

FIRST REGULAR SESSION
[P E R F E C T E D]
SENATE SUBSTITUTE NO. 2 FOR

SENATE BILL NO. 209

90TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR GOODE.

Offered March 31, 1999.

Senate Substitute No. 2 adopted, March 31, 1999.

Taken up for Perfection March 31, 1999. Bill declared Perfected and Ordered Printed, as amended.

TERRY L. SPIELER, Secretary.

S0192.09P

AN ACT

To repeal sections 393.298, 393.299 and 393.302, RSMo Supp. 1998, relating to utility taxation, and to enact in lieu thereof eight new sections relating to the same subject, with an emergency clause.

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

Section A. Sections 393.298, 393.299 and 393.302, RSMo Supp. 1998, are repealed and eight new sections enacted in lieu thereof, to be known as sections 144.850, 144.853, 144.856, 144.859, 144.861, 393.298, 393.299 and 393.302, to read as follows:

144.850. 1. It is the intent of the general assembly through the passage of this act:

(1) To maintain a fair and equitable tax structure and to preserve the state and local tax base by requiring all persons who provide electricity or gas service to pay an equitable share; and

(2) To equalize the amount of sales and use taxes on competing suppliers of electricity and gas service.

2. Political subdivisions provide police, fire and public health services, including the inspection of gas and electric equipment and other facilities used in the consumption of gas and electricity. The state and political subdivisions impose sales and use taxes on providers of electricity and gas services in order to pay for these and

EXPLANATION--Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

other services related to the transportation, use and consumption of electricity and gas services and for the general operation of government.

3. Missouri has historically restricted competition with respect to electricity and gas services by authorizing the Missouri public service commission to limit the number of providers and has allowed political subdivisions to require franchises for these services. Persons entering the gas and electric markets within Missouri receive substantial revenues from consumers in Missouri, thereby creating a purposeful economic presence in this state. In addition, these persons may also cause electricity and gas to be transported over rights-of-way and utility easements and may use electric lines or gas lines which are owned, controlled and maintained by other public and private entities in this state. Unless all participants in the electricity and gas markets pay comparable taxes and fees, there will be significant tax and franchise fee revenue losses by the state and political subdivisions and unfair competitive disparities among such participants.

4. The legislature finds that electricity and gas are essential, but potentially dangerous, commodities in modern society. The electricity transmission and distribution system is an interconnected and interdependent grid. Therefore, the legislature finds that it is in the interest of public health and safety to require registration of all sellers of electricity and gas for use or consumption within Missouri.

5. It is not the intent of this act to regulate the transportation of natural gas, methane, or propane in interstate commerce to the extent that such regulation is preempted by the Constitution of the United States.

144.853. As used in sections 144.853 to 144.865, the following terms mean:

- (1) "Commission", the Missouri public service commission;**
- (2) "Distribution system", the physical plant used to provide energy services including facilities, structures, wires and appurtenances thereto;**
- (3) "Distributor", an electrical or gas corporation as defined by section 386.020, RSMo, which is authorized by the commission under chapter 393 to provide or distribute energy services, or rural electric cooperative organized under chapter 394, RSMo;**
- (4) "Energy services", electricity and all associated services that are necessary for its delivery through a distribution system including but not limited to the generation, production, transmission, distribution, billing and metering of such services, and natural gas, propane or methane;**
- (5) "Political subdivision", any county, municipality or village in the state of Missouri;**
- (6) "Retail user", any person who purchases energy services for its own use or consumption and not for resale;**

(7) "Seller", any person who directly or indirectly uses, leases or controls the distribution system of a distributor or a political subdivision or any part thereof to sell at retail energy services which are consumed within the political subdivision other than a distributor or a political subdivision which uses its own distribution system even if title to the energy services passes from such person to the retail customer or a third party outside of a political subdivision or before such energy services enter the distribution system. A retail user of energy services is deemed not to be a seller within the meaning of this section with respect to the energy services it consumes.

