BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of a Proposed Rulemaking Regarding Electric Utility Renewable Energy Standard Requirements	)))	Case No. EX-2010-0169

APPLICATION FOR REHEARING AND REQUEST FOR STAY

COMES NOW the Missouri Industrial Energy Consumers ("MIEC"),[1] by and through the undersigned counsel, and pursuant to § 386.500, RSMo., 4 CSR 240-2.080, and 4 CSR 240-2.160, submits its Application for Rehearing and requests a stay of the effectiveness of the Order of Rulemaking issued in the above-captioned case on June 2, 2010, and the Revised Order of Rulemaking on July 1, 2010, with respect to 4 CSR 240-20.100. In support of this Application for Rehearing and Request for Stay, MIEC respectfully states the following to the Missouri Public Service Commission ("Commission"):

1. On June 2, 2010, the Commission issued an Order of Rulemaking in the above-captioned case, to be effective on July 2, 2010, in order to adopt Commission Rule 4 CSR 240-20.100. On July 1, 2010, the Commission issued a Revised Order of Rulemaking in the above-captioned case, to be effective on July 6, 2010, in order to adopt Commission Rule 4 CSR 240-20.100. The rule purports to adopt portfolio requirements for all electric utilities to generate or purchase electricity generated from renewable energy resources, as set forth in the "Renewable Energy Standard" legislation adopted by initiative petition, known as Proposition C, and codified at §§ 393.1020 through 393.1030, RSMo. Supp. 2009 ("Proposition C"). The Commission should rehear this matter and thereafter revoke and rescind its Orders of Rulemaking, because

[1] MIEC is a nonprofit corporation organized and existing under the laws of the State of Missouri, active and in good standing. MIEC member companies consist of Anheuser-Busch, Boeing, BioKyowa, Cargill, Doe Run, Enbridge, Ford, General Motors, GKN, Hussmann, JW Aluminum, Monsanto, Nestle Purina, Noranda, Precoat Metals, Procter & Gamble, St. Gobain, Solutia, and U.S. Silica.

the Orders of Rulemaking and the rule adopted therein are unconstitutional, unlawful, unjust, in excess of the Commission's statutory authority, unreasonable, and arbitrary and capricious for all the reasons set forth herein, both individually and collectively.

2. The Commission is purely a creature of statute, and the Commission's powers are limited to those conferred by statute, either expressly or by clear implication as necessary to carry out the powers specifically granted to it. *State ex rel. Public Service Commission v. Bonacker*, 906 S.W.2d 896 (Mo. App. S.D. 1995); *see also State ex rel. Utility Consumers Council* v. *Public Service Commission,* 585 S.W.2d 41 (Mo. banc 1979). Further, "(i)t must be kept in mind that the Commission's authority to regulate does not include the right to dictate the manner in which [a regulated utility] shall conduct its business." *Bonacker*, at 899; *quoting State v. Public Service Commission*, 406 S.W.2d 5, 11 (Mo. banc 1966). The Orders of Rulemaking and the rule contained therein, however, are in excess of the Commission's statutory authority, either express or implied, and purport to dictate the manner in which each regulated utility shall conduct its business. Moreover, and significantly, the Orders of Rulemaking directly contradict the statutory mandates adopted by a vote of the people. For instance, the Orders of Rulemaking do not limit to one percent the fiscal impact to consumers from implementation of the renewable energy standards.

A. The Rate Impact Calculation is Arbitrary, Capricious, Unreasonable, and Illegal

3. The Orders of Rulemaking result in a rule that grossly miscalculates the actual rate impact to consumers. The rule's rate impact provision, section (5), states:

> (5) Retail Rate Impact.
>
> (A) The retail rate impact, as calculated in subsection (5)(B), may not exceed one percent (1%) for prudent costs of renewable energy resources directly attributable to RES compliance. <u>The retail rate impact shall be calculated on an</u>

incremental basis for each planning year that includes the addition of renewable generation directly attributable to RES compliance through procurement or development of renewable energy resources, averaged over the succeeding ten (10)-year period, and shall exclude renewable energy resources owned or under contract prior to the effective date of this rule ***and renewable energy resources previously determined not to exceed the one percent (1%) threshold***.

