STINSON
MORRISON
HECKER LLP

Khristine A. Heisinger
(573) 556-3601
kheisinger@stinson.com
www.stinson.com

230 W. McCarty Street
Jefferson City, MO 65101-1553

Tel (573) 636-6263
Fax (573) 556-3633

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VIA HAND DELIVERY AND FILED IN EFIS

Chairman Robert M. Clayton III
Commissioner Jeff Davis
Commissioner Kevin Gunn
Commissioner Terry Jarrett
Commissioner Robert Kenney
Public Service Commission
Governor Office Building
200 Madison Street
Jefferson City, MO 65102

Re: Electric Utility RES Requirements Rulemaking
Case No. EW-2009-0324
Section (2) Geographic Sourcing

Dear Chairman Clayton and Commissioners:

We represent Wind Capital Group, which proposed the language of section (2) of the current draft of the Proposition C rules, the alternative that three Commissioners voiced their preference for. Since that first Commission meeting specifically reviewing the proposed language of the Electric Utility Renewable Energy Standard ("RES" or "RPS") Requirements, there has been much discussion and attention paid to the issue of geographic sourcing. Having heard or read the concerns and views expressed, we are making this submission to address those concerns and views, and to dispel any misunderstandings about geographic sourcing or the specific language proposed.

I. MANY STATES HAVE THE SAME GEOGRAPHIC SOURCING REQUIREMENT FOR THEIR RENEWABLE ENERGY STANDARD THAT IS CURRENTLY IN MISSOURI'S PROPOSED RULE – IN-STATE GENERATION OR DELIVERY INTO THE STATE.

Numerous states require generation in the state or that the energy is delivered into the state. According to a report from the National Renewable Energy Laboratory ("NREL"), the following states had geographic eligibility requirements:

Table 2. RPS Rules on Geographic Eligibility[1]

State	Geographic Eligibility
Arizona	State generation or interconnection
California	State generation or delivery (CAISO)
Colorado	No restrictions
Connecticut	Regional generation or delivery (ISO-NE)
Delaware	Regional generation or delivery (PJM)
District of Columbia	Regional generation or delivery (PJM) or from states adjacent to PJM
Hawaii	In-state projects only
Illinois	In-state projects only, unless cost-effective alternative available from adjacent state
Iowa	In-state projects only
Maine	Regional generation or delivery (ISO-NE)
Maryland	Regional generation or delivery (PJM) or from states adjacent to PJM
Massachusetts	Regional generation or delivery (ISO-NE)
Minnesota	State generation or delivery
Montana	State generation or delivery
Nevada	State generation or delivery
New Hampshire	Regional generation or delivery (ISO-NE)
New Jersey	Regional generation or delivery (PJM)
New Mexico	State generation or delivery
New York	State generation or delivery (NYISO)
North Carolina	State generation or delivery
Oregon	Regional generation or delivery
Pennsylvania	Regional generation or delivery (PJM)
Rhode Island	Regional generation or delivery (ISO-NE)
Texas	State generation or interconnection
Washington	Regional location or state delivery
Wisconsin	State generation or delivery

[1] From *Renewable Portfolio Standards in the States: Balancing Goals and Implementation Strategies*, Cory, K.S., Swezey, B.G., National Renewable Energy Laboratory, Technical Report, NREL/TP-670-41409, December 2007, p. 8.

As you can see, "State generation or delivery" is quite common. Since the release of the NREL report, Kansas[2] and Ohio[3] have also adopted delivery requirements.

II. MISSOURI'S STATUTORY LANGUAGE DOES ADDRESS THE ISSUE OF GEOGRAPHIC SOURCING.

As noted during the October 28, 2009, agenda meeting, the statute itself addresses geographic sourcing:

> "The portfolio requirements shall apply to all power sold to Missouri consumers whether such power is self-generated or purchased from another source in or outside of this state."

