This section will contain the final text of the rules proposed by agencies. The order of rulemaking is required to contain a citation to the legal authority upon which the order of rulemaking is based; reference to the date and page or pages where the notice of proposed rulemaking was published in the *Missouri Register*; an explanation of any change between the text of the rule as contained in the notice of proposed rulemaking and the text of the rule as finally adopted, together with the reason for any such change; and the full text of any section or subsection of the rule as adopted which has been changed from that contained in the notice of proposed rulemaking. The effective date of the rule shall be not less than thirty (30) days after the date of publication of the revision to the *Code of State Regulations*.

The agency is also required to make a brief summary of the general nature and extent of comments submitted in support of or opposition to the proposed rule and a concise summary of the testimony presented at the hearing, if any, held in connection with the rulemaking, together with a concise summary of the agency's findings with respect to the merits of any such testimony or comments which are opposed in whole or in part to the proposed rule. The ninety (90)-day period during which an agency shall file its order of rulemaking for publication in the *Missouri Register* begins either: 1) after the hearing on the proposed rulemaking is held; or 2) at the end of the time for submission of comments to the agency. During this period, the agency shall file with the secretary of state the order of rulemaking, either putting the proposed rule into effect, with or without further changes, or withdrawing the proposed rule.

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 section 393.1075, RSMo Supp. 2010 and sections 386.040 and 386.250, RSMo 2000, the commission adopts a rule as follows:

4 CSR 240-3.163 is adopted.

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on November 15, 2010 (35 MoReg 1610–1628). Those sections with changes are reprinted here. This proposed rule becomes effective thirty (30) days after publication in the *Code of State Regulations*.

SUMMARY OF COMMENTS: A public hearing on this proposed rule was held December 20, 2010, and the public comment period ended December 15, 2010. The commission received a number of written comments from seventeen (17) entities, many of which were duplicated or echoed from the various entities and involve the same sections or subsections of the proposed rule. Consequently, these comments have been consolidated into ten (10) central comments, which are addressed below. At the public hearing, seventeen (17) witnesses testified. The entities filing comments were AARP, Union Electric d/b/a Ameren Missouri (Ameren Missouri), Consumers Council of Missouri (CCM), Empire District Electric Company (Empire), KCPL Greater Missouri Operations Company (GMO), Great Rivers Environmental Law Center (GRELC), Kansas City Power and Light Company (KCPL), Missouri Department of Natural Resources (MDNR), Missouri Energy Development Association (MEDA),[1] Missouri Energy Group (MEG), Missouri Industrial Energy Consumers (MIEC),[2] the National Resources Defense Council (NRDC), Office of the Public Counsel (OPC), OPOWER, Inc. (OPOWER), Renew Missouri, staff of the Missouri Public Service Commission (staff), Sierra Club, Walmart Stores East, LP, and Sam's East.

All of the comments were generally in support of a rule to implement demand-side programs and demand-side programs investment mechanisms (DSIMs), but many had suggestions for specific changes to the proposed rule and raised concerns regarding the timing of authorizing DSIMs and whether those mechanisms could include recovery of lost revenues. It should be noted that this proposed rule operates in conjunction with proposed rules 4 CSR 240-3.164, 4 CSR 240-20.093, and 4 CSR 240-20.094. All of these rules were promulgated to implement section 393.1075, RSMo, the Missouri Energy Efficiency Investment Act (MEEIA). Any comments directed towards 4 CSR 240-3.163 may be interrelated with these other proposed rules, and the interplay between these proposed rules may need to be addressed in the context of this order or rulemaking; however, this rule specifically addresses electric utility demand-side program and investment mechanism filing and submission requirements. It should also be noted that while comments were directed at specific sections and subsections of the rule, due to changes in the proposed rule those number citations may not match the final numbering of the sections and subsections of the rule.

[1] The MEDA members include KCPL, GMO, Empire, and Ameren Missouri.

[2] MIEC members include Anheuser-Busch Companies, Inc., BioKyowa, Inc., The Boeing Company, Doe Run, Enbridge, Ford Motor Company, General Motors Corporation, GKN Aerospace, Hussmann Corporation, JW Aluminum, MEMC Electronic Materials, Monsanto, Procter & Gamble Company, Nestlé Purina PetCare, Noranda Aluminum, Saint Gobain, Solutia, and U.S. Silica Company.

COMMENT #1: General Changes in Relation to Alleged Single-Issue Ratemaking. AARP, CCM, MIEC, OPC, and staff all believe that any section or subsection of this rule that allows a rate adjustment outside of a general rate case would constitute unlawful single-issue ratemaking. AARP, CCM, and OPC state it is their belief that the legislature purposely deleted any language in SB 376 (the legislation ultimately codified as section 393.1075, RSMo) that would have allowed for changes to a demand-side program investment mechanism in between general rate cases. The purpose statement and following sections and subsections of this rule identified by these entities that would require change based upon this comment are (1)(F), (1)(G), (1)(I), (1)(J), (1)(K), (2)(A), (2)(C), (2)(F), (2)(J), (2)(K), (3), (4), (4)(B), (5)(A), (5)(B), (8)(A)–(8)(G), (9)(A), and (9)(B).

MEDA, MDNR, NRDC, Sierra Club, Renew Missouri, and GRELC, on the other hand, believe that the language in section 393.1075.3 and .5, RSMo, mandating the commission to provide timely cost recovery and timely earnings opportunities by developing cost recovery mechanisms without limitation allows the commission to establish and approve demand-side programs outside the framework of a general rate case. Section 393.1075.11, RSMo, states the commission "may adopt rules and procedures . . . as necessary, to ensure that electric corporations can achieve the goals of this section." Additionally, these entities point out that section 393.1075.13, RSMo, requires the use of a separate line item for charges attributable to demand-side programs, which is consistent with other billing

elements that are adjusted outside of a general rate case. Taxes, fuel adjustment clauses, purchased gas adjustments, and infrastructure system replacement surcharges are all billed in this fashion. While language in the original version of SB 376 providing for a "cost adjustment clause" was removed, the legislature added "timely cost recovery," broadening the commission's discretion with developing cost recovery mechanisms.

RESPONSE: The commission believes that the express language in section 393.1075, RSMo, unequivocally requires the commission provide timely cost recovery for utilities when effectuating the declared social policy of valuing demand-side investments equal to traditional investments in supply and delivery infrastructure. MEEIA contemplates non-traditional investments and mandates timely cost recovery. The language of the proposed rule does not establish any specific type of demand-side investment mechanism (DSIM). Instead, the proposed rule allows the maximum latitude for creating DSIMs while allowing for periodic adjustments in conformity with the language in the statute. The argument that the proposed rule would in and of itself authorize single-issue ratemaking is unfounded and premature. Until an exact DSIM is established, there is no way to claim that original implementation or any periodic adjustments would constitute single-issue ratemaking.

Additionally, the statutory language from which the prohibition against single-issue ratemaking is derived originates in section 393.270.4, RSMo. The statute is permissive. It allows the commission the discretion to examine all facts that the commission believes are relevant. There is no set statutory requirement for how many or what type of facts or factors the commission must consider when making its determination. Indeed, the legislature has delegated its authority to the commission, being the expert agency charged with making these determinations, to decide what factors must be examined when determining the price to be charged for electricity. The commission will make no changes to the language identified by these comments in the proposed rule or to any other language in the rule that would be related to the issue raised in these comments.

COMMENT #2: Lost Revenue Recovery. AARP, CCM, OPC, MIEC, and staff believe that the lost revenue recovery mechanism provisions of the draft rules are unlawful because those provisions are not authorized by statute. These entities believe that lost revenue does not fit in a cost category. The subsections of this rule identified by these entities that would require change based upon this comment are (1)(F), (1)(I), (1)(K), (1)(O), (1)(P), and (4)(C).

MDNR, NRDC, Sierra Club, Renew Missouri, and GRELC comment that lost revenue recovery is not cost recovery or an earnings opportunity. These entities believe that under the mechanism for recovering lost revenues in the proposed rule, utilities would continue to see higher levels of revenue recovery with higher sales. Therefore, they believe the utility will find itself facing the same conflict it currently faces at the prospect of taking actions or supporting policies to save energy and thereby save their customers money, knowing that such actions would cause their shareholders to miss out on the earnings from higher sales. These entities refer to the incentive to maintain higher sales as the "throughput incentive" and believe this is a strong disincentive for utilities to invest in energy efficiency or to support energy saving policies and measures outside their control.

MEG objects to any language that would allow a lost revenue recovery mechanism, not because it is unlawful but because it believes that reduced costs associated with reduced sales will balance out. MEG also believes that a lost recovery mechanism is inconsistent with the way other charges are handled. According to MEG, a utility believes that energy efficiency programs will reduce sales and reduce contributions to fixed costs, but, using that same reasoning, every time the utility adds a customer, it increases sales and contributions to fixed costs. Consequently, MEG concludes, there should be a refund to customers in any class of ratepayers every time a customer is added. MEG also believes there is no way to determine the actual effect of the various energy efficiency programs.

In addition to the other comments made, staff states that only eight (8) other states allow recovery of lost revenues. According to staff, other states that have had such a recovery mechanism in the past have abandoned it. Staff claims that the movement away from direct reimbursement for lost revenues is likely due to several factors including the fact that the approach is vulnerable to "gaming" by over-claiming savings, that it typically leads to very contentious reconciliation hearings as parties argue about the measurement of savings, and that it does not do anything to address the utility disincentive regarding broader energy efficiency policies beyond the specific program addressed with the mechanisms. Staff notes that other commissions have addressed this issue either through decoupling mechanisms and/or performance incentives. Staff recommends the "throughput incentive" be addressed through the utility incentive component of a DSIM.

MEDA believes that section 393.1075.3, RSMo, mandates recovery of all reasonable and prudent costs and requires the commission to 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. MEDA members comment that unless a utility's lost revenues are included in the DSIM or other recovery mechanism, there will always be a financial bias against fully utilizing demand-side management programs that result in the reduction of a utility's revenues.

RESPONSE: Section 393.1075.3, RSMo, requires the commission to "allow recovery of all reasonable and prudent costs of delivering cost-effective demand-side programs." Additionally, section 393.1075.3(2), RSMo, requires the commission to 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." Section 393.1075.5, RSMo, states the commission "may develop cost recovery mechanisms to further encourage investment in demand-side programs . . ." Lost revenue is a cost of delivering cost-effective demand-side programs, and the proposed rule, in conjunction with the interrelated proposed rules, i.e., 4 CSR 240-3.164, 4 CSR 240-20.093, and 4 CSR 240-20.094, require evaluation, measurement, and verification (EM&V). Any request for recovery of lost revenue will have to be verified and approved by the commission prior to recovery.

