BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Proposed Rules	)	
4 CSR 240-3.62 and 4 CSR 240-20.91	)	Case No. EX-2008-0105
Environmental Cost Recovery	)	
Mechanisms	)	

THE MISSOURI INDUSTRIAL ENERGY CONSUMERS' APPLICATION FOR REHEARING

Comes now Anheuser-Busch, BioKyowa, Boeing, Cargill, Chrysler, Doe Run, Enbridge, Explorer Pipeline, Ford, General Motors, Hussmann, JW Aluminum, Monsanto, National Starch, Nestlé Purina, Pfizer, Precoat, Procter & Gamble, Solutia and US Silica, hereafter referred to as the Missouri Industrial Energy Consumers or "MIEC", and pursuant to §386.500 RSMo. and 4 CSR 240-2.160, seeks rehearing of the Commission's Orders of Rulemaking Governing Environmental Cost Recovery Mechanisms ("ECRMs") found at 4 CSR 240-3.162 and 4 CSR 240-20.091 ("Orders"). The Commission's Orders are unlawful, unjust and unreasonable. For its application, the MIEC states as follows:

1. On March 3, 2008, the Commission provided the Orders to the Joint Commission on Administrative Rules and placed the Orders on the Commission's electronic filing information system on March 5, 2008. Pursuant to §536.024 RSMo., the earliest date by which the Commission may submit the Orders to the Secretary of State is April 3, 2008. The Orders are not yet legally effective.

2. In its Orders, the Commission rejected certain arguments of the MIEC and other consumer representatives with a dissent from Commissioner Clayton. The consumer arguments asserted that the Commission failed to comply with procedural requirements and consumer protection requirements of the enabling statute §386.266 RSMo.

3. The first ground upon which the MIEC requests rehearing is that Commission lacked authority to promulgate the ECRM rules because it failed to act within the time limits specified by §386.266 RSMo. The Missouri Supreme Court held in 1979 that absent specific statutory authority, the Commission does not have the legal authority to grant utilities the right to collect costs through the use of surcharges. State ex rel. Utility Consumers Council of Mo. v. Public Service Comm. of Mo., 585 S.W.2d 41, 59 (Mo. 1979). In 2005, the Missouri Legislature passed, and the Governor signed into law, Senate Bill 179, codified at §386.266 RSMo. This legislation was designed to give the Commission limited authority to approve rate schedules with periodic rate adjustments outside of a general rate proceeding to reflect increases or decreases in a utility's prudently incurred environmental compliance costs. Section 386.266.4 specifically authorizes the Commission to approve such rate schedules conditioned upon, but not limited to, the following: (1) "considering all relevant factors which may affect the costs or overall rates and charges" of a utility; and (2) a finding that such rate schedules are "reasonably designed to provide the utility with a sufficient opportunity to earn a fair return on equity." The statute authorized the Commission to adopt regulations:

> ***Prior to August 28, 2005***, the [Commission] shall have the authority to promulgate rules under the provisions of chapter 536, RSMo., as it deems necessary, to govern the structure, content and operation of such rate adjustments, and the procedure for the submission, frequency, examination, hearing and approval of such rate adjustments.

§386.266.9 RSMo. (emphasis added).

4. Administrative agencies only have such jurisdiction or authority as granted by the legislature. State ex. Rel. Mo. Health Care Ass'n v. Mo. Health Facilities Review Comm., 768 S.W.2d 559, 562 (Mo. App. 1988) (citing Sheets v. Labor & Indus. Relations Comm., 622 S.W.2d 391, 393 (Mo. App. 1981). If a regulation is promulgated by an administrative agency with properly delegated authority, that regulation will have force and effect of law. United Pharmacal Co. of Mo.