(B) The RES retail rate impact shall be determined by subtracting the total retail revenue requirement incorporating an **incremental** non-renewable generation and purchased power portfolio from the total retail revenue requirement including an **incremental** RES-compliant generation and purchased power portfolio. The non-renewable generation and purchased power portfolio shall be determined by adding to the utility's existing generation and purchased power resource portfolio additional non-renewable resources sufficient to meet the utility's needs on a least-cost basis for the next ten (10) years. The RES-compliant portfolio shall be determined by adding to the utility's existing generation and purchased power resource portfolio an amount of renewable resources sufficient to achieve the standard set forth in section (2) of this rule and an amount of least-cost non-renewable resources, the combination of which is sufficient to meet the utility's needs for the next ten (10) years. These renewable energy resource additions will utilize the most recent electric utility resource planning analysis. These comparisons will be conducted utilizing projections of the **incremental** revenue requirement for new renewable energy resources, less the avoided cost of fuel not purchased for non-renewable energy resources due to the addition of renewable energy resources. In addition, the projected impact on revenue requirements by non-renewable energy resources shall be increased by the expected value of greenhouse gas emissions compliance costs, assuming that such costs are made at the expected value of the cost per ton of greenhouse gas emissions allowances, cost per ton of a greenhouse gas emissions tax (e.g. a carbon tax), or the cost per ton of greenhouse gas emissions reductions for any greenhouse gas emission reduction technology that is applicable to the utility's generation portfolio, whichever is lower.

(C) Rebates made during any calendar year in accordance with section (4) of this rule shall be included in the cost of generation from renewable energy resources.

(D) For purposes of the determination in accordance with subsection (B) of this section, if the revenue requirement including the RES-compliant resource mix, averaged over the succeeding ten (10)-year period, exceeds the revenue requirement that includes the non-renewable resource mix by more than one percent (1%), the utility shall adjust downward the proportion of renewable resources so that the average annual revenue requirement differential does not exceed one percent (1%). In making this adjustment, the solar requirement shall be in accordance with subsection (2)(F) of this rule. Prudently incurred costs to comply with the RES standard, and passing this rate impact test, may be recovered in accordance with section (6) of this rule or through a rate proceeding outside or in a general rate case.

(E) Costs or benefits attributed to compliance with a federal renewable energy standard or portfolio requirement shall be considered as part of compliance with the Missouri RES if they were would otherwise qualify under the Missouri RES without regard to the federal requirements.

(emphasis added. The bold-faced italicized language was removed in the Revised Order of Rulemaking)

4. This language is intended to define the formula for determining the rate impact limitation, one of the most important and controversial aspects of the Regulation because, under section 393.1030.2(1), the rate impact limitation supersedes the renewable mandate targets. The Regulation's rate impact determination section (section 5), in both Orders of Rulemaking, is confusing, unclear and ambiguous. Certainly a provision that could determine whether over the next decade Missouri consumers pay billions of dollars in the form of increased electric rates should not be so vague and ambiguous.

5. The ambiguities and uncertainties in section (5) are too numerous to list. However, section (5)'s formula requires a "comparison on an incremental basis" or "calculate[ion] on an incremental basis." It is not clear how that important calculation is to be performed. Indeed, subsection (A) references a percentage, but subsection (B) determines a dollar figure. The regulation does not specify how that dollar figure is converted to a percentage. Section (5) references a "planning year;" implying that a rate impact determination will be made

only in such a year. "Planning year" is unclear and is not defined. Section (5) uses the term "incremental RES-compliant generation and purchased power portfolio." That phrase is undefined and its meaning is not otherwise obvious. Section (5) of the June 2 version of the rulemaking does not explain how under paragraph (A) one is to "exclude … renewable energy resources previously determined not to exceed the one percent (1%) threshold" in calculation of the rate impact. And the regulation is not clear on how a utility is to calculate a rate impact if it does not need additional capacity now, or in the next 10 years.

6. As a result of the passage of Proposition C, section 393.1030.1 imposed the renewable mandate. But, consistent with the ballot title approved by the voters, section 393.1030.2(1) required the Commission to adopt regulations that limit rate increases from the Renewable Mandate to: "[a] maximum average retail rate increase of one percent." Renew Missouri operated a website to provide information to voters prior to the November 4, 2008 election and therein it clearly led voters to believe that the rate impact of the mandate would not exceed one percent. Likewise, Henry Robertson, the drafter of Proposition C's provisions, and an attorney for Renew Missouri, testified at the public hearing on the Regulation. Significantly, his position was consistent with those advocating strict adherence to section 393.1030.2(1) and that the incremental average approach was "inconsistent with Proposition C, which says that rates can never increase or bills can never increase more than 1 percent over the whole lifetime of the RES [Renewable Energy Standard], subject to some variations due to averaging." Transcript at 298.