At the rulemaking hearing on December 20, 2010, several participants commented that decoupling could prevent over- and under-earning and that it might present a better long-term solution than allowing recovery of lost revenues. However, section 393.1075.5, RSMo, requires the commission to conclude a docket studying any rate design modification to those currently approved by the commission prior to promulgating an appropriate rule in that regard. Decoupling represents such a change in rate design, and no docket has been opened at this time to fully explore this or other possible changes. The commission has been directed by the legislature to implement section 393.1075, RSMo, and while this proposed rule may ultimately be an intermediary step to decoupling or other changes in rate design models, promulgating a lost revenue recovery mechanism is authorized by MEEIA and, with verification methods in place, the potential for possible "gaming of the system" is minimized. The commission will make no changes to the language identified by these comments in the proposed rule or to any other language in the rule that would be related to the issue raised in these comments.

COMMENT #3: Definition of Lost Revenue. A number of participants raised an issue concerning the issue of how the proposed rule defines lost revenue. Thus, if the commission includes provisions for recovery of lost revenues, these entities debate how "lost revenues" should be defined. See subsections (1)(X) and (1)(R).

MEDA believes that if the commission is going to allow recovery of lost revenue, the definition of "lost revenue" should be modified to conform to the definition included in 4 CSR 240-22. See 4 CSR 240-22.020(38). MEDA sees no reason to have differing definitions in the commission's regulations.

Staff, on the other hand, does not believe that the Chapter 22 definition is appropriate because:

1) The language as drafted is "permissive" in nature and provides for the opportunity for recovery of lost revenues, rather than a guarantee. The proposed MEDA language is more explicit regarding the ability to recover lost revenues;

2) Staff opposes MEDA's proposed use of Chapter 22's definition of lost revenue, because the Chapter 22 definition is used exclusively to exclude lost revenues from the definitions of annualized costs for end-use measures, from the definition of costs for the utility cost test, and from the definition of costs for the total resource cost test. Chapter 22 does not contemplate the use of its definition of lost revenue for any other purposes, and it should not be assumed to be an appropriate definition for the MEEIA rules; and

3) The MEDA language also removes the requirements for evaluation, measurement, and verification (EM&V) of demand-side management (DSM) program results prior to recovery of lost revenue and, therefore, allows for recovery of lost revenues on a prospective basis without any measurement and verification of DSM program results by an independent evaluator. Staff believes that if recovery of lost revenue is included in the MEEIA rules, measurement and verification of lost revenues should be required and should only be accomplished through independent EM&V on a retrospective basis. Lost revenues are based on energy usage that did not occur. In staff's opinion, it is not appropriate to increase customer's rates on guesses as to what the customers who participated in the programs would have used absent the programs without a rigorous EM&V conducted by an independent evaluator.

Staff recommends clarifying the definition of "lost revenues" by changing "net retail" to "net system retail." Staff also proposes changes in the language of the interrelated rule, 4 CSR 240-20.093(2)(G).

Staff's proposed change would apply to subsection (1)(Q) of this proposed rule and the following subsections of the interrelated proposed rules: 4 CSR 240-3.164(1)(M), 4 CSR 240-20.093(1)(Y), and 4 CSR 240-20.094(1)(U).

RESPONSE AND EXPLANATION OF CHANGE: The commission believes staff's proposed revision to the current definition of lost revenue is appropriate and rejects MEDA's proposed revision for the reasons stated by staff. The commission will modify subsection (1)(Q), 4 CSR 240-3.164(1)(M), 4 CSR 240-20.093(1)(Y), and 4 CSR 240-20.094(1)(U) accordingly.

COMMENT #4: Inconsistent Definitions for Designation of Utility's Request for Approval of a Demand-Side Program. In order to clarify language in the interrelated rules related to filing a request for approval of a demand-side program, staff recommends the following definition be included in 4 CSR 240-3.163, 4 CSR 240-20.093, and 4 CSR 240-20.094: "Filing for demand-side program approval means a utility's case filing for approval, modification, or discontinuance of demand-side program(s) which may also include a simultaneous request for the establishment, modification or discontinuance of a DSIM."

After adopting this definition, the following inconsistent terms require clarification:

1) "utility's filing for demand-side program approval" found in subsection (1)(I) and 4 CSR 240-20.093(1)(P);

2) "utility's filing for demand-side program approval proceeding" found in subsections (1)(F), (G), (J), and (K); 4 CSR 240-20.093(1)(M), (N), (Q), (R), and (DD); and 4 CSR 240-20.094(1)(J), (L), (M), and (N);

3) "demand-side program approval proceeding" found in section (9) and subsections (9)(A) and (B); 4 CSR 240-20.093(1)(I), (DD); and 4 CSR 240-20.093(1)(I), (2), (2)(G)2., (3)(B), (4), and (10); and

4) "application for demand-side program approval proceeding" found in 4 CSR 240-20.093(2)(B).

Due to the lack of a definition and the use of inconsistent terminology, it is unclear whether a "filing," "application," or "proceeding" is intended to occur. Therefore, staff recommends that, if this language remains in the proposed MEEIA rules, the recommended definition for the phrase "filing for demand-side program approval" be utilized and that consistent terminology be used throughout the proposed MEEIA rules as indicated above.

RESPONSE AND EXPLANATION OF CHANGE: The commission agrees this language should be clarified, but it also believes that inclusion of the word "case" in staff's recommended version could add confusion. Consequently, the commission will adopt a new definition and clarify the terms identified above.

The proposed rulemaking language for this rule and 4 CSR 240-3.164, 4 CSR 240-20.093, and 4 CSR 240-20.094 will be modified accordingly. However, in section (2), a similar inconsistency in language was corrected by removing the words "for the demand-side program filing" since a DSIM can be established at the same time as a demand-side program filing or as a separate DSIM filing.

COMMENT #5: Definition of Probable Environmental Costs. MDNR, NRDC, Sierra Club, Renew Missouri, and GRELC state that the statutory definition of the total resource cost test (TRC) includes "probable environmental compliance costs"; section 393.1075.2(6), RSMo. The proposed rules do not define or even use this term but incorporate instead the definition of "probable environmental costs" from the proposed integrated resource planning (IRP) rule, 4 CSR 240-22.020(46). See subsection (1)(Q), 4 CSR 240-3.164(1)(R), 4 CSR 240-20.093(1)(Y), and 4 CSR 240-20.094(1)(V). The proposed rule 4 CSR 240-22.040(2)(B) does not provide an adequate method of calculating environmental compliance costs. It is restricted to future costs associated with a selected list of pollutants which, in the judgment of utility decision makers, could have a significant effect on rates. SB 376 plainly means to include all costs, including present costs, and a more objective assessment, not one based on "subjective probability" in certain individuals' judgment. The commission needs to include a methodology in its rules for calculating these costs, which might include an environmental cost adder expressed in dollars or, as in Ohio, a percentage externality factor. Relying on the IRP rule to implement SB 376 has the effect of adding criteria such as the subjective judgment of utility decision makers that, as discussed above, are not in the statute.

Related to these concerns, OPC proposed changes to the definition of the TRC as follows: Total resource cost test or TRC means the test that compares the avoided utility costs (including probable environmental compliance costs) 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. The present value of the program avoided utility benefits shall be calculated over the projected life of the measures installed under the program.

RESPONSE AND EXPLANATION OF CHANGE: The concerns raised by these stakeholders regarding the definitions and relationships between the terms TRC, avoided cost or avoided utility cost, and probable environmental compliance cost are interrelated to OPC's concerns with the definition of TRC echoed in comment #17 to proposed rule 4 CSR 240-20.094. Consequently, the commission will address both of these concerns in its response to each comment.

The current proposed rules 4 CSR 240-3.163(1), 4 CSR 240-3.164(1), 4 CSR 240-20.093(1), and 4 CSR 240-20.094(1) have the same definitions for avoided cost or avoided utility cost, probable environmental cost, and total resource cost test.

Section 393.1075(6), RSMo, defines "total resource cost test" as a test that compares the sum of avoided utility costs and avoided

probable environmental compliance costs to the sum of all incremental costs of end-use measures that are implemented due to the program, as defined by the commission in rules.

The commission proposes changes to the definitions in 4 CSR 240-3.163(1)(C), (R), and (T); 4 CSR 240-3.164(1)(A), (R), and (X); 4 CSR 240-20.093(1)(F), (Z), and (DD); and 4 CSR 240-20.094(1)(D), (W), and (Y) to address the concerns expressed by OPC and by MDNR, NRDC, Sierra Club, Renew Missouri, and GRELC.

Additionally, the commission chooses to not include a methodology in its MEEIA rules for calculating probable environmental compliance costs. The commission notes that section (12) of the proposed rule requires the commission to complete a review of the effectiveness of this rule no later than four (4) years after the effective date at which time it may initiate rulemaking proceeding to revise the rule. Upon review, the commission will have the opportunity to revisit this issue to determine if it is appropriate to include a methodology. The commission's actions on the definitions of avoided cost, probable environmental compliance cost, and total resource cost test are consistent with the commission's actions regarding the interaction between this rule and 4 CSR 240-22 Electric Utility Resource Planning.

COMMENT #6: Definition of Staff. Staff believes that the word "staff" in 4 CSR 240-3.163(1) is too broadly defined in the proposed rule. The definition of staff in each of the draft rules would include attorneys in the Office of the General Counsel other than the general counsel who are not in the Office of the Staff Counsel. Staff is not certain that result is intended. The definitions appear at 4 CSR 240-3.163(1)(S), 4 CSR 240-3.164(1)(V), 4 CSR 240-20.093(1)(BB), and 4 CSR 240-20.094(1)(X).
RESPONSE AND EXPLANATION OF CHANGE: The commission agrees with staff. Not only did the commission not intend to include attorneys in the Office of the General Counsel other than the general counsel who are not in the Office of the Staff Counsel, but the commission will conform the definition of "staff" to that being formulated in the commission's Chapter 2 revisions in order to maintain consistency throughout all of its rules. "Staff" will be redefined.

COMMENT #7: Estimates of the Effect of the DSIM on Customer Rates. MDNR, NRDC, Sierra Club, Renew Missouri, and GRELC express concerns regarding the language in subsection (2)(D). Currently, the supporting information required to be filed with a DSIM under section (2) includes "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."

