Staff believes that is a sufficient number given the fact that the major driver of periodic adjustments will be capital investments and that two filings within the year should be sufficient to capture those additional capital investments to meet the compliance rules.
RESPONSE: The Commission believes the presently required filings are appropriate and reasonable. No change will be made as a result of this comment.

COMMENT: The Chapter 3 rule does not have a waiver provision, but the Chapter 20 rule does. Consistency would be appropriate.
RESPONSE: Both rules, as published, did contain waiver provisions. No change is required by this comment.

COMMENT: Prudence reviews suffer myriad problems in rate cases, one of which is the "too early too late" problem. In the mechanism itself, we're often told that it's too early to look at these issues. Maybe when you get to the rate case we can look at them. But once you get to the rate case, well, those expenditures, those investments have already been approved in the mechanism.

Another issue that could come up relating to prudence could be something like environmental cleanup costs. It is difficult to pinpoint the particular instance of prudent inquiry. Cleaning up the results of a disaster would be prudent, everyone would agree, but was the disaster the result of imprudent practices? What if a utility buys a piece of property that has an environmental liability attached to it, is it prudent to buy that?

One other prudence issues has to do with resource planning; is this utility relying too much on one type of fuel, are they relying too much on natural gas plants causing their -- their rates to be too volatile, or is this utility relying too much on coal, and are going to get hit too hard when all the global issues begin to hit.? We look for the lowest cost generation, but is that necessarily always the most prudent course? The question of whether the course of action is prudent involves a much longer term resource planning decision-making, and when you're looking at expenditures over the course of a year, you're not seeing the facts broadly enough
RESPONSE: The Commission understand that prudence reviews suffer some inherent limitations, but believes that the prudence reviews anticipated in these rules are appropriate and reasonable. No change will be made as a result of this comment.

COMMENT: As to whether it is unreasonably costly to have frequent rate cases, if we had rate cases with these electric utilities every other year or even every year, that wouldn't necessarily concern me from a policy perspective because there wouldn't be as much concern that there were unfair charges or double charges and all this unfair gaming of the system that we're fretting about.
RESPONSE: No change will be made as a result of this comment.

COMMENT: Looking at SB 179, it does require that the Commission only approve a surcharge if it's reasonably designed to provide the utility with sufficient opportunity to earn a fair return on equity. And a return on equity that's in excess of the return that the Commission has authorized is not a fair return, and so in our view, the rules should reflect the statutory language. That's a key protection the rules really should include. In addition, the Commission should reject, the utility proposal that consumers be denied the benefit of capital decreases for environmental investments in rate base at the time that the environmental surcharge is established.
RESPONSE: As noted above, the Commission declines to modify the rule to utterly preclude the possibility of overearning, believing necessary safeguards are in place. No change will be made as a result of this comment.

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

PROPOSED RULE

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

(1)(D) Environmental Cost Recovery Mechanism (ECRM) means a mechanism established in a general rate proceeding that allows periodic rate adjustments, outside a general rate proceeding, to reflect the net increases or decreases in an electric utility's environmental revenue requirement, plus additional environmental costs incurred since the prior general rate proceeding.

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

1. All expensed environmental costs 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 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.

(G) General rate proceeding means a general rate increase proceeding or complaint proceeding before the commission in which all relevant factors that may affect the costs, or rates and charges of the electric utility are considered by the commission; and

(H) Rate class is a customer class defined in an electric utility's tariff. Generally, rate classes include Residential, Small General Service, Large General Service and Large Power Service, but may include additional rate classes. Each rate class includes all customers served under all variations of the rate schedules available to that class.

(2)(L) For each of the major categories of costs, that the electric utility seeks to recover through its proposed ECRM, a complete explanation of the specific rate class cost allocations and rate design used to calculate the proposed environmental revenue requirement and any subsequent ECRM rate adjustments during the term of the proposed ECRM**;**

(3)(L) For each of the major categories of costs, that the electric utility seeks to recover through its proposed ECRM, a complete explanation of the specific rate class cost allocations and rate design used to calculate the proposed environmental revenue requirement and any subsequent ECRM rate adjustments during the term of the proposed ECRM;

(4)(B) The periodic adjustment shall reflect a comprehensive measurement of both increases and decreases to the environmental revenue requirement established in the prior general rate proceeding plus the additional environmental costs incurred since the prior general rate proceeding.

