BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

APPLICATION FOR REHEARING
AND REQUEST FOR STAY

The Empire District Electric Company (hereinafter "Empire" or "the Company"), by and through its undersigned counsel and pursuant to Section 386.500, RSMo, 4 CSR 240-2.080, and 4 CSR 240-2.160, hereby files its Application for Rehearing and Request for Stay ("Application") of the *Order of Rulemaking*, which was adopted by the Missouri Public Service Commission ("Commission") on June 2, 2010, and the final rule, designated 4 CSR 240-20.100, that was adopted therein. In support of its Application Empire states as follows:

1. On December 2, 2009, the Commission issued its *Notice of Finding of Necessity*, which states the intention to propose rules necessary to set forth standards required to comply with Renewable Energy Standard ("RES") prescribed in Proposition C, an initiative approved by Missouri voters on November 4, 2008. Subsequently, on January 8, 2010, the Commission submitted a proposed rule to the Missouri Secretary of State for publication in the Missouri Register. Following a period for public comment, which included a public hearing, the Commission issued an *Order of Rulemaking* on July 2, 2010, which included certain findings and conclusions that purport to explain changes to the proposed rule. This application seeks rehearing or reconsideration of both the *Order of Rulemaking* and the final rule.

2. The Commission should grant this Application because portions of the final rule are contrary to, and/or greatly exceed the scope of, Proposition C. By promulgating a rule that exceeds the letter, the spirit, and the scope of Proposition C the Commission has acted in a manner that is unlawful, unjust, arbitrary, and capricious. But beyond that, the final rule reflects regulatory policy choices that are detrimental to both utilities and the customers they serve. Proposition C was proposed to, and adopted by, Missouri voters as a means to achieve two objectives: to increase the use of renewable energy resources by electric utilities, but to do so in a way that would limit the affect on rates paid by customers for electric service. In many respects, however, the final rule approved by the Commission thwarts those objectives by exalting the interests of would-be providers of renewable resources over those of utilities and the customers they serve. And although the final rule may increase the use of renewable resources, it will do so at a cost that greatly exceeds the limitations contained in Proposition C.

3. The definition of "RES compliance costs," which is found in Section 1(N) of the final rule, is unlawful, unjust, arbitrary, and capricious because it will not allow recovery through rates of revenues lost as a result of the a utility's compliance with the RES. In the *Order of Rulemaking*, the Commission offered the following rationale for not including lost revenues as part of costs directly related to compliance with the RES:

> [T]he commission traditionally does not recognize "lost revenues" as a component of an "extraordinary cost" eligible for recovery in rates by energy utilities . . . For example, the commission has generally allowed electric utilities the opportunity to defer, and subsequently recover, in rates the cost of extraordinary and material storm outages. But the commission has not allowed companies to claim lost revenues (from when their customers were out of service as a result of the outage) as a component of their extraordinary losses for subsequent rate recovery purposes.

4. The Commission's attempt to analogize revenues lost due to compliance with the RES to revenues lost due to an extraordinary and material storm-related outage is unfounded for at least two reasons. First, it ignores the fact that during a material, storm-related outage lost revenues are offset, in whole or in part, by corresponding reductions in certain operating expenses, such as fuel and purchased power expenses. There will be no similar reduction in cost to offset lost revenues attributable to Empire's compliance with the RES. Second, the analogy also fails to take into account the fact that in the next rate case following an extraordinary and material storm outage the Commission routinely makes a "normalization" adjustment that eliminates the non-recurring effects of the storm on both expenses *and revenues*. This is done to try to replicate what the utility's actual cost of service would have been "but for" the extraordinary storm. Including lost revenues in the definition of "RES compliance costs" would achieve the same objective: it would replicate the full and true cost – *i.e.* the impact on both revenues *and* expenses – "but for" the RES.

5. Failing to include lost revenues within the definition of "RES compliance costs" found in Section 1(N) will ensure that the Commission will see only a portion of the true and full cost of implementing the RES. Such a result is *not* consistent with cost recovery principles generally applied by the Commission. Furthermore, it is not consistent with the letter and spirit of Proposition C, which was intended to allow utilities to fully recover all reasonable costs associated with implementation of the RES.