These entities request that this period be revised to "Estimates of the effect of the DSIM on customer rates and average bills over the life of each measure." The lives of many efficiency measures are much longer than three (3) years. As implementation proceeds and these measures approach saturation, the system benefits realized by all customers and the bill savings realized by direct participants will increase.
RESPONSE AND EXPLANATION OF CHANGE: The commission appreciates the concerns expressed by these stakeholders and will modify subsection (2)(D) accordingly. The commission notes that a demonstration of cost-effectiveness and overall rate impact for each demand-side program and for the total of all demand-side programs of the utility is required in the current proposed rule 4 CSR 240-3.164(2)(B)3. The requirements of 4 CSR 240-3.164(2)(B)3. should provide information similar to that requested by these stakeholders and makes it unnecessary to provide the estimated impact of the proposed DSIM upon customers' rates and average bills over the life of each measure. The commission further notes that five (5) years should be sufficient given that most of these programs are expected to have a life of three to five (3–5) years.

COMMENT #8: Intervention Status. MEDA believes that the language in subsection (9)(A) should be removed because its members believe that intervention status in any subsequent related periodic rate adjustment proceeding should not be automatic for persons or entities granted intervention in a prior demand-side program approval proceeding.
RESPONSE: The commission rejects MEDA's proposal. This provision is designed to ensure due process for those entities claiming a substantive right in association with these proceedings. The utilities' rights are ensured by the requirement that "such person or entity shall file a notice of intention to participate within the intervention period." Thus, no entity involved in a prior proceeding can sleep on its claimed rights.

COMMENT #9: Specific Filing Requirements. During the rulemaking hearing, OPC incorporated by reference its "red-lined" version of the proposed rules and stated it supported all of the recommended changes contained in that July 23, 2010 filing. In that filing OPC proposed several changes to 4 CSR 240-3.163 (not already addressed) as follows:
OPC proposes the following change to 4 CSR 240-3.163(2)(F):

(2)(F) Estimates of the effect of the DSIM utility incentive 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 DSIM utility incentive;
OPC proposes the following change to 4 CSR 240-3.163(5)(A):

(5)(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.

RESPONSE: When OPC filed these proposed changes, it stated in its filing: "Many of these changes are self-explanatory (e.g., to provide clarity or consistency with the language in MEEIA) and some are described in the comments below." The commission addressed the specific comments where OPC provided an explanation in other portions of this order or in the orders of the interrelated MEEIA rules.

Perhaps OPC has not revisited its comments from July, 23, 2010, but the current version of the proposed rule adopted language in 4 CSR 240-3.163(2)(E) and 4 CSR 240-3.163(5)(A) is virtually identical, if

not completely identical, to the OPC proposed language. Finding there is no distinction between the current language and the proposed changes, the commission will not amend the current language.

COMMENT #10: Requirements for Semi-Annual Adjustments of DSIM Rates. The MEDA stakeholders express concerns over the language in 4 CSR 240-20.093(4)(A)–(D). The language, according to MEDA, sets forth the requirements for semi-annual adjustments of DSIM and should be modified to apply not only to the cost recovery component of the DSIM, but also to all components of the DSIM, i.e., cost recovery, lost margins or lost revenues, and incentive. The MEDA stakeholders recommend that in order to comply with the intent of the MEEIA—in particular timely cost recovery to utilities, aligning utility financial incentives with helping customers use energy efficiently, and providing timely earnings opportunities associated with cost-effective energy efficiency—adjustments of DSIM rates between general rate proceedings should apply to all components of the DSIM. These three (3) components must be addressed in concert to provide a sustainable business model for utilities to pursue DSM programs and both benefit customers and satisfy shareholders.
RESPONSE AND EXPLANATION OF CHANGE: These proposed changes for 4 CSR 240-20.093 created a ripple effect with 4 CSR 240-3.163 that the commission must address in this proposed rule. The commission will not modify the language in 4 CSR 240-20.093(4) as proposed by MEDA to allow adjustments to the DSIM utility lost revenue requirement or to the DSIM utility incentive revenue requirement during the semi-annual adjustment to DSIM rates. The commission notes determination of the DSIM utility lost revenue requirement and the DSIM utility incentive revenue requirement are dependent upon measurement and verification performed by an EM&V contractor and documented in EM&V reports. Such EM&V reports will be performed in accordance with EM&V plans for each demand-side program and demand-side program plan required by 4 CSR 240-3.164(2)(C)13. and will likely be published no more frequently than annually and will not be available semiannually. However, the DSIM cost recovery revenue requirement is not dependent upon measurement and verification performed by an EM&V contractor and documented in EM&V reports but rather depends upon the contemporaneous accounting records of each electric utility.

In the process of reviewing this issue the commission noticed some internal inconsistencies and finds it is necessary to make changes to language contained in 4 CSR 240-20.093(1) and (2). Similarly, six (6) definitions in 4 CSR 240-3.163(1) and (2) must be changed to maintain conformity throughout the MEEIA rules. These changes should provide clarification to this issue.

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

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

(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 demand-side programs' energy savings and demand savings associated with generation, transmission, and distribution facilities including avoided probable environmental compliance costs. 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 over an hour measured in kilowatts (kW);

(G) DSIM cost recovery revenue requirement means the revenue requirement approved by the commission in a utility's filing for demand-side program approval or a semi-annual DSIM rate adjustment case to provide the utility with cost recovery of demand-side program costs based on the approved cost recovery component of a DSIM;

(I) DSIM revenue requirement means the sum of the DSIM cost recovery revenue requirement, DSIM utility lost revenue requirement, and DSIM utility incentive revenue requirement;

(J) DSIM utility incentive revenue requirement means the revenue requirement approved by the commission to provide the utility with a portion of annual net shared benefits based on the approved utility incentive component of a DSIM;

(K) DSIM utility lost revenue requirement means the revenue requirement explicitly approved (if any) by the commission to provide the utility with recovery of lost revenue based on the approved utility lost revenue component of a DSIM;

(P) Filing for demand-side program approval means a utility's filing for approval, modification, or discontinuance of demand-side program(s) which may also include a simultaneous request for the establishment, modification, or discontinuance of a DSIM;

(Q) 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 system 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;

(R) Probable environmental compliance 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's decision-makers, may be imposed at some point within the planning horizon which would result in environmental compliance costs that could have a significant impact on utility rates;

(S) Staff means all personnel employed by the commission, whether on a permanent or contract basis, except: commissioners; commissioner support staff, including technical advisory staff; personnel in the secretary's office; and personnel in the general counsel's office, including personnel in the adjudication department. Employees in the staff counsel's office are members of the commission's staff; and

(T) Total resource cost test, or TRC, means the test of the cost-effectiveness of demand-side programs that compares the avoided utility costs 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.

(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. Supporting workpapers shall be submitted as executable versions in native format with all formulas intact.

(D) Estimates of the effect of the DSIM on customer rates and average bills for each of the next five (5) years for each rate class.

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

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

(A) A person or entity granted intervention in a utility's filing for demand-side program approval 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 utility's filing for demand-side program approval, 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 utility's filing for demand-side program approval 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 utility's filing for demand-side program approval 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 utility's filing for demand-side program approval 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 utility's filing for demand-side program approval to modify, continue, or discontinue the same DSIM.

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of the Chairman's Request for A Status Report Regarding Energy Efficiency Advisory Groups and Collaboratives	)))	**File No. AO-2011-0035**
In the Matter of the Consideration and Implementation of Section 393.1075, RSMo., The Missouri Energy Efficiency Investment Act	))))	**File No. EX-2010-0368**

CHAIRMAN CLAYTON'S CONCURRENCE TO FINAL ORDER OF RULEMAKING AND RESPONSE TO STAFF'S REPORT

Issue Date: February 9, 2011

This Commissioner files this opinion in support of the Final Order of Rulemaking in File No. EX-2010-0368, regulations formulating future efforts in energy efficiency investments for Missouri investor-owned utilities. Additionally, this opinion sets out this Commissioner's response to the Staff Report on energy efficiency programs, filed in Case No. AO-2011-0035. These two cases demonstrate the new commitment to energy efficiency in Missouri in empowering utility customers to take control of their energy bills.

In response to my request, the Staff of the Commission filed a report on September 15, 2010, describing the work of each energy efficiency advisory group and collaborative currently addressing the energy efficiency issues facing Missouri's investor-owned electric and natural gas utilities. The report is an impressive compilation of material summarizing the changes in Missouri's efforts at improving the efficient delivery and use of energy. As our nation faces an uncertain future with regard to energy-related priorities, the compilation of material demonstrates the Commission's new commitment to assisting customers and utilities in better managing our energy usage through efficiency programs.

The report highlights that in the past several years, Missouri utilities have gone from a few efficiency programs inconsistently scattered among varying sectors to a comprehensive offering of programs with relatively consistent goals among all utilities. Collaboratives or stakeholder groups have been established for each utility to collect input and formulate policy involving diverse groups, associations and agencies with many people effectively engaged. Program offerings are considered, funded and implemented through the collaboratives, with joint recommendations made to the Commission for approval or rejection in a rate case. Procedures are now in place for resolution of disputes among parties and more information is being distributed to more utility customers than ever before with a wide array of opportunities to reduce energy bills.

The concept of energy efficiency is being embraced as never before. Utilities are now recognizing the benefits of efficient use through reduced demand and energy charges and with less urgency in identifying new sources of electric generation or natural gas acquisition. With increased efficiency of energy use, customers are less vulnerable to natural gas price volatility. Utilities are able to delay or avoid costly new energy sources. Demand Response programs are in place in some territories in attempts to avoid the use of costly gas "peaker plants" in times of high demand, which demonstrate that utilities and customers can benefit from reducing power generation costs. Efficiency programs, in general, are smoothing increases in overall demand with more manageable growth, while avoiding the difficulties of securing new, costly baseload generation.

Customers have much to gain from efficient use of energy. While customers benefit from lower utility costs, customers also receive the direct benefit education and training in learning how energy is used, how it is priced and how they can find ways to reduce consumption, thereby , reducing their monthly energy bills. Customers must have greater options through utility programs in evaluating appliance purchases, understanding heating

and cooling needs, learning about new technologies, and learning that one's quality of life does not have to decrease when energy is used more efficiently. To customers, effective energy efficiency programs translate into empowerment to take control of their energy bills. Rebates, incentives and education provide customers with the necessary tools to change behavior and change how energy decisions are made.

The Commission has recognized that these new programs require adequate funding to be effective. In 2000, total funding for efficiency programs focused primarily on weatherization in the amount of $875,000, involving a couple of utilities. In 2010, funding levels have increased to $53 million, including all 8 utilities. The Commission has determined that natural gas utilities should strive for the target of EE funding at a minimum of .5% of their gross revenues, and all large gas utilities are moving toward this policy target. Electric utilities are taking similar steps at developing and delivering a comprehensive offering of efficiency programs with sufficient funding levels.