7. The language of Proposition C, as presented on the ballot and reflected in the language of section 393.1030.2(1), should be given its literal meaning. "When interpreting a statute granting the right to full voter participation in the approval or disapproval of an issue …

the Court should not apply rules of construction to infer a limitation on that right when such limit does not clearly appear in the statute's text." *Hovis v. Daves*, 14 S.W.3d 593, 595 (Mo. banc 2000). As voters enacted Proposition C thereby amending section 393.1030, the language accepted through this process would control on the issue. Thus, the language of section 393.1030 providing for "[a] maximum average retail rate increase of one percent" is the governing law.

8. As indicated, the final regulation's direction for calculating the rate cap is confusing, unclear, and conflicting, but it does appear to conflict with Proposition C and section 393.1030.2(1), the controlling law in this matter, since the final regulation allows rates to be more than one percent higher as a result of the renewable mandate. While this language is far from clear, it does show that the regulation does not contemplate consideration of the full cost of the mandated renewable energy. Under modeling of Union Electric's compliance with the mandate, in 2014, the rate impact to consumers would be 5.33%, yet under the 10 year incremental averaging approach used under the original order of rulemaking, there would be no roll-back of the mandate because the calculated rate impact would be only 0.53%. *See* attached spreadsheet, which was provided by the renewable energy coalition to support this approach to calculating the rate impact.

9. It was represented in the Revised Order that removing 13 words from section (5)(A) converted the rate impact formula from an incremental 10 year average to a cumulative 10 year average and that this would lessen the impact on consumers. *See* Response to Comment 34. That representation is doubtful given that section (5) in the Revised Order still uses "incremental" at least four times in describing the rate impact calculation. Nevertheless, under modeling of Union Electric's compliance with the mandate, in 2014, the rate impact to

consumers would be 5.33%, yet under the 10 year cumulative averaging approach used under the original order of rulemaking, there would be no roll-back of the mandate because the calculated rate impact would be only 0.53%. *See* attached spreadsheet. Calling a 5% increase in rates a 0.5% increase does not change that fact that consumers will be paying well over 1% more for their electricity under the mandate.

10. In addition, 4 CSR 240-20.100(5)(A) as adopted under the Revised Order provides that the calculation of the 1% rate impact "shall exclude renewable energy resources owned or under contract prior to the effective date of this rule." This unlawful provision is clearly contrary to the letter and spirit of the statutory 1% cap and should be eliminated.

B. The Fiscal Note Grossly Understates the Impact to Consumers

11. The Order of Rulemaking grossly misstates (likely by billions of dollars over 10 years) the fiscal impact to consumers of the subject regulation. As explained above, the final rule does not limit the rate impact of the mandate to one percent. For instance, by 2014, consumers could very well be paying 5.33% more for their electricity than they otherwise would have been paying without the mandate. *See* attached spreadsheet. Thus, the impact at that time would be 5%, or roughly $250M, not the $52M that the fiscal note envisions. Over the course of ten years, the true impact to consumers would be over a billion dollars higher than the fiscal note contemplates. The revised fiscal note still shows the lower fiscal impact, although it does acknowledge that the undersigned asserted higher fiscal impacts in filing with the Joint Committee on Administrative Rules.

12. Section 536.205 requires agencies to file fiscal notes along with proposed rules so that interested parties will know the likely financial impact to them. The agency is to make a diligent attempt to make a "reasonable, realistic, good faith effort to estimate the aggregate cost

of the proposed regulation." *Missouri Hospital Ass'n v. Air Conservation Comm'n*, 874 S.W.2d 380 (Mo. App. 1994). After ten years, the collective impact stated by the fiscal note could be understated by over a billion dollars. That is, quite simply, not close enough.

C. The Sourcing Requirements of the Rule are Illegal

13. The Order of Rulemaking purports to link Renewable Energy Credits (RECs) and Solar Renewable Energy Credits (S-RECs) with the electricity from the associated renewable energy resource by requiring that this electricity be sold to Missourians. *See,* 4 CSR 240-20.100(2)(B)2. This requirement is unauthorized by law and is, in fact, contrary to the spirit and letter of the enabling legislation. Proposition C specifically contemplates that an electric utility "may comply" with its renewable energy portfolio requirements "in whole or in part by purchasing RECs." *See,* § 393.1030.1, RSMo. This mechanism of compliance is analogous to the national market created for the sale of sulfur dioxide emission allowances under the Clean Air Act Amendments of 1990. The option to buy RECs instead of energy was intended to "unbundle" the benefit of renewable energy production from the deliverability requirement. It is clear that the legislation was intended to allow electric utilities to comply with their renewable energy portfolio requirements by purchasing tradable certificates instead of arranging for the delivery of a specific resource's output (i.e., "green electrons") into a particular service territory. Indeed, the definition of "renewable energy credit" in section 393.1025(4), RSMo. neither requires RECs to be bundled or linked to electricity actually sold by a Missouri consumer, nor does it mandate renewable energy represented by an REC be produced in the state of Missouri. This fact was confirmed by witness Christine Heisinger, an attorney for a number of wind energy producers who testified at the Commission's April 6, 2010, hearing as follows:

> First, I want to talk about the bundling and unbundling, which I believe Chairman Clayton at one point tried to separate from the geographic sourcing

aspect. And I can say that – I drafted that provision, and it was never intended to require bundling of RECs with electricity. (Tr. p. 257, ll. 9-14)

14. Subsection (2)(B)(2) of the RES rule expressly limits the credits an electric utility may claim to meet its RES requirements derived from an out-of-state generating facility to only those megawatt hours which are "sold to Missouri customers." This effectively restricts the scope of renewable energy facilities outside of Missouri to only those with respect to which an electric utility has a purchased power contract or some other type of contract, and this acts as a de facto bundling relationship requirement. Additionally, it is simply impossible for utilities to prove that energy or an REC from a renewable resource outside of Missouri was sold to Missouri customers. Electricity is fundamentally made up of electrons, and it is impossible for utilities to track where those electrons end up once being released to the grid. Consequently, the rule in its current form is fatally flawed.

15. Not only is the Commission's decision to link or bundle renewable energy generation with the associated RECs at odds with the plain language of Proposition C, it is also inconsistent with the broader objective of deploying renewable energy resources in a cost effective manner. The RES rule has the counterintuitive and counterproductive effect of limiting a utility's ability to meet its renewable energy portfolio requirements. This will have the unintended effect of driving up the cost of renewable energy compliance for electric utility customers and stifling the development of renewable energy resources by channeling limited resources to less than optimally efficient producers. This is directly contrary to the public interest and is certainly contrary to the overall intent of Proposition C, that is, to encourage the deployment of renewable energy resources at the lowest possible cost.

16. The Commission's linkage or bundling of renewable energy generation with associated RECs also has the practical and unlawful effect of limiting the geographic area within

which electric utilities may secure renewable energy or RECs. This is at odds with the enabling legislation which does not in any way restrict Missouri electric utilities' ability to obtain renewable energy or RECs from any source at any location. The definition of the term "REC" is not limited to electricity generated just in the State of Missouri or to energy delivered to Missouri customers. To the contrary, the legislation expressly contemplates that an electric utility may acquire either electricity or RECs generated in states other than the State of Missouri. This simple fact is reflected in the language of § 393.1030.1, RSMo which provides an incentive to electric utilities to favor Missouri generation by providing a 25 percent additional credit towards compliance by stating the following:

> Each kilowatt hour of eligible energy generated in Missouri shall count as 1.25 kilowatt hours for purposes of compliance.

The law provides for an incentive for electric utilities to use Missouri generation sources, but, importantly, does not mandate it. Such an incentive for the use of in-state renewable generation sources only makes sense if it was contemplated that sources outside of the state would also be permissible. Just from a common sense perspective, there is no plausible purpose for the 25 percent compliance incentive had the objective behind Proposition C been to limit renewable energy generation sources only to those located in Missouri.

17. The Commission's rationale for the geographic sourcing limitation in the RES rule is based on an inventive and unjustified reading of Proposition C. On page 8, the Commission attempts to rationalize its restriction on geographic sourcing on the following language in §393.1030.1:

> 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.

This conclusion is unreasonable and unlawful. It is apparent that the statutory language was intended to establish a demand baseline for how the Commission is to determine whether the stair stepped portfolio objectives have been achieved. This language does nothing more than establish what number of megawatt-hours should be used when applying the percentages under the portfolio requirement in future years. This language in no way can be fairly read as nullifying the obvious objective of Proposition C, that is, to sever RECs from the generation source and to allow for unrestricted trading of the certificates. The geographic limitation imposed by the Commission is directly adverse to the letter and intent of Proposition C.

18. The restriction on the geographic area within which electric utilities may secure renewable energy or RECs also impermissibly burdens interstate commerce for a protectionist or discriminatory purpose and is, consequently, *per se* invalid. The geographic sourcing limitation contained in the RES rule has an obvious protectionist motive, that is, to favor renewable energy generated in Missouri over renewable generation located in other states. The intent and impact of the rule is to restrict the flow of interstate commerce for the economic benefit of a specific group of Missouri businesses. This represents economic protectionism or discrimination and is a violation of the dormant Commerce Clause of the United States Constitution. U.S. Const. Art. I, § 8, cl. 3. Consequently, the regulation is invalid.

