BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

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

APPLICATION FOR REHEARING AND REQUEST FOR STAY

COMES NOW the Missouri Energy Development Association ("MEDA"),[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, with respect to 4 CSR 240-20.100. In support of this Application for Rehearing and Request for Stay, MEDA 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. 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 Order of Rulemaking, because the Order of Rulemaking and the rule adopted therein are unconstitutional, unlawful, unjust, in excess of the Commission's statutory authority, unreasonable, arbitrary and capricious for all the reasons set forth herein, both individually and collectively.

[1] MEDA is a nonprofit corporation organized and existing under the laws of the State of Missouri, active and in good standing. MEDA member companies consist of Union Electric Company d/b/a AmerenUE, Kansas City Power and Light Company, The Empire District Electric Company, Laclede Gas Company, Missouri Gas Energy, Atmos Energy Corporation, and Missouri-American Water Company.

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 Order 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.

3. 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.

4. 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)

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. As noted in paragraph 3, supra, 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] There is no requirement in Proposition C (or in any other Missouri statute) that electric utilities use RECs and, consequently, there can be no requirement in the implementing rule that they do so.

12. The Commission's mandate 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.

13. 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 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.

[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).

14. The standard offer contract provision contained in the Order of Rulemaking is in excess of the Commission's statutory authority in that it purports to manage the business of electric utilities. As noted, the Commission's authority to regulate certain aspects of an electric utility's operations and practices does not include the right to dictate the manner in which the Company conducts its business. *State ex rel. City of St. Joseph v. Public Service Commission*, 30 S.W.2d 8, 14 (Mo. banc 1930). The Commission's powers are "purely regulatory in nature." *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 171, 181 (Mo.App. W.D. 1960). The Commission does not have the authority to take over the general management of any utility. While the Commission may regulate a public utility's operations as the law expressly permits, it may not substitute its business judgment for that of the company's management so long as safe and adequate service is being provided.

15. The standard offer contract is also unlawful because it puts the Commission in the conflicting role of both directing the business practices of the utility that it regulates and, consequently, binds the Commission in subsequent rate cases concerning the decisions it made about the business and management practices it has mandated. The Commission has rejected the conflicting dual role when previously confronted with it. The Commission has conceded in arguments to the Southern District Court of Appeals that it cannot be put in the conflicting position of regulator and regulated. *State ex rel. Public Service Commission v. Bonacker*, 906 S.W.2d 896, 899 (Mo. App. 1995). It is clear that the Order of Rulemaking puts the Commission in the untenable position of mandating a contract with a power supplier and then, subsequently, determining whether the terms of the contract are reasonable and prudent. How can the Commission be expected when setting rates to decide on the prudence of the costs

associated with these generous standard solar contract subsidies when it has mandated the contract offers in the first place?

16. Where the standard offer contract is concerned, the Commission should reconsider the policy it is purporting to enact. The generous portfolio of subsidies to solar energy developers will burden the general body of Missouri utility customers with unreasonably high electric costs in order to prop up a fledgling industry. If the viability of solar energy is beyond question, why can't solar developers fund their own projects or secure bank financing after presenting a viable business plan? The mandated contract offer is an unauthorized and significant subsidy to the solar developers using someone else's money. The "someone else" in this case is the general body of electric ratepayers, many of whom are already straining to make ends meet.

17. 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 <u>to generate or purchase</u> 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.

18. The penalty provisions of the Order of Rulemaking found at 4 CSR 240-20.100(7)(C) of the rule are also unauthorized by law and are constitutionally defective. This portion of the rule purports to allow the Commission to fix a penalty amount by calculating the market value for RECs or S-RECs. This language is constitutionally defective in that it violates Art. I, §31 of the Mo. Const. which provides that:

> No law shall delegate to any commission, bureau, board or other administrative agency authority to make any rule fixing a fine or imprisonment as punishment for its violation.

A determination of an appropriate penalty amount for violation of Proposition C or any other provision of the Missouri Public Service Commission Act, is a matter reserved by law to the courts. *See* §386.600.

19. Another discrepancy in the Order of Rulemaking pertains to the requirement in §386.600 that "all monies recovered as a penalty or forfeiture shall be paid to the public school fund of the state." Section 393.1030.2(2), however, purports to divert penalties paid by electric utilities instead to the Department of Natural Resources to buy RECs or other selected projects. This represents an internal conflict in the enabling legislation and calls into question the validity of this aspect of the rule and, indeed, the validity of the legislation itself.

20. The Order of Rulemaking also appears to contain enumeration errors or omissions (although these matters have been addressed in the Notice issued herein by the Commission on June 15, 2010). For example, as set forth in the Order of Rulemaking, section 1 of the rule, which contains the definition of key terms, proceeds from subsection (A) through (D) but then jumps to subsections (J) and (K) and from there to subsections (P) through (R). Another example can be found in subsection (2) which addresses "requirements." In that section, as set forth in the Order of Rulemaking, there is no subsection (A) and the sequence thereafter jumps

from (B) to subsection (G). There are similar problems throughout the rule, as set forth in the Order of Rulemaking, including but not necessarily limited to Sections 3, 4, 5, and 6. There is no explanation in the Order of Rulemaking for any of these enumeration anomalies or omissions. These inconsistencies or omissions are at best confusing. At worst, they evidence omissions and oversights and create critical gaps in substance that could result in future problems of compliance and administration.

21. 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 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 Order of Rulemaking and the order adopted therein indefinitely and until further order of the Commission.

WHEREFORE, MEDA respectfully requests that the Missouri Public Service Commission grant rehearing with respect to its June 2, 2010, Order 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, MEDA 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,

BRYDON, SWEARENGEN & ENGLAND P.C.

By:

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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 30th day of June, 2010.

__/s/ Diana C. Carter_____