Lastly, as Missouri ramps up its efficiency programs, its investments and its increase in knowledge and action for customers, this Commission and future Commissions must be prepared to address an evolving utility industry. If load growth is curtailed, there will be pressure to reevaluate how rates are set. Utilities will push for equal or greater returns on efficiency investments and new models of incentives for utility performance in meeting Commission goals and priorities. Utilities will demand fair treatment if downward pressure is applied to their efforts at increasing sales for greater revenue. On the other hand, consumers will demand that the Commission apply close supervision to new programs, carefully scrutinize new rate making requests and cautiously evaluate any modification to the traditional rate of return regulatory compact. This and future Commissions will be faced with balancing these potentially competing positions to ensure that programs are cost-effective,

deliver benefits to both customers and utilities, and do not inequitably shift risk or cost. These are complicated challenges in a new world of energy delivery.

The Commission is prepared to tackle these issues and has taken additional steps to gather information and set policy. First, the Commission continues its statewide energy efficiency study with a partnering agency, the Missouri Energy Center. It is this Commissioner's hope that realistic, achievable goals can be identified to provide greater assistance to those working on Missouri's energy future. Secondly, the Commission has concluded the formal rulemaking process with regulations stemming from Senate Bill 376, the Missouri Energy Efficiency Act. Through these rules, the Commission addresses a number of significant policy questions to provide clarity and certainty for current and future efficiency programs. The Commission has developed the rules with an eye towards flexibility and the understanding that incentive mechanisms will require careful planning and design. The Commission will need several "attempts" at determining the large-scale benefits and costs upon all stakeholders. Lessons learned from those efforts will provide future commissions with the knowledge to develop programs effectively. The rules certainly contemplate a changing world where the regulator may no longer demand greater sales of energy, but rather strive for decreased usage. How does a utility reduce its sales but maintain profitability? The rules are designed to consider this conundrum.

In conclusion, this Commissioner commends and thanks the staff of the Commission for its efforts in working through challenging and potentially controversial issues. Most Missourians are unaware of the work of the Public Service Commission and even fewer know the dedication, the expertise and the significant work ethic of the PSC staff. This report illustrates the giant steps taken in recent years and the future work that lies ahead. It is my hope and request that a similar report be prepared annually, in a format for easy

consumption, so that the public and Commissioners may understand what we are doing on critically important issues and how those issues evolve in the future.

Therefore, it is my request that the Staff prepares an annual update to its report, in a format acceptable to Staff, every September 15th, and makes that update available to the Commission and the public.

For the foregoing reasons, this Commissioner concurs.

Respectfully submitted,

Robert M. Clayton III
Chairman

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 ROBERT S. KENNEY

I write to dissent from the majority's Final Orders of Rulemaking regarding the Missouri Energy Efficiency Investment Act.[1] I specifically dissent as it relates to those Rules allowing utilities to recover lost revenue. I dissent because the Missouri Energy Efficiency Investment Act (the "MEEIA" or the "Act"), the statute under which the Commission has authority to promulgate these Rules, does not authorize recovery of lost revenue; I dissent because authorizing recovery of lost revenues does nothing to remove the disincentive it is ostensibly designed to remove; and I dissent because authorizing recovery of lost revenues does not serve the interests of Missouri citizens.

I believe in energy efficiency as a least-cost way of reducing carbon emissions. Along with greater deployment of renewable resources, nuclear energy, and new technologies such as carbon capture and sequestration, energy efficiency measures are a certain and cost-effective way of reducing carbon emissions. Equally as important, energy efficiency measures give utility customers an opportunity to realize savings in their bills.

The MEEIA is the product of Senate Bill No. 376, which was first read February 16, 2009. As with most pieces of legislation, SB 376 as introduced differed from the Senate Substitute for Senate Committee Substitute for SB 376, which was the Truly

[1] 4 CSR 240-3.163; 4 CSR 240-3.164; 4 CSR 240-20.093; and 4 CSR 240-20.094 (collectively the "Rules").

Agreed To and Finally Passed bill as signed by Governor Nixon. I will discuss the relevance of this fact later. Governor Nixon signed SB 376 in July 2009. It is codified at Section 393.1075 of the Missouri Revised Statutes.

The MEEIA is a laudable piece of legislation. And the rules we have drafted in support of the MEEIA represent the hard work of our staff and numerous stakeholders. They are to be commended for their efforts. But the issue of lost revenue recovery is of such significance that including provisions allowing for the recovery of lost revenues damages the rules as a whole.

1. The MEEIA does not authorize recovery of lost revenue

The MEEIA sets forth the state's policy "to value demand-side investment equal to traditional investment in supply and delivery infrastructure and allow recovery of all reasonable and prudent *costs* of delivering cost-effective demand-side programs." Mo. Rev. Stat. § 393.1075.3 (2010) (emphasis supplied). The MEEIA further provides that "the [C]ommission may develop *cost* recovery mechanisms to further encourage investments in demand side programs[.]" Mo. Rev. Stat. § 393.1075.5 (2010) (emphasis supplied).

The Commission is instructed to support the state's policy by providing timely cost recovery for utilities; by ensuring 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 by providing timely earnings opportunities associated with cost effective measurable and verifiable efficiency savings. Mo. Rev. Stat. § 393.1075.3 (1) – (3) (2010).

There is no language in the language I have cited or anywhere else in the statute that authorizes the recovery of lost revenue. Lost revenue is neither a *cost* of providing service nor a *cost* of providing energy efficiency programs.

The absence of any such language is telling. What is also telling is that the introduced version of SB 376 included language allowing for "recovery of lost sales attributable to approved energy efficiency programs" and "allowing the utility a fixed investment recovery mechanism to recover lost margins[.]" See Senate Bill No. 376, First Regular Session, 95th General Assembly, Read First Time February 16, 2009.

In the Truly Agreed To and Finally Passed version of the bill, signed by the Governor and codified at Section 393.1075, this language is conspicuously absent. While this absence is not dispositive of the General Assembly's intent, it is instructive. Had the General Assembly intended to authorize recovery of lost revenues, it certainly could have kept the language that appears in the introduced version of SB 376. In certain circumstances, such as this one, "omissions should be understood as exclusions." See, Angoff v. M and M Mgmt. Corp., 897 S.W.2d 649, 655 (Mo. Ct. App. 1995)

2. Allowing for recovery of lost revenue does not solve the problem

Encouraging energy efficiency, on the one hand, requires the utility to act counter to its financial interests. So, some form of lost revenue recovery mechanism is necessary, proponents assert, in order to remove this disincentive. But allowing for recovery of lost revenues does nothing to remove the incentive to increase revenues by increasing sales.

The lost revenue recovery mechanism is supposed to ameliorate the effects of any lost revenues specifically tied to measured and verified energy efficiency programs. The

problem, however, is that the evaluation, measurement, and verification program will likely lead to increased contention as parties litigate the accuracy of the evaluation, measurement, and verification program. Moreover, every indication is that measuring and verifying lost revenues associated with specific energy efficiency programs is a highly imprecise undertaking. In addition to leading to more contentious rate cases, this imprecision allows opportunity for mischief in measuring and verifying the savings associated with a particular program. This is particularly true where, as is the case with the Rules, the utility is charged with evaluating, measuring, and verifying its own program.

Only eight states currently use some form of lost revenue recovery mechanism.[2] More states are looking to some form of revenue decoupling as a preferred method of addressing the disincentives associated with promoting energy efficiency. I do not, at this time, express an opinion about the desirability of decoupling. I only note that it provides a more certain means of removing the so-called "throughput incentive," that is the incentive to increase revenues by increasing sales. Additionally, performance incentives are another effective alternative for addressing the disincentives associated with promoting energy efficiency.

Lost revenue recovery mechanisms are also difficult to administer as the ability to properly implement such mechanisms depends to a significant degree on robust evaluation, measurement, and verification. And since any recovered lost revenues are

[2] Colorado, Kentucky, Montana, North Carolina, Ohio, Oklahoma, South Carolina, and Wyoming. Utah is considering a lost revenue recovery mechanism. As of this writing, the status of that mechanism is uncertain. See The Edison Foundation's Institute for Electric Efficiency, "State Electric Efficiency Regulatory Frameworks," July 2010, accessed at http://www.electric-efficiency.com/issueBriefs/IEE_StateRegulatoryFrame_0710.pdf, on February 7, 2011.

only those directly attributable to the energy efficiency program, the utility continues to have the incentive to increase revenues through increased sales.

In addition to the difficulty associated with administering an effective evaluation, measurement, and verification program, the use of the lost revenue recovery mechanism gives rise to many other questions. How are revenues attributable to energy efficiency programs distinguished from decreased sales attributable to any other factor? How are potential off-system sales taken into account that are realized as a result of any energy efficiency programs? Will customers reap the benefits of increased energy efficiency and decreased consumption in the way of lower bills if the "lost revenues" are ultimately recovered? Will customers' incentives to use energy more efficiently be sustained or enhanced, as instructed by the MEEIA? There are too many unanswered questions to leave one comfortable that allowing for recovery of lost revenues will advance the overarching goals of promoting energy efficiency or inure any great benefits to ratepayers.

3. Conclusion

Energy efficiency measures are to be encouraged and implemented to the greatest degree possible. Energy efficiency is a proven, cost-effective means of addressing many problems: global climate change caused by green house gas emissions; air quality issues; consumption and depletion of finite fossil fuel resources; and energy independence and security.

The policy of the state is to value demand side investments equal to other investments. Utilities' financial incentives are to be aligned with helping customers use

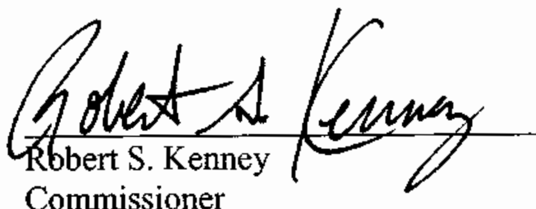
energy more efficiently and in a manner that sustains and enhances their incentives to use energy more efficiently. The MEEIA makes these pronouncements and charges the commission with drafting rules in support of these worthy goals. The MEEIA gives the commission latitude in promulgating rules supportive of its goals. But the MEEIA does not authorize recovery of lost revenues.

Moreover, recovery of lost revenues does not address the problem that it sets out to resolve. While it provides revenue stability for the utility, it does not remove the incentive to promote increased sales. Finally, it is hard to see how allowing for recovery of lost revenues supports or enhances the customers' incentives to use energy more efficiently.

I wholeheartedly and enthusiastically support the overarching principles of the MEEIA. And I recognize the need to align utilities' financial incentives with helping customers decrease consumption of their product. But I do not believe that allowing for recovery of lost revenues achieves this alignment.

For all of the foregoing reasons I dissent.