v. Mo. Bd. of Pharmacy, 159 S.W.3d 361, 365 (Mo. 2005). However, regulations that exceed the scope of the legislative authority conferred upon the [administrative] agency or attempting to end or modify the statute are void. Mo. Hosp. Ass'n v. Mo. Dept. of Consumer Affairs, Regulations & Licensing, 731 S.W.2d 262, 264 (Mo. App. 1987). As defined by the Missouri Supreme Court, action that is void is "null; ineffectual; nugatory; [has] no legal force or binding effect…" United Pharmacal Co. of Mo., 159 S.W.3d at 365. Accordingly, if an administrative agency promulgates regulations without authority, such regulations will have no legal force. Mo. Hosp. Ass'n, 731 S.W.2d at 264. Therefore, regulations may only be promulgated to the extent of, and within the delegated authority of the statute involved, to be valid. Hearst Corp. v. Dir. of Revenue, 779 S.W.2d 557, 558-59 (Mo. 1989).

5. While delegated authority may be expressed or implied, an administrative agency cannot infer a power from the statute simply because that power would facilitate the accomplishments of an end deemed beneficial. Pen-Yan Investment, Inc. v. Boyd Kansas City, Inc., 952 S.W.2d 299, 304 (Mo. App. W.D. 1997). Missouri courts recognize that time limits imposed on administrative agencies by statute are jurisdictional and that once the time limit passes, the agency is without jurisdiction to proceed in the matter. Fehrman v. Blunt, 825 S.W.2d 658, 662 (Mo. App. E.D. 1992). Missouri courts have also recognized that an administrative agency's rulemaking power does not permit it to increase those statutory time limitations. Id. Thus, an administrative agency cannot enlarge the time frame in which it has to act beyond the time period set forth in its enabling statute. R.B. Industries, Inc. v. Goldberg, 601 S.W.2d 5, 7 (Mo. banc 1980).

6. The Orders exceed the scope of authority conferred upon the Commission by the Missouri Legislature. The General Assembly's grant of rule-making authority to the Commission pursuant to §386.266 was specific and limited. The plain language of §386.266.9 imposes a deadline of August 28, 2005 on the Commission's authority to promulgate regulations governing the

structure, content, and operation of rate adjustments, and the procedure for the submission, frequency, examination, hearing, and approval of such rate adjustments. §386.266.9 RSMo. However, the rulemaking process for the ECRM rules did not begin or end prior to mandatory August 28, 2005 deadline. Because the Commission did not promulgate the ECRM rules prior to August 28, 2005, the Commission did not have authority to take such action. In effect, the Orders attempt to expand the Commission's delegated authority by reading the emphasized words into §386.266.9: "Prior to **and after** August 28, 2005, the [Commission] shall have authority to promulgate rules[.]" However, this is contrary to the plain language of §386.266.9 because it extends the Commission's authority past the mandatory deadline expressly stated in the statute.

7. The Commission lacked jurisdiction to promulgate the ECRM rules because the rules were promulgated after August 28, 2005. Under §386.266.9, the Commission could only promulgate regulations within a very limited time frame: "prior to August 28, 2005". The statute did not expressly or impliedly confer any authority to the Commission to promulgate regulations after that date. Applying law set forth in Fehrman, any jurisdiction conferred by §386.266 to promulgate regulations ended after August 28, 2005. By promulgating the regulations after the August 28, 2005 deadline and disregarding objections to such action, the Commission has violated Missouri law set forth in Goldberg by enlarging the time frame beyond the time set forth in its enabling statute. As a result, the Commission's Orders were unauthorized by §386.266. Furthermore, as the Missouri Supreme Court held, the Commission has no authority to permit utilities the right to surcharges without specific legislative authority. Utility Consumers Counsel of Mo., 585 S.W.2d at 59. Therefore, the ECRM rules are void under Missouri law and have no legal force or binding effect.

8. Furthermore, the ECRM rules were not authorized by §§386.250(6) or 393.140(11) RSMo. Section 386.250(6) grants rulemaking authority relating to conditions of rendering public

utility service, disconnection of that service, and billing for such service. The ECRM rules do not address those topics. Section 393.140(11) empowers the Commission to adopt regulations concerning the conduct of rate cases. That statute did not empower the Commission to adopt regulations implementing a surcharge. Indeed, the Missouri Supreme Court expressly stated in Utility Consumers Council of Mo. that §393.140 did not provide such authority, and further found that no other statute governing the Commission afforded such authority. Id. at 56-58.