6. Sections 2(A) and 2(B) of the Commission's final rule are unlawful, unjust, arbitrary, and capricious because, individually or in concert with one another: (i) they impermissibly "bundle" renewable energy credits ("RECs") with energy sold to

Missouri customers, and (ii) they create a proof standard that will make it impossible for Empire, or any other electric utility, to count toward satisfaction of the renewable energy objectives in Section 393.1030.1, RSMo, RECs or renewable energy from out-of-state sources Each of these results is contrary to both the letter and intent of Proposition C.

7. Section 393.1025(4), RSMo, clearly and unambiguously defines the term "[r]enewable energy credit" as "a tradeable certificate or proof that one megawatt–hour of electricity has been generated from renewable energy sources." Despite the fact that this definition neither requires that an REC be linked to or bundled with electricity actually sold to a Missouri customer nor that renewable energy represented by an REC be produced within the state of Missouri, both those requirements were included in the Commission's final rule. Because it is unlawful for the Commission, through its rules, to impose requirements beyond those prescribed by statute, the Commission must order rehearing on Sections 2(A) and 2(B) of the final rules to make those provisions consistent with Section 393.1025(4), RSMo.

8. Testimony given to the Commission during the public hearing held April 6, 2010, also conclusively established that the parties who drafted and were responsible for Proposition C did not intend that there be any relationship between RECs and electricity actually sold to Missouri customers. Khristine Heisinger, an attorney for several wind energy producers, testified 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 the provision, and *it was never intended to require bundling of RECs with electricity*. (emphasis added)

(Transcript p. 257, lines 9-14) If Proposition C was not intended to require a linkage between RECs and energy sold to Missouri customers and if there is no language in the statute that requires such a linkage, then the Commission's attempt to impose such a requirement as part of the final rule lacks both legal and factual support.

9. Although, on their faces, both Sections 2(A) and 2(B) of the final rule appear to allow Empire to count energy or RECs produced outside Missouri toward satisfying the RES, the real effect of these sections is quite different. Before energy or an REC from a renewable resource located outside Missouri can count toward satisfying the RES requirements, Section 2(A) of the final rule states that a utility must "provide proof that the electric energy was sold to Missouri customers." As Empire noted in its written comments to the proposed rule, this is a proof standard that no utility can meet. The reason for this is simple: electrons are not unique they're fungible, and once electrons from an out-of-state generating facility enter the transmission and distribution grid it is impossible to prove whether the electricity ultimately sold to a Missouri customer came from a renewable source or a non-renewable source. The practical effect of this proof standard is that no energy or REC produced outside Missouri can be counted toward satisfying the RES. As noted previously in this Application, that result is contrary to the plain language of Section 393.1025(4), RSMo, which prescribes no geographic limitations on where energy or RECs can originate.

10. Section 4(H) of the final rule is unlawful, unjust, arbitrary, and capricious because it, too, goes well beyond anything that is specifically required or reasonably implied from the language of Proposition C. Among other things, Section 4(H) requires Empire to offer to each customer that installs a qualified solar electric system a "Standard

Offer Contract," which, among other things, will obligate the utility to purchase RECs produced by the solar system ("S-RECs') through either a one-time, lump-sum payment or through annual payments over a ten (10) year period.

11. In its *Order of Rulemaking* the Commission claims that its authority to prescribe a Standard Offer Contract is derived from two sources: (i) its authority under Section 393.1030.2, RSMo, to "make whatever rules are necessary to enforce the renewable energy standard"; and (ii) the requirement in Section 393.1030.1, RSMo, that "[a]t least two percent of each portfolio requirement shall be derived from solar energy." But the Commission's interpretation of its authority under Section 393.1030, RSMo, is much broader than is justified by the text of that statute. Applicable case law holds that an administrative agency's authority to promulgate a particular rule may be implied from a statute only if it necessarily follows from the language of the statute. *Pen-Yan Inv., Inc. v. Boyd Kansas City, Inc.*, 952 S.W.2d 299 (Mo.App. 1997). Although Section 393.1030.2, RSMo, authorizes the Commission to promulgate rules to implement the RES, including the solar energy objectives that are part of that standard, the authority to impose a Standard Offer Contract does not necessarily follow from that general rulemaking authority. The law requires more: a statutory mandate that is both much stronger and much clearer than that found in either Sections 393.1030.1 or 393.1020.2, RSMo. However, no such statutory mandate exists.