Respectfully submitted,



Robert S. Kenney
Commissioner

Dated this 9th day of February 2011,
at Jefferson City, Missouri

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 section 393.1075, RSMo Supp. 2010 and sections 386.040 and 386.250, RSMo 2000, the commission adopts a rule as follows:

4 CSR 240-3.164 is adopted.

A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on November 15, 2010 (35 MoReg 1629–1646). Those sections with changes are reprinted here. This proposed rule becomes effective thirty (30) days after publication in the *Code of State Regulations*.

SUMMARY OF COMMENTS: A public hearing on this proposed rule was held December 20, 2010, and the public comment period ended December 15, 2010. The commission received a number of written comments from seventeen (17) entities, many of which were duplicated or echoed from the various entities and involve the same sections or subsections of the proposed rule. Consequently, these comments have been consolidated into eight (8) central comments, which are addressed below. At the public hearing, seventeen (17) witnesses testified. The entities filing comments were AARP, Union Electric d/b/a Ameren Missouri (Ameren Missouri), the Consumers Council of Missouri (CCM), Empire District Electric Company (Empire), KCPL Greater Missouri Operations Company (GMO), Great Rivers Environmental Law Center (GRELC), Kansas City Power and Light Company (KCPL), Missouri Department of Natural Resources (MDNR), Missouri Energy Development Association (MEDA),[1] Missouri Energy Group (MEG), Missouri Industrial Energy Consumers (MIEC),[2] National Resources Defense Council (NRDC), Office of the Public Counsel (OPC), OPOWER, Inc. (OPOWER), Renew Missouri, staff of the Missouri Public Service Commission (staff), Sierra Club, Walmart Stores East, LP, and Sam's East.

All of the comments were generally in support of a rule to implement demand-side programs and demand-side programs investment mechanisms (DSIMs), but many had suggestions for specific changes to the proposed rule and raised concerns regarding the timing of authorizing DSIMs and whether those mechanisms could include recovery of lost revenues. It should be noted that this proposed rule operates in conjunction with proposed rules 4 CSR 240-3.163, 4 CSR 240-20.093, and 4 CSR 240-20.094. All of these rules were promulgated to implement section 393.1075, RSMo, the Missouri Energy Efficiency Investment Act (MEEIA). Any comments directed towards 4 CSR 240-3.164 may be interrelated with these other proposed rules, and the interplay between these proposed rules may need to be addressed in the context of this order or rulemaking; however, in and of itself, this rule specifically addresses electric utility demand-side program filing and submission requirements. It should also be noted that while comments were directed at specific sections and subsections of the rule, due to changes in the proposed rule those number citations may not match the final numbering of the sections and subsections of the rule.

[1] The MEDA members include KCPL, GMO, Empire, and Ameren Missouri.

[2] MIEC members include Anheuser-Busch Companies, Inc., BioKyowa, Inc., The Boeing Company, Doe Run, Enbridge, Ford Motor Company, General Motors Corporation, GKN Aerospace, Hussmann Corporation, JW Aluminum, MEMC Electronic Materials, Monsanto, Procter & Gamble Company, Nestlé Purina PetCare, Noranda Aluminum, Saint Gobain, Solutia, and U.S. Silica Company.

COMMENT #1: General Changes in Relation to Alleged Single-Issue Ratemaking. AARP, CCM, MIEC, OPC, and staff all believe that sections or subsections of the interrelated MEEIA rules (4 CSR 240-3.163, 4 CSR 240-20.093, and 4 CSR 240-20.094) allowing a rate adjustment outside of a general rate case would constitute unlawful single-issue ratemaking. AARP, CCM, and OPC state it is their belief that the legislature purposely deleted any language in SB 376 (the legislation ultimately codified as section 393.1075, RSMo) that would have allowed for changes to a demand-side program investment mechanism in between general rate cases. No specific sections or subsections of this rule were identified by these entities that would require change based upon this comment. However, to the extent that any of these provisions could be implicated by the language of the interrelated rules, the commission will again address this issue.

MEDA, MDNR, NRDC, Sierra Club, Renew Missouri, and GRELC, on the other hand, believe that the language in section 393.1075.3 and .5, RSMo, mandating the commission to provide timely cost recovery and timely earnings opportunities by developing cost recovery mechanisms without limitation allows the commission to establish and approve demand-side programs outside the framework of a general rate case. Section 393.1075.11, RSMo, states the commission "may adopt rules and procedures . . . as necessary, to ensure that electric corporations can achieve the goals of this section." Additionally, these entities point out that section 393.1075.13, RSMo, requires the use of a separate line item for charges attributable to demand-side programs, which is consistent with other billing elements that are adjusted outside of a general rate case. Taxes, fuel adjustment clauses, purchased gas adjustments, and infrastructure system replacement surcharges are all billed in this fashion. While language in the original version of SB 376 providing for a "cost adjustment clause" was removed, the legislature added "timely cost recovery," broadening the commission's discretion with developing cost recovery mechanisms.

RESPONSE: The commission believes that the express language in section 393.1075, RSMo, unequivocally requires the commission provide timely cost recovery for utilities when effectuating the declared social policy of valuing demand-side investments equal to traditional investments in supply and delivery infrastructure. MEEIA contemplates non-traditional investments and mandates timely cost recovery. The language of the proposed rule does not establish any specific type of demand-side investment mechanism (DSIM). Instead, the proposed rule allows the maximum latitude for creating Demand-Side Programs and the associated DSIMs while allowing for periodic adjustments in conformity with the language in the statute. The argument that the proposed rule would in and of itself authorize single-issue ratemaking is unfounded and premature. Until an exact DSIM is established, there is no way to claim that original implementation or any periodic adjustments would constitute single-issue ratemaking.

Additionally, the statutory language from which the prohibition against single-issue ratemaking is derived originates in section 393.270.4, RSMo. The statute is permissive. It allows the commission the discretion to examine all facts that the commission believes are relevant. There is no set statutory requirement for how many or what type of facts or factors the commission must consider when making its determination. Indeed, the legislature has delegated its authority to the commission, being the expert agency charged with making these determinations, to decide what factors must be examined when determining the price to be charged for electricity. The commission will make no changes to the language identified by these comments in the proposed rule or to any other language in the rule that would be related to the issue raised in these comments.

COMMENT #2: Lost Revenue Recovery. AARP, CCM, OPC, MIEC, and staff believe that the lost revenue recovery mechanism

provisions of the draft rules are unlawful because those provisions are not authorized by statute. These entities believe that lost revenue does not fit in a cost category. The subsections of this rule identified by these entities that would require change based upon this comment are (1)(L), (1)(M), and (1)(P).

MDNR, NRDC, Sierra Club, Renew Missouri, and GRELC comment that lost revenue recovery is not cost recovery or an earnings opportunity. These entities believe that under the mechanism for recovering lost revenues in the proposed rule, utilities would continue to see higher levels of revenue recovery with higher sales. Therefore, they believe the utility will find itself facing the same conflict it currently faces at the prospect of taking actions or supporting policies to save energy and thereby save their customers money, knowing that such actions would cause their shareholders to miss out on the earnings from higher sales. These entities refer to the incentive to maintain higher sales as the "throughput incentive" and believe this is a strong disincentive for utilities to invest in energy efficiency or to support energy saving policies and measures outside their control.

MEG objects to any language that would allow a lost revenue recovery mechanism, not because it is unlawful but because it believes that reduced costs associated with reduced sales will balance out. MEG also believes that a lost recovery mechanism is inconsistent with the way other charges are handled. According to MEG, a utility believes that energy efficiency programs will reduce sales and reduce contributions to fixed costs, but, using that same reasoning, every time the utility adds a customer, it increases sales and contributions to fixed costs. Consequently, MEG concludes, there should be a refund to customers in any class of ratepayers every time a customer is added. MEG also believes there is no way to determine the actual effect of the various energy efficiency programs.

In addition to the other comments made, staff states that only eight (8) other states allow recovery of lost revenues. According to staff, other states that have had such a recovery mechanism in the past have abandoned it. Staff claims that the movement away from direct reimbursement for lost revenues is likely due to several factors including the fact that the approach is vulnerable to "gaming" by over-claiming savings, that it typically leads to very contentious reconciliation hearings as parties argue about the measurement of savings, and that it does not do anything to address the utility disincentive regarding broader energy efficiency policies beyond the specific program addressed with the mechanisms. Staff notes that other commissions have addressed this issue either through decoupling mechanisms and/or performance incentives. Staff recommends the "throughput incentive" be addressed through the utility incentive component of a DSIM.

MEDA believes that section 393.1075.3, RSMo, mandates recovery of all reasonable and prudent costs and requires the commission to 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. MEDA members comment that unless a utility's lost revenues are included in the DSIM or other recovery mechanism, there will always be a financial bias against fully utilizing demand-side management programs that result in the reduction of a utility's revenues.

RESPONSE: Section 393.1075.3, RSMo, requires the commission to "allow recovery of all reasonable and prudent costs of delivering cost-effective demand-side programs." Additionally, section 393.1075.3(2), RSMo, requires the commission to 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." Section 393.1075.5, RSMo, states the commission "may develop cost recovery mechanisms to further encourage investment in demand-side programs . . ." Lost revenue is a cost of delivering cost-effective demand-side programs, and the proposed rule, in conjunction with the interrelated proposed rules, i.e., 4 CSR 240-3.163, 4 CSR 240-20.093, and 4 CSR 240-20.094, require evaluation, measurement, and verification (EM&V). Any request for recovery of lost revenue will have to be verified and approved by the commission prior to recovery.

At the rulemaking hearing on December 20, 2010, several participants commented that decoupling could prevent over- and under-earning and that it might present a better long-term solution than allowing recovery of lost revenues. However, section 393.1075.5, RSMo, requires the commission to conclude a docket studying any rate design modification to those currently approved by the commission prior to promulgating an appropriate rule in that regard. Decoupling represents such a change in rate design, and no docket has been opened at this time to fully explore this or other possible changes. The commission has been directed by the legislature to implement section 393.1075, RSMo, and while this proposed rule may ultimately be an intermediary step to decoupling or other changes in rate design models, promulgating a lost revenue recovery mechanism is authorized by MEEIA and, with verification methods in place, the potential for possible "gaming of the system" is minimized. The commission will make no changes to the language identified by these comments in the proposed rule or to any other language in the rule that would be related to the issue raised in these comments.

COMMENT #3: Definition of Lost Revenue. A number of participants raised an issue concerning the issue of how the proposed rule defines lost revenue. Thus, should the commission include provisions for recovery of lost revenues, these entities debate how "lost revenues" should be defined.

