Under this heading will appear the text of proposed rules and changes. The notice of proposed rulemaking is required to contain an explanation of any new rule or any change in an existing rule and the reasons therefor. This is set out in the Purpose section with each rule. Also required is a citation to the legal authority to make rules. This appears following the text of the rule, after the word "Authority."

Entirely new rules are printed without any special symbology under the heading of the proposed rule. If an existing rule is to be amended or rescinded, it will have a heading of proposed amendment or proposed rescission. Rules which are proposed to be amended will have new matter printed in boldface type and matter to be deleted placed in brackets.

An important function of the *Missouri Register* is to solicit and encourage public participation in the rulemaking process. The law provides that for every proposed rule, amendment, or rescission there must be a notice that anyone may comment on the proposed action. This comment may take different forms.

If an agency is required by statute to hold a public hearing before making any new rules, then a Notice of Public Hearing will appear following the text of the rule. Hearing dates must be at least thirty (30) days after publication of the notice in the *Missouri Register.* If no hearing is planned or required, the agency must give a Notice to Submit Comments. This allows anyone to file statements in support of or in opposition to the proposed action with the agency within a specified time, no less than thirty (30) days after publication of the notice in the *Missouri Register*.

An agency may hold a public hearing on a rule even though not required by law to hold one. If an agency allows comments to be received following the hearing date, the close of comments date will be used as the beginning day in the ninety (90)-day-count necessary for the filing of the order of rulemaking.

If an agency decides to hold a public hearing after planning not to, it must withdraw the earlier notice and file a new notice of proposed rulemaking and schedule a hearing for a date not less than thirty (30) days from the date of publication of the new notice.

Proposed Amendment Text Reminder:
**Boldface text indicates new matter**.
*[Bracketed text indicates matter being deleted.]*

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

## PROPOSED RULE

### 4 CSR 240-3.163 Electric Utility Demand-Side Programs Investment Mechanisms Filing and Submission Requirements

*PURPOSE: This rule sets forth the information that an electric utility must provide when it seeks to establish, continue, modify, or discontinue a Demand-Side Programs Investment Mechanism (DSIM). This rule also sets forth the requirements for submission of information related to DSIM rate adjustment filings and for submission of annual reports as required for electric utilities that have a DSIM.*

(1) As used in this rule, the following terms mean:

(A) Annual net shared benefits means the utility's avoided costs measured and documented through evaluation, measurement, and verification (EM&V) reports for approved demand-side programs less the sum of the programs' costs including design, administration, delivery, end-use measures, incentives, EM&V, utility market potential studies, and technical resource manual on an annual basis;

(B) Annual report means a report of information concerning a utility's demand-side programs having the content described in section (5);

(C) Avoided cost or avoided utility cost means the cost savings obtained by substituting demand-side programs for existing and new supply-side resources. Avoided costs include avoided utility costs resulting from energy savings and demand savings associated with generation, transmission, and distribution facilities. The utility shall use the same methodology used in its most recently-adopted preferred resource plan to calculate its avoided costs;

(D) Demand means the rate of electric power use measured over an hour in kilowatts (kW);

(E) Demand-side program means any program conducted by the utility to modify the net consumption of electricity on the retail customer's side of the meter including, but not limited to, energy efficiency measures, load management, demand response, and interruptible or curtailable load;

(F) Demand-side programs investment mechanism, or DSIM, means a mechanism approved by the commission in a utility's filing for demand-side program approval to encourage investments in demand-side programs. The DSIM may include, in combination and without limitation:

1. Cost recovery of demand-side program costs through capitalization of investments in demand-side programs;
2. Cost recovery of demand-side program costs through a demand-side program cost tracker;
3. Accelerated depreciation on demand-side investments;
4. Recovery of lost revenues; and
5. Utility incentive based on the achieved performance level of approved demand-side programs;

(G) DSIM cost recovery revenue requirement means the revenue requirement approved by the commission in a utility's filing for demand-side program approval proceeding or a semi-annual DSIM rate adjustment case;

(H) DSIM rate means the charge on a customer's bill for the portion of the DSIM revenue requirement assigned by the commission to a rate class;

(I) DSIM revenue requirement means the sum of the DSIM cost recovery revenue requirement, DSIM utility lost revenue requirement, and the DSIM utility incentive revenue requirement, if allowed by the commission in the utility's last filing for demand-side program approval;

(J) DSIM utility incentive revenue requirement means the revenue requirement approved by the commission in a utility's filing for demand-side program approval proceeding to provide the utility with a portion of annual net shared benefits based on the achieved performance level of approved demand-side programs demonstrated through energy and demand savings measured and documented through EM&V reports compared to energy and demand savings targets;

(K) DSIM utility lost revenue requirement means the component of the utility's revenue requirement explicitly approved (if any) by the commission in a utility's filing for demand-side program approval proceeding to address the recovery of lost revenue;