144.856. 1. No person, other than a distributor or a political subdivision providing energy services within its territorial limits, shall provide energy services in a political subdivision unless the person is certified by the commission as a seller and files its agreement with the commission to collect and remit all state and local sales and use taxes for all energy services that have not been excluded from taxation by rule, regulation or other ruling of the department of revenue. Retail sales of energy services by a distributor or political subdivision for consumption outside the territorial limits of the distributor or political subdivision shall only be made if the distributor or political subdivision is certified as a seller by the commission. No retail user shall obtain any energy services from a person other than the distributor or political subdivision providing service within its territorial limits unless the person has been certified as a seller and filed its agreement with the commission to collect and remit all state and local sales and use taxes for all energy services that have not been excluded from taxation by law or rule, regulation or other ruling of the department of revenue. Electric and gas corporations shall file tariffs and electric cooperatives shall implement service conditions no later than October 1, 1999, to comply with the provisions of this section. Any electric or gas corporation which is not providing energy services with respect to energy services sold by a seller to a retail user as of October 1, 1999, shall, upon receiving a request to provide such services, file tariffs or implement service conditions within thirty days of the request. Such tariffs or service conditions shall contain provisions requiring each retail user which purchases or desires to purchase energy services from a person, other than the distributor authorized to provide energy services in the political subdivision in which such energy services will be consumed, to provide documentation to the distributor or political subdivision identifying such person and showing that such person has been certified as a seller by the commission. For purposes of meeting this requirement, the retail user shall furnish a copy of the certificate granted such person by the commission. In the event the retail user fails to provide such a certificate, the distributor or political subdivision shall be the only person authorized to provide energy services to the retail user. The commission shall maintain a current list of all sellers that have valid

certificates, and such list shall be open to public inspection. If, after review of such certificates or upon complaint by the state of Missouri or its political subdivisions, by any distributor, by any seller or by any party with a substantial interest, as determined by the commission, the commission determines that any certificate is invalid or is not in compliance, it shall issue a notice to all affected distributors directing that they discontinue accepting such certificate and discontinue providing energy services to retail users based on that particular certificate or any subsequent certificates involving the same seller. Upon a finding that an electrical or gas corporation has provided or distributed, or is providing or distributing, energy services to any person who has obtained energy services from a seller which has not been certified by the commission, the commission shall within thirty days of the finding issue an order to the electrical or gas corporation to discontinue energy services to such person, after appropriate notice to the affected persons, such notice to be determined by the commission. The commission may exercise any additional authority as granted pursuant to chapter 386, RSMo, to enforce the provisions of this section.

2. An agreement described in subsection 1 of this section shall expressly state that the seller waives (1) its right to challenge the validity of the agreement and (2) its right to the refund of amounts paid pursuant to the agreement. Any person who otherwise has standing may challenge the validity of this section without signing such agreement by filing an action for a declaratory judgment in circuit court in the county in which the political subdivision is located. The agreement filed with the commission under subsection 1 of this section shall be limited solely to the requirements of this subsection and the seller's agreement to pay its taxes and provisions which require the seller to make available to the political subdivision or the commission its records, including the right to audit.

3. The commission shall establish procedures for certification and enforcement pursuant to chapter 536, RSMo.

4. Nothing in this section shall be construed to give any seller the right to use the rights-of-way, utility easements or the distribution system of any distributor or political subdivision for any purpose other than to provide energy services to the seller's retail customers.

5. Any agreement described in subsection 1 of this section shall cease to be effective upon the failure of the seller to fulfill any material obligation under the agreement. The appropriate political subdivision shall notify the commission of any failure to pay any amount required by any agreement described in subsection 1 of this section. Upon such notification, the commission shall immediately notify the seller which shall cease to provide energy services unless it requests a hearing with the commission within fifteen days of the date the notice is filed with the

commission. Upon receiving notice from the seller requesting a hearing, the commission shall conduct a hearing to determine whether all material obligations under an agreement have been satisfied. If the commission determines that material obligations have not been satisfied, it shall notify the distributor, and the seller shall thereafter be prohibited from providing energy services from the date set forth in the notice, which shall not be less than thirty days after the commission makes its determination. The distributor shall not provide energy services to the seller if the distributor does not request a hearing after being notified of the seller's material fault or if the commission determines that the seller has failed to satisfy a material obligation of the agreement and thirty days have expired from the date of the commission notification of a breach of a material obligation of any agreement authorized by subsection 1 of this section.

6. This section shall not be construed as conferring any rights on any seller to provide energy services within a political subdivision in the state of Missouri. No seller may provide energy services unless it does so in accordance with all applicable laws and in accordance with the applicable rules of the commission. Any seller of natural gas shall file its agreement with the commission within thirty days from the effective date of this section.

7. Any person liable for the tax under this section, upon proof that such person has paid a tax in another state or political subdivision with respect to a charge for the sale of such gas, electricity or energy services, shall be allowed a credit against the tax authorized by this section, to the extent of the amount of the tax legally due and paid in the other state or political subdivision with respect to such charge. However, a credit shall not be permitted against the tax due under this subsection if the service supplied is billed or paid within the political subdivision charging the tax.