§ 393.1030.1, RSMo (emphasis added). This language is clear and requires that the power be sold to Missouri consumers. As such, we proposed language carrying out this requirement given the decision to rely upon renewable energy credits ("RECs") for tracking compliance with the RES and that it has been determined that unbundling of RECs from the associated electricity is allowed. To ignore this language would be to step outside of the Commission's statutory authority.[4] To require generation in Missouri or delivery to Missouri's customers is not outside the statutory authority of the Commission but is actually the mandate of the statute.

III. REQUIRING GENERATION IN THE STATE OR DELIVERY TO THE CUSTOMERS DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

A simple review of the jurisprudence on the dormant commerce clause as regards geographic sourcing in RES, which has been done in some legal journals, has resulted in the opinion that generated in or delivered into would *not* violate the dormant commerce clause.[5]

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[2] S.S. for H.B. 2369, Secs. 1-7 (Ks. 2009).

[3] Case No. 08-888-EL-ORD Rules for Energy Efficiency, Alternative & Renewable Energy, Emission Controls and Amendments to Forecasting Chapters 4901:5-1, 4901:5-3, and 4901:5-5 of the Ohio Administrative Code, 4901:1-40-01(I) and 4901:1-40-03(A)(2)(b). Ohio requires 50% in state generation and 50% demonstrably deliverable into Ohio.

[4] The Commission "is purely a creature of statute" and its "powers are limited to those conferred by the [Missouri] statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted." *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission,* 585 S.W.2d 41, 47 (Mo. banc 1979).

[5] Nathan E. Enrud, *State Renewable Energy Portfolio Standards: Their Continued Validity and Relevance in Light of the Dormant Commerce Clause, the Supremacy Clause, and Possible Federal Legislation*, 45 HARV.J.ON LEGIS. 259, 270-274 (2008);

It is not about economic protectionism, but about many factors. When the New York Public Service Commission addressed the delivery requirement, it identified all of the important benefits that accrue to the state and the ratepayers:[6]

> As long as the cost of new electric generation from renewable resources continues to be higher than the cost of generation from other resources, our adoption of the RPS will necessarily increase the direct cost of electricity supplied to New York consumers. Since we are likely mandating an increase in costs, it is important that we structure the RPS in a manner that maximizes the benefits that can accrue to New York from an RPS, consistent with all applicable laws and treaties. The structure of the delivery requirement affects the contractual flow of electricity, the location of pollution reduction and economic development activities, and the levels of wholesale energy and capacity prices, resource diversity and energy security.
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> As stated in the RD and as argued by many of the parties, imposition of such a requirement is consistent with and in furtherance of our stated goals of increasing the amount of renewable energy retailed in the State, improving energy security, diversifying the State's electricity generation mix, reducing local air emissions and protecting against oil and natural gas price spikes or possible supply disruptions. Moreover, as noted by several parties, the requirement will also help ensure that New York State ratepayers enjoy the benefits from the costs they will incur to support the RPS program and its objectives.
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> * * *
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> [ ] we see no unnecessary burden on interstate commerce or potential violation of the Commerce Clause. The RPS concerns requirements for the retail sale of electricity in New York State. For commerce to occur, the product, electricity generated from renewable resources, must be in the State to be sold to retail customers. The RPS promotes interstate commerce by allowing imports on the same terms as electricity generated within the State. The delivery requirement applies to domestic generation as well as imports. Therefore, it is equivalently applied to in-State and out-of-State renewable generation sources and imposes only a minimal, if any, burden on commerce. In

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Trevor D. Stiles, *Renewable Resources and the Dormant Commerce Clause*, 4 Envt'l & Energy L. & Pol'y J. 33, 63 (2009)

[6] NY PSC Order Regarding Retail Renewable Portfolio Standard in Case 03-E-0188, issued and effective September 24, 2004.

> addition, the delivery requirement serves important State interests including supply security and diversity, and environmental benefits.

IV. COMPLIANCE WITH A GENERATED IN OR DELIVERED INTO REQUIREMENT IS NOT PROBLEMATIC, REGARDLESS OF WHETHER YOU ARE IN THE SPP OR MISO FOOTPRINT.