(L) Electric utility or utility means any electric corporation as defined in section 386.020, RSMo;

(M) Energy means the total amount of electric power that is used over a specified interval of time measured in kilowatt-hours (kWh);

(N) Energy efficiency means measures that reduce the amount of electricity required to achieve a given end-use;

(O) Evaluation, measurement, and verification, or EM&V, means the performance of studies and activities intended to evaluate the process of the utility's program delivery and oversight and to estimate and/or verify the estimated actual energy and demand savings, utility lost revenue, cost effectiveness, and other effects from demand-side programs;

(P) Lost revenue means the net reduction in utility retail revenue, taking into account all changes in costs and all changes in any revenues relevant to the Missouri jurisdictional revenue requirement, that occurs when utility demand-side programs approved by the commission in accordance with 4 CSR 240-20.094 cause a drop in net retail kWh delivered to jurisdictional customers below the level used to set the electricity rates. Lost revenues are only those net revenues lost due to energy and demand savings from utility demand-side programs approved by the commission in accordance with 4 CSR 240-20.094 Demand-Side Programs and measured and verified through EM&V;

(Q) Probable environmental cost means the expected cost to the utility of complying with new or additional environmental legal mandates, taxes, or other requirements that, in the judgment of the utility decision-makers, may be imposed at some point within the planning horizon which would result in compliance costs that could have a significant impact on utility rates. The utility shall use the same methodology used in its most recently-adopted preferred resource plan to calculate its probable environmental costs;

(R) Staff means all commission employees, except the secretary of the commission, general counsel, technical advisory staff as defined by section 386.135, RSMo, hearing officer, or regulatory judge; and

(S) Total resource cost test, or TRC, means the test of the cost-effectiveness of demand-side programs that compares the avoided utility costs plus avoided probable environmental cost to the sum of all incremental costs of end-use measures that are implemented due to the program (including both utility and participant contributions), plus utility costs to administer, deliver, and evaluate each demand-side program to quantify the net savings obtained by substituting the demand-side program for supply-side resources.

(2) When an electric utility files to establish a DSIM as described in 4 CSR 240-20.093(2), the electric utility shall file the following supporting information as part of, or in addition to, its direct testimony for the demand-side program filing. Supporting workpapers shall be submitted as executable versions in native format with all formulas intact.

(A) The notice provided to customers describing how the proposed DSIM will work, how any proposed DSIM rate will be determined, and how any DSIM rate will appear on customer bills.

(B) An example customer bill showing how the proposed DSIM shall be separately identified on affected customers' bills.

(C) A complete description and explanation of the design, rationale, and intended operation of the proposed DSIM.

(D) Estimates of the effect of the DSIM on customer rates and average bills for each of the next three (3) years for each rate class.

(E) Estimates of the effect of the utility incentive component of DSIM on utility earnings and key credit metrics for each of the next three (3) years which shows the level of earnings and credit metrics expected to occur for each of the next three (3) years with and without the utility incentive component of DSIM.

(F) A complete explanation of all the costs that shall be considered for recovery under the proposed DSIM and the specific account used for each cost item on the electric utility's books and records.

(G) A complete explanation of any change in business risk to the electric utility resulting from implementation of a utility incentive related to the DSIM in setting the electric utility's allowed return on equity, in addition to any other changes in business risk experienced by the electric utility.

(H) A proposal for how the commission can determine if any DSIM utility incentives are aligned with helping customers use energy more efficiently.

(I) Annual reports, if any, required by 4 CSR 240-20.093(8).

(J) If the utility proposes to adjust its DSIM rates between general rate proceedings, proposed DSIM rate adjustment clause tariff sheets.

(K) If the utility proposes to adjust the DSIM cost recovery revenue requirement between general rate proceedings, a complete explanation of how the DSIM rates shall be established and adjusted to reflect over-collections or under-collections as well as the impact on the DSIM cost recovery revenue requirement as a result of approved new, modified, or discontinued demand-side programs.

(3) If an electric utility files to modify its approved DSIM, the electric utility shall file with the commission and serve parties, as provided in section (9), the following supporting information as part of, or in addition to, its direct testimony. Supporting workpapers shall be submitted with all models and spreadsheets provided as executable versions in native format with all formulas intact.

(A) Information as required by subsections (2)(A) through (K).

(B) Explanation of any proposed modification to the DSIM and why the proposed modification is being requested.

(C) A complete explanation of any change in business risk to the electric utility resulting from modification of a utility incentive related to the DSIM in setting the electric utility's allowed return on equity, in addition to any other changes in business risk experienced by the electric utility.

(D) Any additional information the commission ordered to be provided.