144.859. Notwithstanding the provisions of section 1.140, RSMo, to the contrary, the provisions of section 144.856 shall be nonseverable, and if any provision is for any reason held to be invalid, such decision shall invalidate all of the remaining provisions of section 144.856.

144.861. 1. In the event that any legal action to challenge the validity of any agreement made pursuant to subsection 1 of section 144.856 is filed in any court of competent jurisdiction, the party initiating that action shall immediately furnish a certified copy of the initial pleading to the commission, which act shall be deemed to suspend the provisions of such agreement pending a final and nonappealable judgment or disposition of such action. Upon receipt of the notification, the commission shall immediately notify each affected political subdivision and person providing energy services of the suspension of those agreements. No seller or distributor shall provide energy services after it receives notice from the commission that the seller's agreements

have been suspended pursuant to subsection 1 of section 144.856.

2. In the event that the provisions of section 144.856 are declared to be void or invalid by final judgment of a court of competent jurisdiction, no energy services shall be permitted except upon a finding of public convenience and necessity and compliance with all provisions of this chapter, regulations adopted pursuant to this chapter, and commission orders. No refund of any tax or fee shall be made to any seller that signs an agreement waiving its right to challenge the validity of section 144.856.

393.298. As used in this section and sections 393.299, 393.301 and 393.302, the following terms mean:

- (1) "Commission", the Missouri public service commission;
- (2) "Distribution system", the physical plant used to provide energy services including facilities, structures, wires and appurtenances thereto;
- (3) "Distributor", an electrical or gas corporation as defined by section 386.020, RSMo, which is authorized by the commission under this chapter, to provide or distribute energy services, **or rural electric cooperative organized under chapter 394, RSMo;**
- (4) "Energy services", [the retail sale of] electricity [or natural gas, propane or methane to customers or consumers] and all associated services that are necessary for their delivery through a distribution system including but not limited to the generation, production, transmission, distribution, billing and metering of such services, **and natural gas, propane or methane;**
- (5) "Gross receipts", all revenues from energy services which are subject to a business license tax of a political subdivision or a franchise agreement between a distributor and a political subdivision or a PILOT;
- (6) "Person", includes any individual, firm, cooperative, copartnership, joint venture, association, corporation, municipal or private, and whether organized for profit or not, state, county, political subdivision, state department, commission, board, bureau or agency, or any other group or combination acting as a unit, and the plural as well as the singular number;
- (7) "PILOT", the payment or transfer of funds or services by a gas or electric utility owned by a political subdivision and used to provide government services by the political subdivision including the value of free or subsidized services, provided the value of these services are stated annually in an ordinance as a percentage of the total gross receipts of the gas or electric system;
- (8) "Political subdivision", any county, municipality or village in the state of Missouri;
- (9) "Proportionate share", the seller's gross receipts multiplied by the franchise fee rate, specified in a franchise agreement between a distributor and a political subdivision or the PILOT rate as provided in any ordinance or order of the political subdivision for the corresponding use of rights-of-way, utility easements or the distribution system of a political subdivision;
- (10) **"Retail user", any person who purchases energy services for its own use or**

consumption and not for resale;

(11) "Seller", any person who directly or indirectly uses, leases or controls the distribution system of a distributor or a political subdivision or any part thereof to sell energy services at retail which are consumed within the political subdivision other than a distributor or a political subdivision which uses its own distribution system, even if title to the energy services passes from such person to the retail customer or a third party outside of a political subdivision or before such energy services enter the distribution system. A retail user of energy services is deemed not to be a seller within the meaning of this section with respect to the energy services it consumes.