MEDA believes that if the commission is going to allow recovery of lost revenue, the definition of "lost revenue" should be modified to conform to the definition included in 4 CSR 240-22.020(38). MEDA sees no reason to have differing definitions in the commission's regulations.

Staff, on the other hand, does not believe that the Chapter 22 definition is appropriate because:

1) The language as drafted is "permissive" in nature and provides for the opportunity for recovery of lost revenues, rather than a guarantee. The proposed MEDA language is more explicit regarding the ability to recover lost revenues;

2) Staff opposes MEDA's proposed use of Chapter 22's definition of lost revenue, because the Chapter 22 definition is used exclusively to exclude lost revenues from the definitions of annualized costs for end-use measures, from the definition of costs for the utility cost test, and from the definition of costs for the total resource cost test. Chapter 22 does not contemplate the use of its definition of lost revenue for any other purposes, and it should not be assumed to be an appropriate definition for the MEEIA rules; and

3) The MEDA language also removes the requirements for evaluation, measurement, and verification (EM&V) of demand-side management (DSM) program results prior to recovery of lost revenue and, therefore, allows for recovery of lost revenues on a prospective basis without any measurement and verification of DSM program results by an independent evaluator. Staff believes that if recovery of lost revenue is included in the MEEIA rules, measurement and verification of lost revenues should be required and should only be accomplished through independent EM&V on a retrospective basis. Lost revenues are based on energy usage that did not occur. In staff's opinion, it is not appropriate to increase customer's rates on guesses as to what the customers who participated in the programs would have used absent the programs without a rigorous EM&V conducted by an independent evaluator.

Staff recommends clarifying the definition of "lost revenues." Staff also proposes changes in the language of the interrelated rule, 4 CSR 240-20.093(2)(G).

Staff's proposed change would apply to subsection (1)(Q) of this proposed rule and the following subsections of the interrelated proposed rules: 4 CSR 240-3.163(1)(P), 4 CSR 240-20.093(1)(Y), and 4 CSR 240-20.094(1)(U).

RESPONSE AND EXPLANATION OF CHANGE: The commission believes staff's proposed revision to the current definition of lost revenue is appropriate and rejects MEDA's proposed revision for the reasons stated by staff. The commission will modify 4 CSR 240-3.163(1)(Q), 4 CSR 240-3.164(1)(M), 4 CSR 240-20.093(1)(Y), and 4 CSR 240-20.094(1)(U) accordingly.

COMMENT #4: Definitions of Potentials. MDNR, NRDC, Sierra Club, Renew Missouri, and GRELC believe the definition of "economic potential" in subsection (1)(H), "maximum achievable potential" in subsection (1)(N), "realistic achievable potential" in subsection (1)(T), and "technical potential" in subsection (1)(W) should be deleted and replaced with the nationally recognized definitions for technical, economic, achievable, and program potential developed through a public-private partnership of experts and contained in the National Action Plan for Energy Efficiency (NAPEE). Those definitions are found on pages 2–4 of the document entitled "Guide for Conducting Energy Efficiency Potential Studies" (http://www.epa.gov/cleanenergy/documents/suca/potential_guide.pdf).

According to these stakeholders, the definitions of potential in the proposed rule, taken together, could significantly and adversely influence commission review of progress toward the legislative goal of "achieving all cost-effective demand-side savings" as well as future utility conduct of potential studies. The core distinction in NAPEE's Guide is between "achievable potential" and "program potential." As NAPEE uses the terms, "achievable potential" takes expected program participation into account and is the reference point for considering various levels of "program potential" that are based on different levels of utility funding and implementation. This is in contrast to an assumption of an absolute distinction between "maximum" and "realistic" achievable potential that introduces an analytic weakness and which does not acknowledge that there can be many levels of "achievable potential" based on the level of funding and aggressiveness of implementation that the company elects to pursue. Estimates from a market potential study are highly variable, depending on the measures included in a study, the range of customer incentives considered in the study questionnaires, and the assumptions used to calculate energy savings forecasts. Using the current definitions in the proposed rule could result in the following adverse consequences: 1) the draft language could limit the commission's view of the potential for cost-effective demand-side savings to the level of funding and aggressiveness of implementation that the company elects to assume in its potential study; and 2) future utility potential studies could focus unduly on establishing a single level of "realistic" achievable potential, limiting their study of the range of options under different levels of program implementation. This would be most likely to occur if the rule requires the utility to conduct potential studies but fails to establish adequate standards for conducting them.

RESPONSE: Substituting the current definitions of these terms would create a very material change to the current proposed MEEIA rules (specifically 4 CSR 240-20.094(2)(A)), because the NAPEE definition of achievable potential is equivalent to the current proposed MEEIA definition of maximum achievable potential. NAPEE defines these terms as follows:

Achievable potential is the amount of energy use that efficiency can realistically be expected to displace assuming the most aggressive program scenario possible (e.g., providing end-users with payments for the entire incremental cost of more efficiency equipment). This is often referred to as maximum achievable potential. Achievable potential takes into account real-world barriers to convincing end-users to adopt efficiency measures, the non-measure costs of delivering programs (for administration, marketing, tracking systems, monitoring and evaluation, etc.), and the capability of programs and administrators to ramp up program activity over time.

Program potential refers to the efficiency potential possible given specific program funding levels and designs. Often, program potential studies are referred to as "achievable" in contrast to "maximum achievable." In effect, they estimate the achievable potential from a given set of programs and funding. Program potential studies can consider scenarios ranging from a single program to a full portfolio of programs. A typical potential study may report a range of results based on different program funding levels.

The use of the NAPEE definitions will result in the most aggressive DSM program scenarios possible (e.g., "providing end-users with payments for the entire incremental cost of the most efficient equipment") while maximum achievable potential in the current proposed MEEIA rules assumes ". . .incentives that represent a very high portion of total programs cost and very short customer payback periods. Maximum achievable potential is considered the hypothetical upper boundary of achievable demand-side savings potential, because it presumes conditions that are ideal and not typically observed."

As noted in the NAPEE definition of achievable potential, changing the definitions assumes "the most aggressive program scenario possible." The commission believes substituting the definitions will result in an expectation of very high goals that are unrealistic or unattainable in the early stages of implementing the MEEIA. The commission will not substitute or change the current definitions of these terms.

Finally, the commission notes that section (7) of the proposed rule requires the commission to complete a review of the effectiveness of this rule no later than four (4) years after the effective date at which time it may initiate rulemaking proceeding to revise the rule. Upon review, the commission will have the opportunity to revisit this issue to determine if the current definitions require modification.

COMMENT #5: Definition of Probable Environmental Cost. MDNR, NRDC, Sierra Club, Renew Missouri, and GRELC state that the statutory definition of the total resource cost test (TRC) includes "probable environmental compliance costs"; section 393.1075.2(6), RSMo. The proposed rules do not define or even use this term but incorporate instead the definition of "probable environmental costs" from the proposed integrated resource planning (IRP) rule, 4 CSR 240-22.020(46). See 4 CSR 240-3.163(1)(Q), 4 CSR 240-3.164(1)(R), 4 CSR 240-20.093(1)(Y), and 4 CSR 240-20.094(1)(V). The proposed rule 4 CSR 240-22.040(2)(B) does not provide an adequate method of calculating environmental compliance costs. It is restricted to future costs associated with a selected list of pollutants which, in the judgment of utility decision makers, could have a significant effect on rates. SB 376 plainly means to include all costs, including present costs, and a more objective assessment, not one based on "subjective probability" in certain individuals' judgment. The commission needs to include a methodology in its rules for calculating these costs, which might include an environmental cost adder expressed in dollars or, as in Ohio, a percentage externality factor. Relying on the IRP rule to implement SB 376 has the effect of adding criteria such as the subjective judgment of utility decision makers that, as discussed above, are not in the statute.

Related to these concerns, OPC proposed changes to the definition of the TRC as follows: Total resource cost test or TRC means the test that compares the avoided utility costs (including probable environmental compliance costs) 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. The present value of the program avoided utility benefits shall be calculated over the projected life of the measures installed under the program.

RESPONSE AND EXPLANATION OF CHANGE: The concerns raised by these stakeholders regarding the definitions and relationships between the terms TRC, avoided cost or avoided utility cost, and probable environmental compliance cost are interrelated to OPC concerns with the definition of TRC echoed in comment #17 to proposed rule 4 CSR 240-20.094. Consequently, the commission will address both of these concerns in its response to each comment.

The current proposed rules 4 CSR 240-3.163(1), 4 CSR 240-3.164(1), 4 CSR 240-20.093(1), and 4 CSR 240-20.094(1) have the same definitions for avoided cost or avoided utility cost, probable environmental cost, and total resource cost test.

Section 393.1075(6), RSMo, defines "total resource cost test" as a test that compares the sum of avoided utility costs and avoided probable environmental compliance costs to the sum of all incremental costs of end-use measures that are implemented due to the program, as defined by the commission in rules.

The commission proposes changes to the definitions in 4 CSR 240-3.163(1)(C), (R), and (T); 4 CSR 240-3.164(1)(A), (R), and (X); 4 CSR 240-20.093(1)(F), (Z), and (DD); and 4 CSR 240-20.094(1)(D), (W), and (Y) to address the concerns expressed by OPC and by MDNR, NRDC, Sierra Club, Renew Missouri, and GRELC.

Additionally, the commission chooses to not include a methodology in its MEEIA rules for calculating probable environmental compliance costs. The commission notes that section (7) of the proposed rule requires the commission to complete a review of the effectiveness of this rule no later than four (4) years after the effective date at which time it may initiate rulemaking proceeding to revise the rule. Upon review, the commission will have the opportunity to revisit this issue to determine if it is appropriate to include a methodology. The commission's actions on the definitions of avoided cost, probable environmental compliance cost, and total resource cost test are consistent with the commission's actions regarding the interaction between this rule and 4 CSR 240-22 Electric Utility Resource Planning.

COMMENT #6: Definition of Staff. Staff believes that the word "staff" in 4 CSR 240-3.164(1) is too broadly defined in the proposed rule. The definition of staff in each of the draft rules would include attorneys in the Office of the General Counsel other than the general counsel who are not in the Office of the Staff Counsel. Staff is not certain that result is intended. The definitions appear at 4 CSR 240-3.163(1)(S), 4 CSR 240-3.164(1)(V), 4 CSR 240-20.093(1)(BB), and 4 CSR 240-20.094(1)(X).
RESPONSE AND EXPLANATION OF CHANGE: The commission agrees with staff. Not only did the commission not intend to include attorneys in the Office of the General Counsel other than the general counsel who are not in the Office of the Staff Counsel, but the commission will conform the definition of "staff" to that being formulated in the commission's Chapter 2 revisions in order to maintain consistency throughout all of its rules. Staff will be redefined.