(4) If an electric utility files to discontinue its approved DSIM, the electric utility shall file with the commission and serve parties, as provided in section (9), the following supporting information as part of, or in addition to, its direct testimony. Supporting workpapers shall be submitted with all models and spreadsheets provided as executable versions in native format with all formulas intact.

(A) An example of the notice to be provided to customers as required by 4 CSR 240-20.093(3)(D).

(B) If the utility's DSIM allows adjustments of the DSIM rates between general rate proceedings, a complete explanation of how the over-collection or under-collection of the DSIM revenue requirement that the electric utility is proposing to discontinue shall be handled.

(C) A complete explanation of why the DSIM is no longer necessary to provide the electric utility a sufficient opportunity to recover demand-side programs costs, lost revenues, and/or to receive a utility incentive.

(D) A complete explanation of any change in business risk to the electric utility resulting from discontinuation of a utility incentive related to the DSIM in setting the electric utility's allowed return on equity, in addition to any other changes in business risk experienced by the electric utility.

(E) Any additional information the commission ordered to be provided.

(5) Each electric utility with approved demand-side programs shall submit, with an affidavit attesting to the veracity of the information, annual reports as required in 4 CSR 240-20.093(8) to the manager of the energy resource analysis section of the staff, public counsel, and others as provided in section (9). The submission to the staff may be made through the commission's electronic filing and information system (EFIS). Annual reports shall include at a minimum the following information and all models and spreadsheets shall be provided as executable versions in native format with all formulas intact:

(A) A list of all approved demand-side programs and the following information for each approved demand-side program:

1. Actual amounts expended by year, including customer incentive payments;

2. Peak demand and energy savings impacts and the techniques used to estimate those impacts;

3. A comparison of the estimated actual annual peak demand

and energy savings impacts to the level of annual peak demand and energy savings impacts that were projected when the program was approved;

4. For market transformation programs, a quantitative and qualitative assessment of the progress being made in transforming the market;

5. A comparison of actual and budgeted program costs, including an explanation of any increase or decrease of more than ten percent (10%) in the cost of a program;

6. The avoided costs and the techniques used to estimate those costs;

7. The estimated cost-effectiveness of the demand-side program and a comparison to the estimates made by the utility at the time the program was approved;

8. The estimated net economic benefits of the demand-side program;

9. For each program where one (1) or more customers have opted out of demand-side programs pursuant to section 393.1075.7, RSMo, a listing of the customer(s) who have opted out of participating in demand-side programs;

10. A copy of the EM&V report for the most recent annual reporting period; and

11. Demonstration of relationship of the demand-side program to demand-side resources in latest filed 4 CSR 240-22 compliance filing; and

(B) If the utility's DSIM includes adjustments of the DSIM rates between general rate proceedings, the actual revenues billed under the DSIM.

(6) If the electric utility is not submitting a Surveillance Monitoring Report as required in 4 CSR 240-3.161(6) Electric Utility Fuel and Purchased Power Cost Mechanisms Filing and Submission Requirements, then it shall submit a Surveillance Monitoring Report in the form and content required in 4 CSR 240-3.161(6). In addition to the requirements under 4 CSR 240-3.161(6), each electric utility with a DSIM shall submit as page 6 of the Surveillance Monitoring Report a quarterly progress report in a format determined by the staff, and all models and spreadsheets shall be provided as executable versions in native format with all formulas intact.

(7) EM&V reports shall document, include analysis, and present any applicable recommendations for at least the following, and all models and spreadsheets shall be provided as executable versions in native format with all formulas intact:

(A) Process evaluation and recommendations, if any; and

(B) Impact evaluation—

1. The lifetime and annual gross and net demand savings and energy savings achieved under each program, and the techniques used to estimate annual demand savings and energy savings; and

2. A demonstration of the cost-effectiveness of the program, to include at a minimum the TRC of each program.

A. If a program is determined not to be cost-effective, the electric utility shall identify the causes why and present appropriate program modifications, if any, to make the program cost-effective. If there are no modifications to make the program cost-effective, the utility shall describe how it intends to end the program and how it intends to achieve the energy and demand savings initially estimated for the discontinued program.

B. The fact that a program proves not to be cost-effective is not by itself sufficient grounds for disallowing cost recovery.

(8) If an electric utility's DSIM includes adjustments of the DSIM rates between general rate proceedings, when it files with the commission tariff sheets to adjust its DSIM rates as described in 4 CSR 240-20.093(4), and serves parties as provided in section (9) in this rule, the tariff sheets shall be accompanied by supporting testimony and contain at least the following supporting information. All models and spreadsheets shall be provided as executable versions in native format with all formulas intact.

(A) Amount of revenue that it has over-collected or under-collected through the most recent recovery period by rate class.

(B) Proposed adjustments or refunds by rate class.

(C) Electric utility's short-term borrowing rate.

(D) Proposed adjustments to the current DSIM rates.

(E) Complete documentation for the proposed adjustments to the current DSIM rates.

