

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**STATE OF MISSOURI, ex rel., PUBLIC COUNSEL, APPELLANT
STATE OF MISSOURI, ex rel., AMEREN MISSOURI, APPELLANT
STATE OF MISSOURI, ex rel., KANSAS CITY POWER & LIGHT COMPANY AND
KCP&L GREATER MISSOURI OPERATIONS COMPANY, APPELLANT**

vs.

**PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, RESPONDENT
EARTH ISLAND INSTITUTE, RESPONDENT**

DOCKET NUMBER WD74676 (Consolidated with WD74678, WD74848, WD74849 and
WD74850)

DATE: January 15, 2013

Appeal from:

The Circuit Court of Cole County, Missouri
The Honorable Richard R. Green, Judge

Appellate Judges:

Division Two: Joseph M. Ellis, P.J., Alok Ahuja and Mark D. Pfeiffer, JJ.

Attorneys:

Paul A. Boudreau, for Appellant Union Electric Company
Lewis R. Mills, Jr., for Appellant Office of Public Counsel
Larry W. Dority, for Appellant Kansas City Power & Light Company & KCP&L Greater
Missouri Operations Company
Henry B. Robertson, for Respondent Earth Island Institute
Jennifer L. Heintz, for Respondent Public Service Commission

MISSOURI APPELLATE COURT OPINION SUMMARY

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Cole County, Missouri

Before Division Two Judges: Joseph M. Ellis, P.J., Alok Ahuja and Mark D. Pfeiffer, JJ.

Appellants Union Electric Company d/b/a Ameren Missouri ("Ameren"), Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company (collectively "KCP&L"), and the Office of Public Counsel ("the OPC") appeal from four final orders of rulemaking entered by the Public Service Commission ("the Commission") adopting rules to implement the Missouri Energy Efficiency Investment Act ("the MEEIA"), § 393.1075.

In 2009, the legislature enacted the MEEIA, which establishes that it is Missouri's policy to value demand-side investments 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. Demand-side programs are programs instituted by a utility in an effort to increase energy efficiency by reducing its customers' use of and demand for electricity. Because any reduction in consumer use of electricity ultimately affects a utility's revenue, utilities have traditionally been reluctant to implement demand-side programs. Thus, the MEEIA further provides that the Commission may develop cost recovery mechanisms to further encourage utilities to invest in demand-side programs.

In 2010, the Commission promulgated four rules pursuant the MEEIA that pertain to demand-side programs and cost-recovery mechanisms. The rules set forth the requirements and procedures by which electric utilities are to file for approval, modification, or discontinuation of demand-side programs with the Commission. The rules also outline the procedures by which utilities can apply for a demand-side program investment mechanism ("DSIM"), which is a mechanism approved by the Commission that encourages investment in demand-side programs. Under the rules, a utility's DSIM can include recovery of demand-side program costs and recovery of lost revenues.

In approving a utility's DSIM, the Commission also approves a DSIM rate. The DSIM rate is a charge attributable to a utility's DSIM that appears on customers' bills. Pursuant to the rules, the Commission can approve a DSIM that would permit the DSIM rate to be adjusted outside of a general rate case proceeding.

On appeal, each appellant raised multiple points of error. The majority of those points addressed concerns regarding the rules' rate adjustment provisions as well as the recovery of lost revenues component.

AFFIRMED

Division Two holds:

(1) The Commission's orders of rulemaking are not unlawful in that they permit the DSIM rates to be adjusted outside of a general rate case proceeding because the legislature gave the Commission a broad grant of authority in developing cost-recovery mechanisms that encourage demand-side investments and language in the MEEIA suggests that the Commission had the implied authority to promulgate rules that permit single-issue ratemaking.

(2) The Commission's requirements for semi-annual adjustments of DSIM rates are not unreasonable in that they do not permit adjustments to the lost revenue or incentive components in the same manner in which they permit adjustment to the cost recovery component because such an argument is merely subjective and does not constitute a sufficiently weighty reason for invalidating rule 4 C.S.R. § 240-20.093.

(3) The Commission's orders of rulemaking are not unlawful in that they permit for the recovery of lost revenues because the Commission had the implied authority to permit recovery of lost revenues under the MEEIA in that lost revenues can be considered a reasonable and prudent cost of delivering demand-side programs in the context of the MEEIA. Furthermore, allowing recovery of lost revenues attributable to energy efficiency programs serves as an effective mechanism that ensures utility financial incentives are aligned with helping customers to use energy more efficiently and is, thereby, consistent with the goals of the MEEIA.

(4) The Commission's definition of lost revenues does not contravene the goals and objectives of the MEEIA because, by narrowly tailoring its definition of lost revenues, the Commission ensures that utilities will recover lost revenues only attributable to the utility's demand-side programs thereby making the definition consistent with the MEEIA's directive that the Commission cannot permit recovery unless a demand-side program results in energy or demand savings. Furthermore, the fact that the definition of lost revenues promulgated by the Commission does not mirror the definition of lost revenues found in Chapter 22, which addresses integrated resource planning, does not make the definition unreasonable given that testimony at the hearing indicated Chapter 22 was drafted in a different context and has been unsuccessful in encouraging investment in demand-side programs.

(5) The Commission's orders of rulemaking are not unlawful or unreasonable in that the rules provide that "[a]ny explicit utility lost revenue component of a DSIM shall be implemented on a retrospective basis and all energy and demand savings to determine a DSIM utility lost revenue requirement must be measured and verified through EM&V prior to recovery" because the MEEIA gives the Commission explicit authority to provide oversight to utilities' demand-side programs, including independent evaluation of demand-side programs, as necessary, and the retrospective nature of the rules is also consistent with the MEEIA's directive that the Commission cannot permit recovery unless a demand-side program results in energy or demand savings.

(6) The Commission did not err in concluding that adopting a rule permitting the imposition of penalties or adverse consequences was inconsistent with the goal of the MEEIA to encourage demand-side investment because the MEEIA was enacted to encourage utilities to voluntarily invest in demand-side programs and implementing rules that would impose the risk of penalties or adverse consequences as a result of not meeting certain energy savings goals would provide little incentive for utilities to invest in demand-side programs.

(7) The Commission's order of rulemaking with respect to rule 4 C.S.R. § 240.20-094 is not null and void or unenforceable in that the Commission failed to respond to a portion of the OPC's comments regarding rule 4 C.S.R. § 240-20.094 because the Commission's response to the OPC's comments establishes that the Commission clearly acknowledged the OPC's concerns about the specific calculation of a utility's savings goals. Furthermore, the record establishes that that OPC had the opportunity to express its concerns about the proposed rules to the Commission and that the Commission took those concerns into consideration. The Commission, therefore, complied with the purpose of the notice and comment requirements, which is to allow opportunity for comment by supporters or opponents of the measure so as to induce modification of the rules.

Opinion by Joseph M. Ellis, Judge

Date: January 15, 2013

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