19. Beyond just the legalities associated with the geographic sourcing limitation contained in the Commission's Order of Rulemaking, is the practical consideration that a sourcing restriction will simply limit the energy resource alternatives available to electric utilities and, consequently, drive up costs because electric utilities may not be able to utilize least cost options to meet their portfolio requirements. This will translate into less competition on the part of suppliers and, inevitably, higher costs to electric utilities and their customers. This is squarely

at odds with the primary objective of Proposition C, that is, to encourage electric utilities to seek out and use affordable sources of renewable energy to meet customers' demands.

20. As noted, Proposition C provides that electric utilities "may comply" with their renewable energy portfolio requirements by purchasing RECs. The purchase of RECs is thus left to the discretion of each utility's management. The Commission's rule at subsection (3) states that "RECs and S-RECs *shall be used* to satisfy the RES requirements of this rule" thus making the purchase of RECs mandatory. The Commission has no authority to make mandatory an act or thing that is discretionary as set forth in a statute.[2] Neither Proposition C nor any other Missouri statute require that electric utilities use RECs and, consequently, there can be no requirement in the implementing rule that they do so.

D. The Standard Offer Contract in the Original Order of Rulemaking is Illegal

21. The Commission's mandate in the Original Order of Rulemaking at 4 CSR 240-20.100(4)(H) that electric utilities extend to customers wanting to install solar energy systems a so-called "standard offer contract" has no legitimate basis in the enabling legislation or in any other Missouri statute. The only financial incentive contemplated by Proposition C is a $2.00 per watt subsidy found in § 393.1030.3. The standard offer contract, however, is a separate, additional subsidy. Additionally, the contract is a violation of the due process rights of electric utilities as a mandatory monetary payment to solar energy developers in violation of both the U.S. (Fifth Amendment) and Missouri (article 1, § 9) Constitutions.

22. The standard offer contract is in no way authorized by law and is, consequently, in excess of the Commission's statutory authority. The standard offer contract requirement is

[2] The Commission may not adopt a rule which nullifies the objective of the General Assembly as expressed in a legislative enactment. *State ex rel. Springfield Warehouse & Transfer Co. v. Public Service Commission*, 225 S.W.2d 792 (Mo. App. 1949).

also a violation of electric utilities' due process rights in that it constitutes a mandatory monetary payment by utilities to customers installing solar energy systems in violation of Mo. Const. art. I, § IX and the Fifth Amendment of the United States Constitution.

23. Assuming that the standard offer contract for solar developers withstands legal scrutiny, the Commission has unlawfully favored a particular segment of generators by purporting to prohibit electric utilities from extending a contract offer to an affiliate. *See,* 4 CSR 240-20.100(4)(H)(6)(e). This limitation is squarely at odds with Proposition C which permits "electric utilities to generate or purchase electricity from renewable energy resources." (emphasis added) Clearly, Proposition C contemplates that electric utilities should have a self-build option to meet their renewable energy portfolio requirements, an option which makes sense in the event that third party providers are not able to supply renewable energy at a reasonable cost. In any event, the Commission has no authority under Proposition C to limit, either directly or indirectly, solar generation investments by electric utilities and thus favor one class of providers over another.

E. The MIEC Incorporates by Reference the Arguments for Rehearing Asserted by the OPC

24. The MIEC incorporates herein by reference each of the arguments for rehearing asserted by the OPC in its Motion for Rehearing.

F. Request for Stay

25. Electric utilities should be excused from incurring the expense of complying with the Order of Rulemaking and the RES rule adopted therein until the important legal and policy issues identified in this filing, and the other Motions for Rehearing, are resolved and the scope of RES obligations are settled. As such, the Commission should exercise its discretion under

§386.500.3 and stay the effectiveness of the Orders of Rulemaking indefinitely and until further order of the Commission.

WHEREFORE, MIEC respectfully requests that the Missouri Public Service Commission grant rehearing with respect to its June 2 and July 1, 2010, Orders of Rulemaking issued in the above-captioned case, as requested herein, and upon rehearing and reconsideration of the issues raised herein, issue a new Order of Rulemaking consistent with this filing. Additionally, MIEC requests that the Commission stay the effectiveness of its order and the rule until such time as the issues identified herein can be reheard and resolved in a manner consistent with the language and intent of Proposition C and other relevant Missouri statutes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent by electronic transmission, facsimile, or email to all counsel of record on this 1st day of July, 2010.

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