(F) Annual report as required by 4 CSR 240-20.093(8).

(G) Any additional information the commission ordered to be provided.

(9) Party status and providing to other parties affidavits, testimony, information, reports, and workpapers in related proceedings subsequent to the demand-side program approval proceeding establishing, modifying, or continuing a DSIM.

(A) A person or entity granted intervention in a demand-side program approval proceeding in which a DSIM is approved by the commission shall be a party to any subsequent related periodic rate adjustment proceeding without the necessity of applying to the commission for intervention; however, such person or entity shall file a notice of intention to participate within the intervention period. In any subsequent demand-side program approval proceeding, such person or entity must seek and be granted status as an intervenor to be a party to that proceeding. Affidavits, testimony, information, reports, and workpapers to be filed or submitted in connection with a subsequent related semi-annual DSIM rate adjustment proceeding or demand-side program approval proceeding to modify, continue, or discontinue the same DSIM shall be served on or submitted to all parties from the prior related demand-side program approval proceeding and on all parties from any subsequent related periodic rate adjustment proceeding or demand-side program approval proceeding to modify, continue, or discontinue the same DSIM, concurrently with filing the same with the commission or submitting the same to the manager of the energy resource analysis section of the staff and public counsel.

(B) A person or entity not a party to the demand-side program approval proceeding in which a DSIM is approved by the commission may timely apply to the commission for intervention, pursuant to 4 CSR 240-2.075(2) through (4) of the commission's rule on intervention, respecting any related subsequent periodic rate adjustment proceeding, or, pursuant to 4 CSR 240-2.075(1) through (5), respecting any subsequent demand-side program approval proceeding to modify, continue, or discontinue the same DSIM.

(10) Right to Discovery Unaffected. In addressing certain discovery matters and the provision of certain information by electric utilities, this rule is not intended to restrict the discovery rights of any party.

(11) Variances. Upon request and for good cause shown, the commission may grant a variance from any provision of this rule.

(12) Rule Review. The commission shall complete a review of the effectiveness of this rule no later than four (4) years after the effective date of this rule and may, if it deems necessary, initiate rulemaking proceedings to revise this rule.

*AUTHORITY: section 393.1075.11, RSMo Supp. 2009. Original rule filed Oct. 4, 2010.*

*PUBLIC COST: This proposed rule will not cost state agencies or political subdivisions more than five hundred dollars ($500) in the aggregate.*

*PRIVATE COST: This proposed rule is estimated to cost affected private entities two hundred thousand dollars ($200,000) in year one, two hundred thousand dollars ($200,000) in year two, two hundred*

*thousand dollars ($200,000) in year three, and two hundred thousand dollars ($200,000) in year four.*

*NOTICE OF PUBLIC HEARING AND NOTICE TO SUBMIT COMMENTS: Anyone may file comments in support of or in opposition to this proposed rule with the Missouri Public Service Commission, Steven C. Reed, Secretary of the Commission, PO Box 360, Jefferson City, MO 65102. To be considered, comments must be received at the commission's offices within thirty (30) days after publication of this notice in the* ***Missouri Register*** *and should include a reference to Commission Case No. EX-2010-0368. Comments may also be submitted via a filing using the commission's electronic filing and information system at http://www.psc.mo.gov/case-filing-information. A public hearing regarding this proposed rule is scheduled for Monday, December 20, 2010, at 10:00 a.m., in Room 310 of the commission's offices in the Governor Office Building, 200 Madison Street, Jefferson City, Missouri. Interested persons may appear at this hearing to submit additional comments and/or testimony in support of or in opposition to this proposed rule and may be asked to respond to commission questions.*

*SPECIAL NEEDS: Any persons with special needs as addressed by the Americans with Disabilities Act should contact the Missouri Public Service Commission at least ten (10) days prior to the hearing at one (1) of the following numbers: Consumer Services Hotline 1-800-392-4211 (voice) or Relay Missouri at 711.*

## FISCAL NOTE
## PRIVATE COST

**I. Department Title:** Missouri Department of Economic Development
**Division Title:** Missouri Public Service Commission
**Chapter Title:** Chapter 3 - Filing and Reporting Requirements

| | |
|---|---|
| **Rule Number and Title:** | 4 CSR 240-3.163<br><br>Electric Utility Demand-Side Programs Investment Mechanisms Filing and Submission Requirements |
| **Type of Rulemaking:** | Proposed Rule |

## II. SUMMARY OF FISCAL IMPACT

| Estimate of the number of entities by class which would likely be affected by the adoption of the rule: | Classification by types of the business entities which would likely be affected: | Estimate in the aggregate as to the first year cost of compliance with the rule by the affected entities: | Estimate in the aggregate as to the cost of compliance with the rule by the affected entities (years 2-4): |
|---|---|---|---|
| 4 | Investor-owned electric utilities | $200,000 | $600,000 |

## III. WORKSHEET

1. Estimated aggregate cost of compliance is based on information provided by the four (4) investor-owned electric utilities.
2. The estimated aggregate cost to Missouri electric utilities is provided for the first four (4) years as the rule contains language stating that the commission shall complete a review of the effectiveness of this rule no later than four (4) years after the effective date of this rule.
3. 2010 dollars were used to estimate costs. No adjustment for inflation is applied.