Even putting aside the mandate of the statute, which the Commission is not free to ignore, we are somewhat perplexed at the apparent controversy over the use of the word "delivered" in our proposed language, as this term is commonly used in literature regarding geographic sourcing. Moreover, the proposed language does not require investor owned utilities to "track electrons" as some have suggested. Such an argument is a red herring. The New York Public Service Commission, in response to similar outcries as regards its consideration of geographic sourcing put it best when it stated:

> [Stakeholder's] argument that a delivery requirement is "impractical" given the inability to track electrons is of no consequence. No tracking system claims to track electrons. The entire financial system supporting electricity generation, transmission, distribution and delivery is based on the path of contracts, not the physical properties of electrons. What is important is that monies paid by retail customers to obtain electricity from renewable resources are used for that purpose in a system that provides verification.[7]

We have never been advocating for the impossible. "Deliver" is a common term and as noted in New York, it is documentable by financial documents, a path of contracts, if not documentable by physical transmission pathways.

Dr. Proctor reported to the Commission at the agenda meeting on October 21, 2009, that physical delivery can be shown without any burden in the Southwest Power Pool (SPP). His concerns were only that the Midwest ISO ("MISO") does not track transmission physically but only financially. Consistent with the approach taken by the New York Public Service Commission, we have no issue with verifying that electricity is sold to Missouri consumers in more than one manner, as long as it is a reliable manner and there is no double-counting.

Other MISO states have a generated in or delivered to requirement. Montana is in the MISO footprint and it requires generation or delivery to Montana.[8] Ohio, a state

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[7] *Supra,* note 6.

[8] "Eligible renewable resource" means a facility either located within Montana or delivering electricity from another state into Montana . . ." Mont. Code Ann. § 69-3-2003(10), (2009).

partially within the MISO footprint, requires 50% in state and 50% deliverable.[9] Finally, Wisconsin, a state fully within the MISO footprint, requires in-state generation or delivery as well.[10] If Wisconsin, Montana and Ohio can determine delivery into their respective states within the MISO footprint, surely Missouri can as well.

V. RESOLVING THE DISPUTE

Based upon all of the foregoing, we truly do not believe there are valid and strong arguments against implementing the language of the statute, which is to have a geographic sourcing requirement of generation in or delivery into the state of Missouri. If the use of the term "delivered" is causing undue concerns, the simplest solution would be to take the language from the statute and substitute it in the regulation, putting "sold" wherever "delivered" appears. We never intended anything other than the statutory mandate. A revision of the current section (2) of the rule (from Revision 15) is attached, showing this simple change. Surely under the SPP footprint or the MISO footprint or even outside one of those footprints (as some portions of Missouri are covered by neither), an investor-owned utility can prove that electricity generated from an identified source is actually sold to retail electric customers in Missouri.

We greatly appreciate the opportunity to provide this information to address the various concerns that have arisen since the initial 3-2 "vote of support" for the geographic sourcing language in the current section (2) of the draft RES rule, Revision 15.

Sincerely,

STINSON MORRISON HECKER LLP

Khristine A. Heisinger

Enclosure

cc: Steven Reed
Michael Taylor
Filed in EFIS

[9] *Supra,* note 3.
[10] Wis. Admin. Code PSC 118.01-118.08 (2007).

(2) Requirements. Pursuant to the provisions of this rule and 393.1025 and 393.1030, RSMo, all electric utilities must generate or purchase RECs and S-RECs associated with electricity from renewable energy resources in sufficient quantity to meet both the RES requirements and RES solar energy requirements respectively on a calendar year basis. Utility renewable energy resources utilized for compliance with this rule must include the RECs or S-RECs associated with the generation. The RES requirements and the RES solar energy requirements are based on total retail electric sales of the electric utility.

(A) Electric energy or RECs associated with electric energy are eligible to be counted towards the RES requirements only if the generation facility for the renewable energy resource is either located in Missouri or, if located outside of Missouri, the renewable energy resource is sold ~~delivered~~ to Missouri electric energy retail customers. For renewable energy resources generated at facilities located outside Missouri, an electric utility shall provide proof that the electric energy was sold ~~delivered~~ to Missouri customers.