9. The ECRM rules are also invalid because they conflict with state law and exceed the authority granted by §386.266 RSMo. As the Missouri Supreme Court held in Hearst, regulations may be promulgated only to the extent of, and within the delegated authority of the statute involved, to be valid. Hearst, 779 S.W.2d at 558-59. Regulations that exceed the authority granted to the promulgating agency, like the Commission's regulations at issue here, are invalid and deemed null and void. Id.; see also Termini v. Mo. Gaming Comm., 921 S.W.2d 159, 161 (Mo. App. 1996). The validity of a regulation also hinges on the purpose and language of the enabling statute. Mo. Hosp. Ass'n, 731 S.W.2d at 264. A regulation will be deemed invalid if it stands at odds with the purpose of the enabling statute. Id. Thus, to be valid and enforceable, a regulation must be consistent with the purpose of its enabling statute. Hearst, 779 S.W.2d at 558. To determine whether a regulation is consistent with its enabling statute, the legislative intent of the General Assembly must be ascertained from the language used in the statute and given effect. Mo. Hosp. Ass'n, 731 S.W.2d at 264. (citing Goldberg v. Administrative Hearing Comm., 609 S.W.2d 140, 144 (Mo. 1980)).

10. The Orders conflict with state law, exceed the purpose of the enabling statute, and are in conflict with the purpose of the General Assembly's grant of rulemaking authority to the Commission. Section 386.266 requires that an ECRM may only be approved if the Commission makes a specific finding that the rate adjustment mechanism set forth in the schedules is "reasonably designed to provide the utility with a sufficient opportunity to earn a fair return on equity." The

ECRM rules fail to meet this essential requirement of the enabling statute, and permit approval of rate mechanisms that allow the utility to earn an unfair and unlawful return on equity. As a result, even where environmental compliance costs increase but other utility costs decrease or revenues are higher than projected, the utility is permitted to impose a surcharge. This allows utilities an excessive return at the expense of consumers, and violates the statute's mandate that the authorized surcharges be reasonably designated to provide the utility with the opportunity to earn a fair, rather than excessive, return on equity.

11. Additionally, while §386.266 explicitly limits an increase in any year to 2.5% of revenue, the regulation would appear to permit an annual increase greater than that amount by stacking unused annual limits into a cumulative rate increase. However, the cumulative 2.5% rate increases and the unlimited cost deferral are inconsistent with the statute's consumers protection provisions designed to prevent excessive earnings and place an annual cap on surcharge adjustments. By allowing unlimited deferrals, expenses can be deferred for collection during a time when a utility company may be over-earning. This scheme fails to protect consumers. While proponents of these regulations argue that consumers are protected because of a 2.5% cap on annual adjustments to the surcharge, this protection is illusory because consumers are not protected from the amounts that exceed the caps and are deferred for collection in future rates. The Orders fail to provide essential protection against excessive deferrals of costs that would result in unreasonable rates and undue harm to ratepayers.

12. Section 386.266 required the Commission to provide consumer protection against excessive rates. The Orders have failed to meet statutory requirements, and resulted in ECRM rules that provide utilities with an opportunity to earn an excessive and unlawful profit at the consumer's expense.

WHEREFORE, for the reasons stated above, the MIEC respectfully requests the Commission grant its Application for Rehearing.

Dated: April 2, 2008

Respectfully submitted,

BRYAN CAVE, LLP

By:_____

Diana M. Vuylsteke, # 42419
211 N. Broadway, Suite 3600
St. Louis, Missouri 63102
Telephone: (314) 259-2543
Facsimile: (314) 259-2020
E-mail: dmvuylsteke@bryancave.com

Attorney for The Missouri Industrial Energy Consumers

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been e-mailed this 2nd day of April, 2008 to all persons to be served in this case.