## IV. ASSUMPTIONS

If adopted, this proposed rule (along with proposed rules 4 CSR 240-3.164, 4 CSR 240-20.093 and 4 CSR 240-20.094) will enact the provisions of the Missouri Energy Efficiency Investment Act established by SB 376 (2009).

This rule sets forth the information that an electric utility must provide when it seeks to establish, continue, modify, or discontinue a Demand-Side Programs Investment Mechanism (DSIM). This rule also sets forth the requirements for submission of information related to DSIM rate adjustment filings and for submission of annual reports as required for electric utilities that have a DSIM.

1. Kansas City Power and Light Company and KCP&L Greater Missouri Operations Company (KCPL/GMO) stated that the estimated fiscal impact includes costs associated with implementation of SB 376 excluding program costs of the demand-side programs. It is expected that the programs will be those programs defined in the company's Integrated Resource Plan filing made with the Missouri Public Service Commission. In addition, KCPL/GMO indicated that the costs related to annual reporting requirements and annual Evaluation, Measurement and Verification (EM&V) for 4 CSR 240-3.163 were included in their response to 4 CSR 240-20.093.

2. Empire District Electric Company stated that they are providing a conservative estimate for the implementation of SB 376 as it relates to the Proposed Rule 4 CSR 240-3.163. Costs attributable to this rule include reporting requirements and outside consultants.

3. AmerenUE estimated that 100% of their costs related SB 376 should be applied to the Proposed Rule 4 CSR 240-20.094. However, AmerenUE notes that there will be additional costs in the programming, legal, accounting and regulatory departments that are hard to quantify at this time. AmerenUE will have to make additional filings, develop accounting systems and an additional line item will need to be placed on the post card bill.

# 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 |

## DISSENTING OPINION OF COMMISSIONER TERRY M. JARRETT

The Public Service Commission ("Commission") has voted to transmit to the Secretary of State proposed rules regarding Senate Bill 376, codified at Section 393.1075, RSMo Cum. Supp. 2009, and known as the Missouri Energy Efficiency Investment Act ("MEEIA" or "Act"). MEEIA represents a positive step forward in promoting energy efficiency. However, transmitting proposed rules to the Secretary of State at this time is premature because some of the provisions are either unconstitutional or unlawful. These legal concerns should be addressed before formal rulemaking begins. Therefore, I dissent.

Portions of the proposed rules unlawfully exceed the scope of the Act and can only result in rules that are unlawful, unjust, arbitrary, and capricious. The rules as currently drafted reflect regulatory policy choices that are detrimental to electric utilities and the customers they serve – rather than enhancing the opportunities for electric utilities to develop effective energy efficiency programs as anticipated by the Act.

Following the law and promulgating rules that are within the grant of authority given to the Commission is critical to achieving the goals set out in MEEIA. Making policy choices that exceed the scope of the Act will not serve Missouri's citizens; rather, it will cause the rules implementing this important piece of energy legislation to be snarled in expensive, time-

consuming and unnecessary legal entanglements. Even worse, the proposed rules as written will not encourage electric utilities to implement energy efficiency programs.

This Commission should propose lawful rules that will not only withstand the scrutiny of notice and comment, but also JCAR and the courts of this state. The proposed rules do not.

My concerns are not limited to those items outlined here, but the issues identified below are unlawful and do not merit transmittal to the Secretary of State. Senate Bill 376 stated unequivocally that it is the "***policy of the state to value demand-side investments equal to traditional investments in supply and delivery infrastructure and allow recovery of all reasonable and prudent costs of delivering cost-effective demand-side programs.***" Section 393.1075.3. The portions of the rules that concern me are at odds with this stated policy.

1. **Rules are not mandatory.** Section 393.1075.11 provides: "The commission shall provide oversight and ***may*** adopt rules and procedures and approve corporation-specific settlements and tariff provisions, independent evaluation of demand-side programs, as necessary, to ensure that electric corporations can achieve the goals of this section." (emphasis added). The use of the word "may" by the General Assembly means that this Commission is not required to adopt any rules. The Act is sufficient standing alone to implement its purposes. Rather than adopt rules, the Commission could choose to exercise its oversight in other proceedings, such as rate cases. It follows that if this Commission chooses to adopt rules, it should take great care to ensure that such rules do not go beyond the scope of the law. Unfortunately, the proposed rules go beyond the scope of the law in at least two important respects.