393.299. 1. [No person, other than a distributor or a political subdivision operating within its territorial limits, shall provide energy services in a political subdivision which has business license taxes in effect pursuant to section 66.300, RSMo, section 71.610, RSMo, section 92.045, RSMo, section 94.110 or 94.360, RSMo, on persons who sell energy services unless the person is certified by the commission as a seller and files its agreement with the commission to pay to the political subdivision all applicable business license taxes. All Retail sales of energy shall be made by a distributor, seller or a political subdivision operating within its territorial limits. No distributor or political subdivision shall provide energy services to any person on behalf of any seller unless the seller has been certified and filed its agreement with the commission to pay all applicable business license taxes and the commission has furnished such distributor or political subdivision with evidence of such certification.] **No person, other than a distributor or a political subdivision providing energy services within its territorial limits, shall provide energy services in a political subdivision unless the person is certified by the commission as a seller and files its agreement with the commission to collect and remit all business license taxes in effect pursuant to section 66.300, RSMo, section 71.610, RSMo, section 92.045, RSMo, section 94.110 or 94.360, RSMo. Retail sales of energy services by a distributor or political subdivision for consumption outside the territorial limits of the distributor or political subdivision shall only be made if the distributor or political subdivision is certified as a seller by the commission. No retail user shall obtain any energy services from a person other than the distributor or political subdivision providing service within its territorial limits unless the person has been certified as a seller and filed its agreement with the commission to collect and remit all business license taxes in effect pursuant to section 66.300, RSMo, section 71.610, RSMo, section 92.045, RSMo, section 94. 110 or 94.360, RSMo. Electric and gas corporations shall file tariffs and electric cooperatives shall implement service conditions no later than October 1, 1999, to comply with the provisions of this section. Any electric or gas corporation which is not providing energy services with respect to energy services sold by a seller to a retail user as of October 1, 1999, shall, upon receiving a request to provide such services, file tariffs or implement service conditions within thirty days of**

the request. Such tariffs or service conditions shall contain provisions requiring each retail user which purchases or desires to purchase energy services from a person, other than the distributor authorized to provide energy services in the political subdivision in which such energy services will be consumed, to provide documentation to the distributor or political subdivision identifying such person and showing that such person has been certified as a seller by the commission. For purposes of meeting this requirement, the retail user shall furnish a copy of the certificate granted such person by the commission. In the event the retail user fails to provide such a certificate, the distributor or political subdivision shall be the only person authorized to provide energy services to the retail user. The commission shall maintain a current list of all sellers that have valid certificates, and such list shall be open to public inspection. If, after review of such certificates or upon complaint by the state of Missouri or its political subdivisions, by any distributor, by any seller or by any party with a substantial interest, as determined by the commission, the commission determines that any certificate is invalid or is not in compliance, it shall issue a notice to all affected distributors directing that they discontinue accepting such certificate and discontinue providing energy services to retail users based on that particular certificate or any subsequent certificates involving the same seller. Upon a finding that an electrical or gas corporation has provided or distributed, or is providing or distributing, energy services to any person who has obtained energy services from a seller which has not been certified by the commission, the commission shall within thirty days of the finding issue an order to the electrical or gas corporation to discontinue energy services to such person, after appropriate notice to the affected persons, such notice to be determined by the commission. The commission may exercise any additional authority as granted pursuant to chapter 386, RSMo, to enforce the provisions of this section.

2. No person shall provide energy services in a political subdivision if a franchise agreement is in effect between a distributor and a political subdivision with respect to energy services, or if the political subdivision owns the distribution system, unless (1) that person enters into an agreement with the political subdivision to pay its proportionate share of the franchise fee or the PILOT, which agreement shall be supplied to the distributor, or (2) the person obtains certification from the commission as a seller and files its agreement to pay the seller's proportionate share of any franchise fee or PILOT. No distributor or political subdivision shall provide energy services to any person on behalf of any seller if a franchise agreement is in effect between a distributor and a political subdivision for energy services, or if the political subdivision owns the distribution system, unless (1) that seller has entered into an agreement with the political subdivision to pay the seller's proportionate share of the franchise fee or the PILOT, or (2) the seller has obtained certification from the commission as a seller and files its agreement to pay the seller's proportionate share of any franchise fee or PILOT. **Electrical and gas**

corporations shall file tariffs and electric cooperatives shall implement service conditions no later than October 1, 1999, to comply with the provisions of this subsection.

3. An agreement described in subsections 1 and 2 of this section shall expressly state that the seller waives (1) its right to challenge the validity of the agreement and (2) its right to the refund of amounts paid pursuant to the agreement. Any person who otherwise has standing may challenge the validity of this section without signing such agreement by filing an action for a declaratory judgment in circuit court in the county in which the political subdivision is located. The agreement filed with the commission under subsections 1 and 2 of this section shall be limited solely to the requirements of this subsection and the seller's agreement to pay its taxes, its proportionate share of franchise fees or PILOT's and provisions which require the seller to make available to the political subdivision or the commission its records, including the right to audit.

4. The commission shall establish procedures for certification **and enforcement** pursuant to chapter 536, RSMo.

5. Nothing in this section shall be construed to give any seller the right to use the rights-of-way, utility easements or the distribution system of any distributor or political subdivision for any purpose other than to provide energy services to the seller's retail customers.