(5) (C) All significant factors that have affected the level of ECRM revenues along with workpapers documenting these significant factors;

(D) The difference, by rate class and voltage level, as applicable, between the total billed ECRM revenues and the projected ECRM revenues;

(E) Any additional information ordered by the commission to be provided; and

(F) To the extent any of the requested information outlined above is provided in response to another section, the information only needs to be provided once.

(7)(A)1.D. Base rate component of environmental compliance costs and revenues;

E. Identification of capital projects placed in service that were not anticipated in the previous general rate proceeding; and

F. Any additional requirements ordered by the commission in the prior general rate proceeding;

AUTHORITY: sections 386.250 and 393.140, RSMo 2000, and 386.266, RSMo Supp. 2006. Original rule filed Oct. 31, 2007.

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

In the Matter of Proposed Rules 4 CSR 240-3.162 and 4 CSR 240-20.091, Environmental Cost Recovery Mechanisms.	)))))	**Case No. EX-2008-0105**

DISSENTING OPINION OF COMISSIONER ROBERT M. CLAYTON III

This Commissioner dissents from the Final Order of Rulemaking for the rule known as the Environmental Cost Recovery Mechanism (ECRM) or surcharge. This is the second surcharge authorized by SB179 to impact Missouri customers and it has, by far, the greatest potential for significant rate increases. The first surcharge stemming from SB179 was the Fuel Adjustment Mechanism rule promulgated in 2007. In the present rulemaking, the majority rejected all of this Commissioner's amendments that were designed to protect customers from rate increases over and above the utility's authorized rate of return. The public should be prepared for new rate cases in which electric utilities will be permitted to seek not one, but two new surcharges on consumer bills.

First and foremost, surcharges, riders or modifiable trackers are rate designs that permit rate adjustments outside of a general rate case where normally "all relevant factors" are taken into consideration in establishing rates that are "just and reasonable." To determine how much revenue the company should receive to provide service, all expenses, revenues, capital plans and expenditures, labor decisions, fuel estimates and

infrastructure retirements are fully evaluated. Base rates are designed from the comprehensive audit and review by staff in identifying the revenue requirement. The surcharges, however, can be adjusted upward without a full evaluation of "all relevant factors." Over or under collections for non-environmental costs are not evaluated or considered in the appropriateness of the surcharge. If the utility is over-collecting or over-earning after a review of "all relevant factors," it would still be able to collect additional funds through the surcharge enabling it to earn over and above its authorized rate of return or profit. If the utility is under-collecting or under-earning, then the surcharge can elevate the utility to its authorized return level. In either case, the utility receives a benefit while the customer pays more than he or she would have without the surcharge.

Missouri's first surcharge authorizing rate increases without reviewing "all relevant factors" was created in HB208 in 2003 for gas and water utilities known as the Infrastructure System Replacement Surcharge (ISRS). In 2005, SB179 authorized the creation of a Fuel Adjustment Mechanism or clause (FAC), which has since been codified in 4 CSR 240-20.090 and implemented in one electric utility's latest rate case. The ECRM, like the FAC, is applicable to electric utilities. Each surcharge has the potential to enable inappropriate utility returns.

Electric utilities now have two separate mechanisms that may be authorized by the Commission and can easily lead to examples of utility over-earning. During the rulemaking hearing, staff witnesses affirmatively stated that for the utility, "there's no down side risk. . . The possibility for them to overearn, you've enhanced that possibility.

That's just a given."[1] This Commissioner recommended that language proposed by the Public Counsel be included in the rule to protect customers from paying rates over and above the utility's authorized rate of return. This amended language was offered in 4 CSR 240-3.162 for subsections 2(E), 3(E) and 4(C), and in 4 CSR 240.20.091 for subsections 2(A), 4(C)(4-8). The language simply allows the utility to use the surcharge to reach its Commission approved rate of return as authorized by statute, but not to exceed it. Some have argued that this language is unnecessary because such analysis is implicit in what the Commission does. However, including the proposed language only restates current statute and makes the Commission's purpose clear. Clarity only improves this rule.