2. **Energy and demand "savings goals."** 4 CSR 240-20.094 (2)(A) and (B) establish energy and demand savings goals, increasing for each year between 2012 and 2020. Interested persons in the workshop and rulemaking process did not and cannot show that these

goals have any scientific basis or facts to support them, or are in any way relevant to Missouri's electric utilities. Instead, the percentages—by admission of the Commission staff—are based on statutory choices made in other states, rules or policy announcements. These other states do not have the same statutory or regulatory structure that we have in Missouri, so the goals do not translate to Missouri and our electric utilities.

This Commission is an agency of limited jurisdiction and authority, and the lawfulness of its actions depends entirely upon whether or not it has statutory authority to act. The General Assembly could have adopted set percentages of demand-side savings for each individual Missouri electric utility or it could have instructed the Commission to set such targets as part of its rulemaking authority (other states' statutes have done one or the other). Our General Assembly did neither. Instead, it stated simply that the programs need to be "cost-effective." There is no express or implied authority for the Commission to adopt standard savings goals in the regulations implementing MEEIA. These two subsections should be removed from the proposed rule altogether.

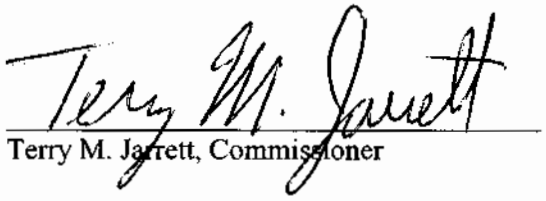
3. **Penalties.** 4 CSR 240-20.094 (2) establishes that if a participating electric utility does not meet the energy savings goals discussed above, then the electric utility may be subject to a penalty or other, undefined, adverse consequences. The Act provides no express or implied authorization for the imposition of penalties or adverse consequences; to the contrary, the Act is designed to incent electric utilities to create programs which result in decreased sales. This unlawful provision negates the positive attributes of the Act. Cost recovery and incentives fail to outweigh the wide ranging risks of incurring the penalties or adverse consequences possible from an electric utility participating under the Act. Why would an electric utility spend a large amount of money to implement an energy efficiency program when it would face the risk of a

penalty or other adverse consequences (such as negative treatment in a rate case) if arbitrary and unscientific goals are not achieved? The risk of penalties or adverse consequences stifle experimentation, creativity and innovation, three things that the Act was designed to encourage. The current language in 4 CSR 240-20.094 (2) goes beyond the Commission's statutory authority, works against the General Assembly's mandate to incent electric utilities to implement energy efficiency programs, and should be stricken from the rule.

**Conclusion**

The proposed rules as currently written do not enable or encourage electric utilities to achieve the purposes of the Act. They need more work to bring them into compliance with the law. Therefore, they should not be transmitted to the Secretary of State until the unlawful provisions have been removed.

Sincerely,



Terry M. Jarrett, Commissioner

Submitted this 28th day of September, 2010

# BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of the Consideration and )
Implementation of Section 393.1075, the ) **File No. EX-2010-0368**
Missouri Energy Efficiency Investment Act. )

## DISSENT OF COMMISSIONER JEFF DAVIS TO PUBLISH RULES IMPLEMENTING THE MISSOURI ENERGY EFFICIENCY INVESTMENT ACT

I dissent fully with my colleagues in the reasoning and decision to transmit the proposed "energy efficiency" rules to the Secretary of State. My disagreement is not with what my colleagues are trying to do, but with the way they are going about it.

There are three major issues with regard to this rulemaking: (1) the presence of "energy and demand 'savings goals'" in 4 CSR 240-20.094(2)(A) and (B); (2) the penalty language prescribed in 4 CSR 240-20.094(2); and (3) the legality of the cost recovery mechanism.

**I. The discussion of energy and demand savings goals...**

With regard to the energy and demand "savings goals" outlined in 4 CSR 240 20.094(2)(A) and (B), it is my opinion that these goals are not supported by competent and substantial evidence.

I am not opposed to this Commission establishing energy and demand savings goals. I must oppose adopting a standard based on the standards set by other states around us without competent and substantial evidence adduced in the hearing process to support the goals we have adopted and further approving language that could be used to penalize utilities for failure to meet those targets beginning in 2012.

When establishing goals of this nature and attaching a penalty thereto for non-compliance, we need to take evidence in support of those goals and the parties supplying that evidence need to be subject to cross-examination. A one-size fits all goal might be fine for an entity like the state of Missouri, but it may not be feasible for an individual utility. A wide range of factors, especially weather, can affect a utility's ability to meet these goals. An evidentiary hearing would be the only way to get to the truth of the matter by establishing an appropriate record on which standards could be based. Now, utilities are going to be put in the unenviable task of having to prove themselves innocent in front of the Commission if they are unable to comply with goals established without hearing or evidence, but they'll sure "sound good" when we read them in the newspaper.