COMMENT #7: The Interplay Between This Rule and 4 CSR 240-22 Electric Utility Resource Planning. MDNR, NRDC, Sierra Club, GRELC, and Renew Missouri have expressed concerns regarding the interplay between the proposed rules to implement MEEIA and the commission's Chapter 22 rules involving integrated resource planning (IRP). These concerns implicate paragraph (2)(B)3. and 4 CSR 240-20.094(3)(A)3. Consequently, the commission will address those comments in both rules.

MDNR, NRDC, Sierra Club, Renew Missouri, and GRELC would like for paragraph (2)(B)3. and 4 CSR 240-20.094(3)(A)3. to be eliminated. Rule 4 CSR 240-20.094(3)(A)3. says the PSC must approve programs that pass the total resource cost test, but it adds the following condition: that the programs "are included in the electric utility's preferred plan or have been analyzed through the integration process required by 4 CSR 240-22.060 to determine the impact of the demand-side programs and program plans on the net present value of revenue requirements of the electric utility." However, the criterion of the MEEIA is the cost effectiveness of demand-side programs; see section 393.1075.3–4, RSMo. Under the latest Chapter 22 rewrite, the primary criterion is the minimization of utility costs, but utilities may use other critical factors; see 4 CSR 240-22.010(2). The most cost effective demand-side portfolio could fail the IRP tests if it were packaged with a bad set of supply-side resources.

Selection of a preferred resource plan (PRP) is contingent on the policy objectives and performance measures and also on the judgment of utility decision-makers; see 4 CSR 240-22.070(1). While it would appear from 4 CSR 240-22.070(1)(C) that a PRP will maximize demand-side resources, it is not clear how the winnowing of ARPs assembled under 4 CSR 240-22.060 will automatically yield a PRP with the most cost-effective demand-side portfolio; the minimally compliant ARP of 4 CSR 240-22.060(3)(A)1. and the optimally compliant ARP of 4 CSR 240-22.060(3)(A)5. could both fail during the analysis prescribed in 4 CSR 240-22.060(4)–(7). Furthermore, even the demand-side component of the PRP is subject to the judgment of utility decision-makers; they decide whether the PRP is in the public interest and achieves state energy policies; see 4 CSR 240-22.070(1)(C). Lowest present value of revenue requirements (PVRR), IRP policy objectives, performance measures, critical uncertain factors, and decision-makers' judgment are all criteria absent from the MEEIA.

According to MDNR, NRDC, Sierra Club, Renew Missouri, and GRELC, there is a disconnect between 4 CSR 240-22.060 and 4 CSR 240-22.070: 4 CSR 240-22.060(3)(A)1.–5. prescribes a special set of alternative resource plans for renewable and demand-side resources. These include a minimally compliant demand-side plan (the "compliance benchmark"), an "aggressive" plan defined as maximum technical potential (which is an academic exercise), and an optimally compliant plan (minimal compliance with legal mandates but may be something more).

It's unclear what happens to these plans. They must go through the analysis of 4 CSR 240-22.060(4)–(7). The preferred resource plan must use demand-side resources to the "maximum" amount that complies with legal mandates; see 4 CSR 240-22.070(1)(C). This differs from both the minimal compliance benchmark ARP and the "optimal" ARP. Indeed, 4 CSR 240-22.070 does not even say that the PRP must be one of the ARPs in 4 CSR 240-22.060.

According to MDNR, NRDC, Sierra Club, Renew Missouri, and GRELC, the status of the PRP is uncertain. The PRP is a moving target. It can change at any time and be replaced by a contingent plan if the PRP ceases to be appropriate for any reason; see 4 CSR 240-22.070(4). The PRP can become obsolete if it ceases to be consistent with the utility's business plan or acquisition strategy; see 4 CSR 240-22.080(12). A utility can get variances from the rule; see 4 CSR 240-22.080(13). A utility may request action in other cases that is inconsistent with the PRP as long as it provides a detailed explanation; see 4 CSR 240-22.080(17). Under the MEEIA rule, 20.094(3)(A)3., the utility can disregard the PRP, but whatever programs it offers must first go through 4 CSR 240-22.060 integration, which still involves all the criteria itemized above that are not in the MEEIA.

According to MDNR, NRDC, Sierra Club, Renew Missouri, and GRELC, MEEIA outranks Chapter 22. If the IRP rule is to perform that role, it must be modified to accommodate the MEEIA. SB 376 is a delegation of specific rulemaking authority to achieve the MEEIA's purposes; see section 393.1075.11, RSMo. Chapter 22, by contrast, has no specific legislative authority. Its status as an internal commission rule is reflected in the limited, procedural nature of the commission's review of utility IRPs; only deficiencies in Chapter 22 compliance are reviewable, not the substance of the plans; see 4 CSR 240-22.080(7), (8), and (16).

According to MDNR, NRDC, Sierra Club, Renew Missouri, and GRELC, MEEIA, if the commission subordinates the MEEIA to Chapter 22, it will be imposing criteria not prescribed by the legislature and will be unlawful. The commission cannot use its general rulemaking powers under sections 386.250(6) and 393.140(11), RSMo, to make rules inconsistent with the MEEIA. To do so would be to exercise a legislative function in violation of the separation of executive from legislative powers; see Mo. Constitution Article II, section 1. Chapter 22 and the MEEIA can only be harmonized by ensuring that a demand-side portfolio that satisfies the criteria of the MEEIA automatically becomes part of the preferred resource plan, not the other way around.

The staff of the Missouri Public Service Commission responded to these concerns in the following manner:

Various groups expressed opposition regarding the requirement that proposed demand-side programs be analyzed through the integration analysis process required by Chapter 22 Electric Utility Resource Planning. Some of the concerns expressed by these stakeholder organizations were that the process is a burdensome requirement and that it may not result in a set of demand-side resources that are adequate to meet a MEEIA goal of achieving all cost-effective demand-side savings; therefore, the results of the Chapter 22 integration analysis process should not be a limiting factor in the approval of the demand-side programs submitted under the proposed 4 CSR 240-20.094 rule. These stakeholder groups contend that the total resource cost test (TRC) should be an adequate measure, by itself, to determine which demand-side programs are proposed and approved. Staff does not agree with the concerns of these stakeholder groups.

According to staff, Missouri's Chapter 22 Electric Utility Resource Planning rules are expected to continue to result in an ongoing and dynamic electric utility resource planning process to "optimize" both supply-side resources and demand-side resources at the lowest cost to electricity ratepayers while taking into consideration risk and uncertainty associated with critical uncertain factors such as future customer loads (for energy and for demand), future fuel and purchased power prices, future economic conditions, future legal mandates, and new technology. Simply using the TRC test to determine which demand-side programs are proposed and approved does not give any consideration to risk and uncertainty associated with critical uncertain factors. Proposed rule 4 CSR 240-20.094(3)(A) requires that proposed demand-side programs "are included in the electric utility's preferred plan or have been analyzed through the integration process required by 4 CSR 240-22.060 to determine the impact of the demand-side programs and program plans on the net present value of revenue requirements of the electric utility." Staff supports this requirement as it places demand-side resources on an equal basis with supply-side resources. See section 393.1075.3, RSMo. The requirement that proposed demand-side programs be analyzed through the integration analysis process is consistent with MEEIA. Moreover, the requirement in proposed rule 4 CSR 240-20.094(3)(A) indicates that the integration analysis should be completed and filed as required by 4 CSR 240-3.164(2)(B)3., but does not state that the results would necessarily be a limiting factor in the approval of demand-side programs.

Finally, staff would like to clarify for the commission that should the electric utility determine that it wants to propose demand-side programs or program plans which are not included in the electric utility's preferred resource plan, a completely new Chapter 22 analysis and new preferred resource plan are not necessary. The only requirement of 4 CSR 240-20.094(3)(A) is that demand-side programs and program plans "have been analyzed through the integration process required by 4 CSR 240-22.060 to determine the impact of the demand-side programs and program plans on the net present value of revenue requirements of the electric utility." Further, such integration analysis to determine the impact of individual demand-side programs on the net present value of revenue requirements of the electric utility have been requested by staff during 2010 on several occasions for demand-side programs which were not in the preferred resource plans of the individual electric utilities. The electric utilities performed the integration analysis, reported the incremental change to the net present value of revenue requirements, and communicated to staff that the integration analysis was not burdensome taking no more than a day or two to set up and run the integration analysis with the proposed demand-side program.

RESPONSE: The commission agrees with its staff. MEEIA states, "the commission shall consider the total resource cost test 'a' preferred cost-effectiveness test." MEEIA does not state the total resource cost test shall be "the" cost-effectiveness test or even (as stated in the formal comments of the stakeholder group) "the primary" cost-effectiveness test. So clearly there is additional opportunity for the commission to choose a more comprehensive process to determine what demand-side resources constitute all cost-effective demand-side savings than simply using the total resource cost test. If the commission stops with the results of the TRC, then demand-side analysis is given preferential treatment over supply-side analysis which is contrary to the MEEIA.

While "a" goal of MEEIA is to achieve all cost-effective demand-side savings, the stated fundamental objective of the proposed Chapter 22 rules is to provide the public with energy services that are safe, reliable, and efficient, at just and reasonable rates, in a manner that serves the public interest. This objective further enhances the MEEIA and is also consistent with sound public policy. This objective requires that the utility—

A. Consider and analyze demand-side resources and supply-side resources on an equivalent basis;

B. Use minimization of the present worth of long-run utility costs as the primary selection criterion in choosing the preferred resource plan; and

C. Explicitly identify and, where possible, quantitatively analyze any other considerations which are critical to meeting the fundamental objective of the resource planning process, but which may constrain or limit the minimization of the present worth of expected utility costs. … These considerations shall include, but are not necessarily limited to, mitigation of risks associated with critical uncertain factors (such as future electricity loads, future economic conditions, future fuel and purchased power prices, and future legal mandates including environmental regulations). Finally, Chapter 22 risk analysis also considers the mitigation of rate increases associated with alternative resource plans.

The stakeholder group is suggesting that the total resource cost test is the only analysis needed to determine all cost-effective demand-side savings. The TRC may use as few as a single avoided cost amount for a year. Chapter 22 uses the total resource cost test to screen demand-side resources. Chapter 22 then requires further analysis of all resources that have passed screening analysis (both supply-side resources and demand-side resources) through integration analysis. The integration process required by Chapter 22 requires the utilities to look at all eight thousand seven hundred sixty (8,760) hours of the year. The demand-side and supply-side resources that best meet the load requirements of all eight thousand seven hundred sixty (8,760) hours each year are included in the preferred resource plan. The integration process is followed by risk analysis and finally strategy selection by the utility's decision makers. The programs that survive this rigorous screening should be the programs for which the utilities' request the commission's approval and receive "non-traditional" ratemaking treatment. These programs are also the most likely to be the best use of the ratepayers' money.

