

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

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

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

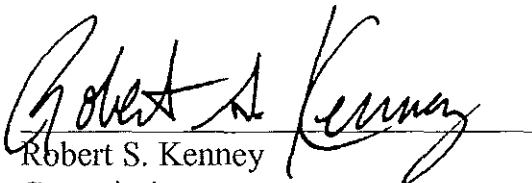
energy more efficiently and in a manner that sustains and enhances their incentives to use energy more efficiently. The MEEIA makes these pronouncements and charges the commission with drafting rules in support of these worthy goals. The MEEIA gives the commission latitude in promulgating rules supportive 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

FIRST REGULAR SESSION

SENATE BILL NO. 376

95TH GENERAL ASSEMBLY

INTRODUCED BY SENATORS LAGER AND CALLAHAN.

Read 1st time February 16, 2009, and ordered printed.

TERRY L. SPIELER, Secretary.

1744S.021

AN ACT

To amend chapter 393, RSMo, by adding thereto one new section relating to energy efficiency investments by electric and gas corporations.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Chapter 393, RSMo, is amended by adding thereto one new
2 section, to be known as section 393.1124, to read as follows:

393.1124. 1. This section shall be known as the "Missouri
2 Residential and Small Business Energy Efficiency Investment Act".

3 2. The public service commission shall permit electric and gas
4 corporations to implement commission-approved energy efficiency
5 programs proposed pursuant to this section. Such programs shall be
6 beneficial to all customers in the customer class in which the program
7 is proposed, regardless of whether the program is utilized by all
8 customers.

9 3. The commission shall develop cost recovery mechanisms that
10 value energy efficiency investments equal to or better than traditional
11 supply side investments. Such mechanisms shall include the
12 capitalization of investments in and expenditures for energy efficiency
13 programs and a recovery of lost sales attributable to approved energy
14 efficiency programs. The commission may also develop cost recovery
15 mechanisms to further encourage investments in energy efficiency
16 including, in combination and without limitation: an incentive rate of
17 return higher than the rate of return on other investments, accelerated
18 depreciation on energy efficiency investments, allowing the utility to
19 retain a portion of the net benefits of an energy efficiency program for
20 its shareholders, allowing the utility a fixed investment recovery
21 mechanism to recover lost margins and a cost adjustment clause for

22 collection of costs associated with energy efficiency programs.

23 4. The commission may reduce or exempt allocation of energy
24 efficiency expenditures to low income classes, as defined in an
25 appropriate rate proceeding, as a subclass of residential service. No
26 customer in any rate class shall pay more than five thousand dollars a
27 month to support programs authorized under this
28 section. Notwithstanding any other statute or commission rules, this
29 section explicitly provides the commission authority to approve low
30 income tariffs.

31 5. The commission shall provide oversight and may adopt rules
32 and procedures and approve corporation-specific settlements and tariff
33 provisions, as necessary, to ensure that electric and gas corporations
34 can achieve the goals of this section. Any rule or portion of a rule, as
35 that term is defined in section 536.010, RSMo, that is created under the
36 authority delegated in this section shall become effective only if it
37 complies with and is subject to all of the provisions of chapter 536,
38 RSMo, and, if applicable, section 536.028, RSMo. This section and
39 chapter 536, RSMo, are nonseverable and if any of the powers vested
40 with the general assembly pursuant to chapter 536, RSMo, to review, to
41 delay the effective date, or to disapprove and annul a rule are
42 subsequently held unconstitutional, then the grant of rulemaking
43 authority and any rule proposed or adopted after August 28, 2009, shall
44 be invalid and void.

45 6. Each electric and gas corporation shall submit an annual
46 report to the commission describing the energy efficiency programs
47 implemented by the utility in the previous year. The report shall
48 document program expenditures, including incentive payments, peak
49 demand and energy savings impacts and the techniques used to
50 estimate those impacts, avoided costs and the techniques used to
51 estimate those costs, the estimated cost-effectiveness of the energy
52 efficiency programs, and the net economic benefits of the energy
53 efficiency programs.

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