Of equal or even greater concern to me is the stakeholder process by which the PSC Staff assembled these rules. More interest groups and parties are intervening in PSC cases and taking positions in rulemakings than ever before. Public concern for the environment and rising rates in a weak economy is understandable, but we also have to be wary that many of these special interest groups have their own agendas that include selling products and services as well as achieving certain environmental goals that are not necessarily aligned with keeping the rates low or the lights on.

Throughout the stakeholder process in developing these rules, the utilities did not appear to be on equal footing with the other stakeholder groups. As an observer of the process, it was my impression that all a stakeholder had to do to get something in the rule was convince a majority of the other stakeholders to vote with them. The effect is to send the wrong message to intervenors and participants – just get a bunch of your

buddies to come in, support your position no matter how absurd it may be and you'll get something out of the deal.

That's my impression of what happened here. When the utilities opposed a proposal, the PSC Staff would attempt to split the difference between the two factions. The PSC Staff is in a tough spot and performed admirably in this regard, but the problem is the same one that has been manifesting itself in rate cases for the last several years – "splitting the difference" between two positions often causes parties to take increasingly outrageous positions in an effort to gain a more favorable outcome.

It's important to remember that utilities are the ones responsible for keeping the lights on and delivering heat to people's homes. As such, they are not entitled to preferential treatment by this Commission; however, they should be entitled to due process including the ability to present evidence and cross-examine witnesses regarding the goals we are setting for them.

Several parties were quick to point out that there is a wealth of information on this issue available, but other than comparing what is being published to what other states have enacted, there was no evidence in the record to support the goals being transmitted to the Secretary of State for publication are appropriate for the affected utilities. Further, there is no support whatsoever for the language contained in Sections 4 CSR 240-20.094(2)(A)(9) and (2)(B)(9) that contain annual default percentage goal reductions after the year 2020.

In conclusion, I am fine with setting goals for energy and demand savings by the respective utilities, but they need to be based on this Commission's findings and not findings in another state. Those goals should be established in an actual case here at

the PSC where all interested parties have an opportunity to have witnesses present evidence under oath and be subject to cross-examination. It is the only way to know whether we're getting truly honest answers from the parties. Anything less than that, particularly where there are penalties attached, is arbitrary and capricious.

**II. Penalties for failure to comply with Section 4 CSR 240-20.094(2):**

Section 4 CSR 240-20.094(2) states in pertinent part:

> The fact that the electric utility's demand-side programs do not meet the incremental or cumulative annual demand-side savings goals established in this section may impact the utility's DSIM revenue requirement but is not by itself sufficient grounds to assess a penalty or adverse consequence for poor performance.

Alternatively, I read this sentence to say: "The fact that the electric utility's demand-side programs do not meet the incremental or cumulative annual demand-side savings goals established in this section may be combined with any other factor to assess a penalty or impose adverse consequences on a utility for performance."

I was shocked and troubled that no utility offered any comment on this last-minute piece of wordsmithing. Arguably, the language is better than some of the other language that was proposed; however, it still leaves much to be desired.

It is important to remember that the PSC is a creature of statute and the case law is clear our powers are only those expressly conferred or clearly implied by statute. Section 393.1075 does not give us the authority to establish demand reduction and energy savings goals. Arguably, we might have that authority under other sections of law, but those sections are not being cited in this case. More importantly, Section 393.1075 contains no support for "penalties" or "adverse consequences."

Section 393.1075 contains only one reference to any kind of penalty that can be imposed pursuant to the statute. In Section 393.1075.14(3), the statute provides "The penalty for a customer who provides false documentation under subdivision (2) of this subsection shall be a class A misdemeanor." The express language of this provision emphasizes the point that if the legislature had wanted to penalize utilities for failing to comply with this act, they had ample opportunity to do so and affirmatively chose not to act.

Further, this language is inconsistent with the positive language used by the Missouri General Assembly in Section 393.1075.3, which states the purpose of the legislation:

> **It shall be the policy of the state to value demand-side investments equal to traditional investments in supply and delivery infrastructure and allow recovery of all reasonable and prudent costs of delivering cost-effective demand-side programs. In support of this policy, the commission shall:**
>
> **(1) Provide timely cost recovery for utilities;**
>
> **(2) Ensure that utility financial incentives are aligned with helping customers use energy more efficiently and in a manner that sustains or enhances utility customers' incentives to use energy more efficiently; and**
>
> **(3) Provide timely earnings opportunities associated with cost-effective measurable and verifiable efficiency savings.**

One must presume the legislature knew what it was doing when enacting this law. This section clearly lays out the purpose of the act and clearly emphasizes positive financial incentives for utilities: "timely cost recovery," "ensuring that utility financial incentives are aligned with helping customers" and "provid[ing] timely earnings opportunities." The use of the term "incentives" by the General Assmebly evidences the

fact that they know how to provide "incentives" as well as "disincentives", but for whatever reason did not provide any disincentives for failure to act by the utility itself, probably because the act is in and of itself voluntary in nature.