6. Any agreement described in subsection 1 or 2 of this section shall cease to be effective upon the failure of the seller to fulfill any material obligation under the agreement. The appropriate political subdivision shall notify the commission of any failure to pay any amount required by any agreement described in subsection 1 or 2 of this section. Upon such notification, the commission shall immediately notify the seller which shall cease to provide energy services unless it requests a hearing with the commission within fifteen days of the date the notice is filed with the commission. Upon receiving notice from the seller requesting a hearing, the commission shall conduct a hearing to determine whether all material obligations under an agreement have been satisfied. If the commission determines that material obligations have not been satisfied, it shall notify the distributor, and the seller shall thereafter be prohibited from providing energy services from the date set forth in the notice, which shall not be less than thirty days after the commission makes its determination. The distributor shall not provide energy services to the seller if the distributor does not request a hearing after being notified of its material fault or if the commission determines that the seller has failed to satisfy a material obligation of the agreement and thirty days have expired from the date of the commission notification of a breach of a material obligation of any agreement authorized by subsection 1 or 2 of this section.

7. A seller shall be required to pay a political subdivision at a rate equal to but not greater than the rate paid by a distributor for business license taxes, franchise fees or PILOT's as provided for in an ordinance or order of the political subdivision or in a franchise agreement.

8. This section shall not be construed as conferring any rights on any seller to provide energy services within a political subdivision in the state of Missouri. No seller may provide energy services unless it does so in accordance with all applicable laws and in accordance with the applicable rules of the commission. Any seller of natural gas shall file its agreement with the commission within thirty days from the passage of this section.

9. Any person liable for the tax under this section, upon proof that such person has paid a **business license** tax in another state or political subdivision with respect to a [charge] **business license** for the sale [or transfer of such gas, electricity or] **of** energy services, shall be allowed a credit against the tax authorized by this section, to the extent of the amount of the tax legally due and paid in the other state or political subdivision with respect to such charge. **However, a credit shall not be permitted against the tax due under this subsection if the service supplied is billed or paid within the political subdivision charging the tax.**

10. Notwithstanding the provisions of section 1.140, RSMo, to the contrary, the provisions of this section shall be nonseverable, and if any provision is for any reason held to be invalid, such decision shall invalidate all of the remaining provisions of this section.

393.302. **1.** Notwithstanding the provisions of section 393.299, a political subdivision may by ordinance impose a tax upon persons who use or consume gas, electricity or energy services within such political subdivision but who take title to such gas, electricity or energy services outside of that political subdivision. Any person liable for the tax under this section, upon proof that such person has paid a tax in another state or political subdivision with respect to a charge for the sale or transfer of such gas, electricity or energy services, shall be allowed a credit against the tax authorized by this section, to the extent of the amount of the tax legally due and paid in the other state or political subdivision with respect to such charge. [The tax shall be measured by all charges for gas, electricity or energy services by the person using or consuming the gas, electricity or energy services at a rate equal to the rate of the applicable business license tax, as authorized in section 66.300, RSMo, section 71.610, RSMo, section 92.045, RSMo, section 94.110 or 94.360, RSMo, or the applicable franchise fee.]

2. The tax shall be computed by multiplying a rate equal to the applicable business license tax, as authorized by section 66.330, 71.610, 92.045, 94.110 or 94.360, RSMo, or the applicable franchise fee, by all charges for gas, electricity, or energy services to the person using or consuming the gas, electricity, or energy services, such charges to include any separately stated recovery of the applicable business license tax from the customer.

3. Such tax shall not become effective unless the governing body of the political subdivision submits to the voters of that political subdivision at any public election allowed pursuant to subsection 1 of section 115.123, RSMo, a proposal to impose a tax under the provisions of this section. The question shall be submitted to the voters in substantially the following form:

Shall the (political subdivision) levy a tax for the purpose of equalizing the obligations of all users of gas, electricity or energy services of a percent which is equal to the obligations of current taxpayers on the purchase price of gas, electricity or energy services sold by any person, corporation or other business entity for ultimate use in the political subdivision but not subject to the current tax?

YES

NO

If a majority of the votes cast on the question by the qualified voters voting thereon are in favor of the question, then the tax shall become effective on the first day of the first calendar quarter following the calendar quarter in which the election was held. If a majority of the votes cast on the question by the qualified voters voting thereon are opposed to the question, then the governing body of the political subdivision shall have no power to impose the tax authorized by this section unless and until the governing body of the political subdivision again submits the question to the qualified voters of the political subdivision and such question is approved by a majority of the qualified voters voting on the question.

Section B. Because of the need to ensure a stable and reliable source of electricity and gas for the cities of this state, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval.

Bill

Copy