While this stakeholder group asserts that it is inappropriate that the judgment of utility decision makers be used for the determination of all cost-effective demand-side savings for its utility, ultimately, it is the utility decision-makers who decide which alternative resource plan best meets the Chapter 22 objective for its utility. The utility decision-makers (and not the total resource cost test) decide which DSM programs and demand-side programs investment mechanisms are proposed to the commission. These same utility decision-makers will be accountable for the delivery and performance of their utility's commission-approved DSM programs.

Finally, as staff clarifies, should the electric utility determine that it wants to propose demand-side programs or program plans which are not included in the electric utility's preferred resource plan, a completely new Chapter 22 analysis and new preferred resource plan are not necessary. The only requirement is that the programs and program plans be analyzed through the integration process required by 4 CSR 240-22.060.

The commission will make no changes to the language identified by these comments in the proposed rule or to any other language in the rule that would be related to the issue raised in these comments.

COMMENT #8: Specific Filing Requirements. During the rulemaking hearing, OPC incorporated by reference its "red-lined" version of the proposed rules and stated it supported all of the recommended changes contained in that July 23, 2010 filing. In that filing OPC proposed several changes to 4 CSR 240-3.164 (not already addressed). OPC states that this additional language should be added to 4 CSR 240-3.164 to provide clarity and consistency with the statutory language in MEEIA.

OPC recommends the following addition of 4 CSR 240-3.164(2)(C)12.:

12. Any market transformation elements included in the program and and an EM&V plan for estimating, measuring, and verifying the energy and capacity savings that the market transformation efforts are expected to achieve.

OPC recommends the following changes to 4 CSR 240-3.164(2)(E) and the addition of 4 CSR 240-3.164(2)(F):

(E) Demonstration and explanation of efforts made by the utility to include initiatives that are expected to achieve substantial program participation by hard to reach customers.

(F) Demonstration and explanation of efforts made by the utility to increase the cost effectiveness of, and/or level of participation in, its programs through coordinated or jointly delivered programs with other electric and gas utilities.

RESPONSE: Perhaps OPC has not re-visited its comments from July, 23, 2010, but the current version of the proposed rule adopted language in 4 CSR 240-3.164(2)(C)12. is completely identical to the OPC's proposed language. Finding there is no distinction between the current language and the proposed changes, the commission will not amend that paragraph.

With regard to the other proposed amendments, when OPC filed these proposed changes, it stated in its filing: "Many of these changes are self-explanatory (e.g., to provide clarity or consistency with the language in MEEIA) and some are described in the comments below."

The commission notes that while it appreciates OPC's suggestions, the provisions addressing hard-to-reach customers was simply not fully developed at the time of this rulemaking, and the commission declines to add this language at this time. It is possible that the commission will amend this rule in the future to include this and/or other changes. Indeed, 4 CSR 240-3.164(7) mandates a complete review of the effectiveness of this rule no later than four (4) years after the effective date. The Utility-Specific and State-Wide Collaboratives to be mandated in 4 CSR 240-20.094 will be invited to make any suggested modifications during the review process.

With regard to the suggested changes relating to coordinating programs between gas and electric utilities, MEEIA applies to electric utilities and the commission does not believe it is appropriate to require the level of analysis suggested in OPC's proposed change.

4 CSR 240-3.164 Electric Utility Demand-Side Programs Filing and Submission Requirements

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

(A) 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 demand-side programs' energy savings and demand savings associated with generation, transmission, and distribution facilities including avoided probable environmental compliance costs. The utility shall use the same methodology used in its most recently-adopted preferred resource plan to calculate its avoided costs;

(M) 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 system 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;

(R) Probable environmental compliance 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's decision-makers, may be imposed at some point within the planning horizon which would result in environmental compliance costs that could have a significant impact on utility rates;

(V) Staff means all personnel employed by the commission, whether on a permanent or contract basis, except: commissioners; commissioner support staff, including technical advisory staff; personnel in the secretary's office; and personnel in the general counsel's office, including personnel in the adjudication department. Employees in the staff counsel's office are members of the commission's staff;

(X) Total resource cost test, or TRC, means the test of the cost-effectiveness of demand-side programs that compares the avoided utility costs 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; and

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of the Chairman's Request for A Status Report Regarding Energy Efficiency Advisory Groups and Collaboratives	)))	**File No. AO-2011-0035**
In the Matter of the Consideration and Implementation of Section 393.1075, RSMo., The Missouri Energy Efficiency Investment Act	))))	**File No. EX-2010-0368**

CHAIRMAN CLAYTON'S CONCURRENCE TO FINAL ORDER OF RULEMAKING AND RESPONSE TO STAFF'S REPORT

Issue Date: February 9, 2011

This Commissioner files this opinion in support of the Final Order of Rulemaking in File No. EX-2010-0368, regulations formulating future efforts in energy efficiency investments for Missouri investor-owned utilities. Additionally, this opinion sets out this Commissioner's response to the Staff Report on energy efficiency programs, filed in Case No. AO-2011-0035. These two cases demonstrate the new commitment to energy efficiency in Missouri in empowering utility customers to take control of their energy bills.

In response to my request, the Staff of the Commission filed a report on September 15, 2010, describing the work of each energy efficiency advisory group and collaborative currently addressing the energy efficiency issues facing Missouri's investor-owned electric and natural gas utilities. The report is an impressive compilation of material summarizing the changes in Missouri's efforts at improving the efficient delivery and use of energy. As our nation faces an uncertain future with regard to energy-related priorities, the compilation of material demonstrates the Commission's new commitment to assisting customers and utilities in better managing our energy usage through efficiency programs.

The report highlights that in the past several years, Missouri utilities have gone from a few efficiency programs inconsistently scattered among varying sectors to a comprehensive offering of programs with relatively consistent goals among all utilities. Collaboratives or stakeholder groups have been established for each utility to collect input and formulate policy involving diverse groups, associations and agencies with many people effectively engaged. Program offerings are considered, funded and implemented through the collaboratives, with joint recommendations made to the Commission for approval or rejection in a rate case. Procedures are now in place for resolution of disputes among parties and more information is being distributed to more utility customers than ever before with a wide array of opportunities to reduce energy bills.

The concept of energy efficiency is being embraced as never before. Utilities are now recognizing the benefits of efficient use through reduced demand and energy charges and with less urgency in identifying new sources of electric generation or natural gas acquisition. With increased efficiency of energy use, customers are less vulnerable to natural gas price volatility. Utilities are able to delay or avoid costly new energy sources. Demand Response programs are in place in some territories in attempts to avoid the use of costly gas "peaker plants" in times of high demand, which demonstrate that utilities and customers can benefit from reducing power generation costs. Efficiency programs, in general, are smoothing increases in overall demand with more manageable growth, while avoiding the difficulties of securing new, costly baseload generation.

Customers have much to gain from efficient use of energy. While customers benefit from lower utility costs, customers also receive the direct benefit education and training in learning how energy is used, how it is priced and how they can find ways to reduce consumption, thereby , reducing their monthly energy bills. Customers must have greater options through utility programs in evaluating appliance purchases, understanding heating

and cooling needs, learning about new technologies, and learning that one's quality of life does not have to decrease when energy is used more efficiently. To customers, effective energy efficiency programs translate into empowerment to take control of their energy bills. Rebates, incentives and education provide customers with the necessary tools to change behavior and change how energy decisions are made.

The Commission has recognized that these new programs require adequate funding to be effective. In 2000, total funding for efficiency programs focused primarily on weatherization in the amount of $875,000, involving a couple of utilities. In 2010, funding levels have increased to $53 million, including all 8 utilities. The Commission has determined that natural gas utilities should strive for the target of EE funding at a minimum of .5% of their gross revenues, and all large gas utilities are moving toward this policy target. Electric utilities are taking similar steps at developing and delivering a comprehensive offering of efficiency programs with sufficient funding levels.

Lastly, as Missouri ramps up its efficiency programs, its investments and its increase in knowledge and action for customers, this Commission and future Commissions must be prepared to address an evolving utility industry. If load growth is curtailed, there will be pressure to reevaluate how rates are set. Utilities will push for equal or greater returns on efficiency investments and new models of incentives for utility performance in meeting Commission goals and priorities. Utilities will demand fair treatment if downward pressure is applied to their efforts at increasing sales for greater revenue. On the other hand, consumers will demand that the Commission apply close supervision to new programs, carefully scrutinize new rate making requests and cautiously evaluate any modification to the traditional rate of return regulatory compact. This and future Commissions will be faced with balancing these potentially competing positions to ensure that programs are cost-effective,

deliver benefits to both customers and utilities, and do not inequitably shift risk or cost. These are complicated challenges in a new world of energy delivery.

The Commission is prepared to tackle these issues and has taken additional steps to gather information and set policy. First, the Commission continues its statewide energy efficiency study with a partnering agency, the Missouri Energy Center. It is this Commissioner's hope that realistic, achievable goals can be identified to provide greater assistance to those working on Missouri's energy future. Secondly, the Commission has concluded the formal rulemaking process with regulations stemming from Senate Bill 376, the Missouri Energy Efficiency Act. Through these rules, the Commission addresses a number of significant policy questions to provide clarity and certainty for current and future efficiency programs. The Commission has developed the rules with an eye towards flexibility and the understanding that incentive mechanisms will require careful planning and design. The Commission will need several "attempts" at determining the large-scale benefits and costs upon all stakeholders. Lessons learned from those efforts will provide future commissions with the knowledge to develop programs effectively. The rules certainly contemplate a changing world where the regulator may no longer demand greater sales of energy, but rather strive for decreased usage. How does a utility reduce its sales but maintain profitability? The rules are designed to consider this conundrum.

In conclusion, this Commissioner commends and thanks the staff of the Commission for its efforts in working through challenging and potentially controversial issues. Most Missourians are unaware of the work of the Public Service Commission and even fewer know the dedication, the expertise and the significant work ethic of the PSC staff. This report illustrates the giant steps taken in recent years and the future work that lies ahead. It is my hope and request that a similar report be prepared annually, in a format for easy

consumption, so that the public and Commissioners may understand what we are doing on critically important issues and how those issues evolve in the future.

Therefore, it is my request that the Staff prepares an annual update to its report, in a format acceptable to Staff, every September 15th, and makes that update available to the Commission and the public.

For the foregoing reasons, this Commissioner concurs.

Respectfully submitted,

Robert M. Clayton III
Chairman