Section 393.1075.4 further evidences the lack of a mandate for any kind of Commission-imposed penalty language by stating "The commission shall permit electric corporations to implement commission-approved demand-side programs proposed pursuant to this section with a goal of achieving all cost-effective demand-side savings." Had the legislature wanted to require electric utilities to implement demand response programs, they would have made the language mandatory for the electric utilities to offer such programs instead of being permissive.

Thus, in addition to having "goals" not supported by competent and substantial evidence, we have an unlawful provision containing a "penalty" or "adverse consequence." The only penalty authority we have is that expressly given us in Section 386.570 and any reference to the contrary should be removed.

**III. Questions Regarding Cost Recovery:**

From the consumer perspective, the most hotly contested issue in this rulemaking is the presence of the cost recovery language. Section 393.1075.3(1) unequivocally states that the commission shall provide utilities with "timely cost recovery" in support of valuing demand-side utility investments equal to traditional investments in supply and delivery infrastructure.

What does "timely cost recovery" mean? Here, the dispute is not over the concept of "cost recovery," but what is "timely" in the context of cost recovery? Consumer advocates argued we are somehow violating the Supreme Court's ban on single-issue ratemaking. The electric utilities would have preferred a surcharge mechanism similar to the "Infrastructure System Replacement Surcharge" (ISRS) used by gas utilities and one water company in St. Louis County. In the end, the Commission did include cost recovery language patterned after the fuel adjustment surcharge.

This is one part of the rule that I actually support. I would have preferred the ISRS approach because it would have provided the utilities with more timely cost recovery, but I can live with it going forward and did not find the briefs of the opposing parties persuasive on the single-issue ratemaking point.

To me, this issue hinges on the definition of the word "timely." The word is not defined by case law, statute or rule, so we're left with the Canons of Statutory Construction. The Canons say to give words their plain and ordinary meaning as found in the dictionary. Merriam-Webster's On-line Dictionary offered several definitions of the word "timely." When using the term as an adjective as used by the legislature in this case, two definitions jumped off the page: "coming early or at the right time" and "appropriate under the circumstances."

As the legislature is often want to do, they have given the PSC wide latitude to decide how best to implement their directive. In this case, we've been instructed to phase in cost recovery for programs approved pursuant to Section 393.1075. Had they

wanted us to implement these charges in a rate case proceeding or by a tariff filing, they could have said so either expressly or implicitly. They didn't.

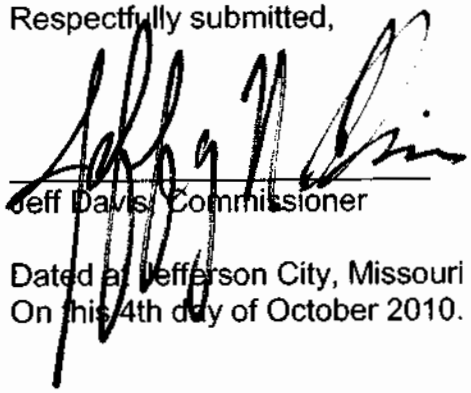
All relevant factors have to be considered in setting rates that are both just and reasonable. That being said I didn't find anything filed by the consumer advocates in this case to be persuasive on their point that what the Commission has done constitutes single-issue ratemaking. Likewise, I was not persuaded by the arguments of Ameren UE (now Ameren Missouri) and other parties in that company's previous rate case that in order to consider all relevant factors you have to spend eleven months analyzing three rounds of pre-filed testimony, two weeks of live testimony and two or three more rounds of briefings with an update to consider all relevant factors. Thus, based on the comments provided so far in this proceeding, I can find no evidence to persuade me that the Commission's chosen method of cost recovery in this rulemaking is unlawful. It's simply not the mechanism I would have chosen and I have grave concerns that removing these provisions would, in fact, violate Section 393.1075.3(1), which states the Commission "shall provide timely cost recovery for utilities" when approving these programs.

## IV. Conclusion:

For the reasons set out above, I dissent with the Commission's decision to send these rules to the Secretary of State for publication. We should strip out the goals and have real proceedings for each of the affected utilities to determine what their energy and demand savings goals are. The penalty language associated with these goals is inconsistent with the statute and should be removed. Finally, the rate adjustment

mechanism used to implement these programs appears to be lawful, although not my favorite. "Timely cost recovery" is not meant to be instantaneous, but it shouldn't take11 months or longer as some parties have suggested.

Respectfully submitted,



Jeff Davis, Commissioner

Dated at Jefferson City, Missouri
On this 4th day of October 2010.