(B) The amount of renewable energy resources or RECs associated with renewable energy resources that can be counted towards meeting the RES requirements are as follows:

1. If the facility generating the renewable energy resources is located in Missouri, the allowed amount is the amount of megawatt-hours generated by the applicable generating facility, further subject to the additional .25 credit pursuant to subsection (3)(H) of this rule;

2. If the facility generating the renewable energy resources is located outside Missouri, the allowed amount is the amount of megawatt-hours generated by the applicable generating facility that is sold ~~delivered into Missouri and used by~~ Missouri customers. For the purposes of (A) and (B) of this section, Missouri electric energy retail customers shall include retail customers of regulated Missouri utilities as well as customers of Missouri municipal utilities and Missouri rural electric cooperatives.

(C) The RES requirements are:

1. No less than two percent (2%) in each calendar year 2011 through 2013;

2. No less than five percent (5%) in each calendar year 2014 through 2017;

3. No less than ten percent (10%) in each calendar year 2018 through 2020; and

4. No less than fifteen percent (15%) in each calendar year beginning in 2021.

(D) At least two percent (2%) of each RES requirement listed in subsection (C) of this section shall be derived from solar energy. The RES solar energy requirements are:

1. No less than four-hundredths percent (0.04%) in each calendar year 2011 through 2013;

2. No less than one-tenth percent (0.1%) in each calendar year 2014 through 2017;

3. No less than two-tenths percent (0.2%) in each calendar year 2018 through 2020; and

4. No less than three-tenths percent (0.3%) in each calendar year beginning in 2021.

(E) If compliance with the above RES and RES solar energy requirements would cause retail rates to increase on average in excess of one percent (1%) as calculated per section (5) of this rule, the above requirements shall be limited to providing renewable energy in amounts that would cause retail rates to increase on average one percent (1%) as calculated per section (5) of this rule.

(F) If an electric utility is not required to meet the RES requirements of subsection (C) of this section in a calendar year, because doing so would cause retail rates to increase on average in excess of one percent (1%) as calculated per section (5) of this rule, then the RES solar energy requirement specified in subsection (D) shall be two percent (2%) of the renewable energy that can be acquired subject to the one percent (1%) average retail rates limit as calculated per section (5) of this rule.

(G) If an electric utility intends to accept proposals for renewable energy resources to be owned by the electric utility or an affiliate of the electric utility, it shall include a written separation policy and name an independent auditor whom the electric utility proposes to hire to review and report to the commission on the fairness of the competitive acquisition process. The independent auditor shall have at least five (5) years experience conducting and/or reviewing the conduct of competitive electric utility resource acquisition, including computerized portfolio costing analysis. The independent auditor shall be unaffiliated with the electric utility; and shall not, directly or indirectly, have benefited from employment or contracts with the utility in the preceding five (5) years, except as an independent auditor under these rules. The independent auditor shall not participate in, or advise the electric utility with respect to, any decisions in the bid solicitation or bid evaluation process. The independent auditor shall conduct an audit of the electric utility's bid

solicitation and evaluation process to determine whether it was conducted fairly. For purposes of such audit, the electric utility shall provide the independent auditor immediate and continuing access to all documents and data reviewed, used or produced by the electric utility in its bid solicitation and evaluation process. The utility shall make all its personnel, agents, and contractors involved in the bid solicitation and evaluation available for interview by the auditor. The electric utility shall conduct any additional modeling requested by the independent auditor to test the assumptions and results of the bid evaluation analyses. Within sixty (60) days of the utility's selection of renewable energy resources, the independent auditor shall file a report with the commission containing the auditor's findings on whether the electric utility conducted a fair bid solicitation and bid evaluation process, with any deficiencies specifically reported. After the filing of the independent auditor's report, the electric utility, other bidders in the renewable energy resource acquisition process, and other interested parties shall be given the opportunity to review and comment on the independent auditor's report.