Over-earning can also be affected by deferrals of cost increases. The proponents of the rule argue that consumers are protected because of a two and one-half per cent (2½ %) cap on annual adjustments to the surcharge. While on the surface, customers do receive some comfort of a limitation on the increase, one should be concerned with the amounts that exceed the cap and are deferred for collection in future rate cases. There is no limit to the amount of such a deferral. Capital investments would most likely be added to rate base anyway, but expenses incurred outside the test year would not be added. The greatest inequity with the unlimited deferrals is those expenses deferred for collection in the next case during a time when the company may be over-earning. For example, if the utility defers $10 million in investments or expenses that exceed the two and one-half per cent (2½ %) cap during a year in which it is earning 200 basis points above its authorized rate of return, the utility gets to keep the over collections and then would be entitled to collect the additional deferrals in base rates in the next rate case. In

[1] Tr. at 31-32.

the past, without using surcharges, the staff would fully evaluate the occurrences of both over and under-earning to find a revenue requirement that was "just and reasonable."

This Commissioner offered for consideration language suggested by Public Counsel and supported by AARP for evaluating this circumstance. In 4 CSR 240-20.091, subsection 4(C) (4-8) was offered to contemplate an occasion for unlimited deferrals when the company is also over-earning. The majority rejected this language. During examination at the hearing, this Commissioner inquired as to staff's intentions during periodic adjustments to the ECRM in light of company earnings. Staff advised that it currently has the power and authority to investigate and possibly file a complaint to reduce rates at times of over-earning. This is supposedly a consumer protection in the rule, however, one person on staff has the responsibility to review all electric and gas utilities' income statements and revenue calculations outside of a rate case which may require several years in analysis. Staff is entirely dependent on the utility to supply accurate and sufficient data to conduct such an analysis. One year's calculation may not be sufficient to trigger a complaint. There are simply insufficient protections in the rule to address the potential for over-earning with pending deferrals.

Lastly, the testimony highlights the great potential for significant amounts of costs to be processed or collected through this surcharge.[2] It is not clear what may be included in the surcharge calculation which is certainly defined to include capital and expense costs. Staff suggests that many of these details should wait for consideration during general rate increases. With possible Congressional mandates on the horizon, the potential for new taxes or fees on certain types of generation and the pursuit of more costly renewable sources of energy, there is no limit on what can be argued by a party to

[2] Tr. at 120.

be eligible for inclusion in the surcharge. This Commissioner recommended adding language that would require costs to be "directly" associated with environmental compliance, yet this language was also rejected by the majority.

Other concepts were suggested to offer guidance to future Commissions. In 4 CSR 240-20.091(11), this Commissioner offered language proposed by some of the consumer advocates that would authorize incentive mechanisms to balance or align the interests of ratepayers and shareholders to encourage prudent decisions. Language was suggested in 4 CSR 240.3-162, subsection 2(P-Q) and 3(P-Q), to require five years worth of study on pending environmental investments and cost incurring decisions with how the surcharge would effect the utility's rate of return. This Commissioner offered another amendment that would have authorized the Commission the flexibility to include "some or all" of the environmental costs as part of the surcharge in 4 CSR 240.20.091(1) (B) if fairness or reasonableness required it. The majority rejected each of these amendments that would have offered a layer of protection for consumers.

In conclusion, the most striking testimony admitted into the record related to the alleged underlying purpose of the rule. It has been argued that this rule is important for Missouri's compliance with environmental rules and that this rule will enable a cleaner Missouri environment. The testimony by industry representatives reflected that this rule does not encourage environmental investment;[3] there was further testimony that environmental projects would not necessarily be accelerated because of this rule;[4] and, the industry comments reflected that this rule will not cause any new environmental

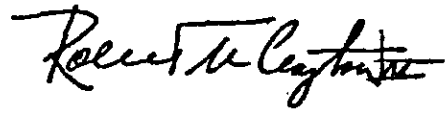
[3] Tr. at 66.
[4] Tr. at 67.

improvement that would not already be required under the law.[5] One surcharge currently in place, the ISRS, which allows for earlier recovery of infrastructure investment has not led to additional or accelerated utility investment.[6]

There is no question that the utility stands to benefit from the acceleration of cost recovery and the shift in risk to consumers. The General Assembly intended for this Commission to promulgate a rule to implement this surcharge. However, consumers, legislators and the public expect that the Commission will use its expertise to implement the rule in a fair and reasonable manner to make sure all parties have a share of the alleged benefits. The Final Order of Rulemaking fails to balance those interests and may very well lead to inappropriate rate increases.

For the foregoing reasons, this Commissioner dissents.

Respectfully submitted,



Robert M. Clayton III
Commissioner

Dated at Jefferson City, Missouri,
on this 28th day of February 2008.

[5] Tr. at 67-68.
[6] Tr. at 68-69.