12. The only provision of Proposition C that specifically addresses rebates payable to solar electric systems is Section 393.1030.3, RSMo, which simply states, in relevant part, that an electric utility must "make available to its retail customers a standard rebate offer of at least two dollars per installed watt for now or expanded solar

electric systems." It cannot be credibly argued that the authority to impose the Standard Offer Contract requirement "necessarily follows" from a statute that does nothing more than set a floor for rebates payable for the installation of solar electric systems. Because Proposition C did not give the Commission the authority necessary to include a Standard Offer Contract requirement in the final rule, both the *Order of Rulemaking* and the final rule are unlawful.

13. But beyond the legal reasons noted above for invalidating the requirement for a Standard Offer Contract, that requirement also is contrary to one of the primary purposes for Proposition C: to increase the amount of electricity actually generated using solar energy. Under Section 4(H) of the final rule, S-RECs will not be purchased based on the amount of energy *actually produced* by a solar system; instead, they will be purchased based on an estimate of the amount of energy that *could be produced*, as determined by the nameplate capacity of the system. This will result in a windfall for the owner/operator of the solar system, but may do little or nothing to actually increase the amount of solar energy used to meet future demand for electricity. And the costs of this windfall will be borne by retail electric customers, even if the amount of the rebates exceeds the amount of solar energy actually produced. As previously noted, this is contrary to the purpose of Proposition C. It is also unfair to ratepayers who must bear the cost of this subsidy, especially those ratepayers who are not able to acquire and operate a solar electric system.

14. The Commission should grant rehearing/reconsideration of Section 4(H) to eliminate any obligation for Empire, or any other electric utility, to offer a Standard Offer Contract. Proposition C does not mandate such an arrangement and it is unlawful,

and an abuse of the Commission's discretion to include such a requirement in the final rule. Moreover, any payments that a utility makes for S-RECs should be based on electricity actually generated by a solar system instead of merely the capacity of the system to generate electricity. Otherwise the Commission's rule will frustrate a major objective of Proposition C – to substitute electric energy actually generated using renewable resources for electric energy from non-renewable resources.

15. In addition, Section 4(E) of the final rule, which prohibits a utility from purchasing S-RECs from an affiliate, is unlawful, unjust, arbitrary, and capricious . There is nothing in Proposition C that states that a utility, or its affiliates, cannot contribute to achieving the solar energy objectives prescribed in the initiative. And there can be little question that large electric utilities, with their superior financial strength and access to capital, have a greater ability to install and utilize solar generation than do smaller, more thinly-capitalized companies that focus on solar power exclusively. Consequently, the prohibition in Section 4(E) of the final rule is contrary to one of the primary objectives of Proposition C – to produce electricity using solar technology as quickly and as cost-effectively as possible. Moreover, Section 4(E) unjustly and unlawfully discriminates against utility affiliates that may want to invest in and deploy solar generation.

16. Section 5 of the final rule, which concerns the retail rate impact of complying with the RES, is unlawful, unjust, arbitrary, and capricious because: (i) allowing retail rates to increase by an average of one percent (1%) per year to recover costs related to the RES exceeds the maximum increase allowed under Section 393.1030.2(1), RSMo; (ii) the methodology for determining recoverable costs – *i.e.* "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" – imposes an extraordinary and disproportionate burden on a company like Empire that already is capable of satisfying a substantial portion of its energy requirements with power generated by renewable resources; (iii) Section 5 is ambiguous to the point of being impossible to both comply with and enforce; and (iv) the methodology for determining recoverable costs is fundamentally flawed because it double counts certain fuel and environmental regulatory costs.

17. Section 393.1030.2(1), RSMo, limits rate increases attributable to compliance with the RES to "[a] maximum average retail rate increase of one percent." Empire believes the "rate cap" contemplated by the statute is a *total* increase of no more than one percent. Support for this interpretation comes not only from the language of the statute itself but also from statements made by proponents of Proposition C, who advertized the initiative as a means to increase the use of renewable energy sources while, at the same time, limiting the effect of this increase on retail electric rates. In addition, the summary of Proposition C that was approved by the Secretary of State and that appeared on the November 2008 ballot states that the measure would restrict "to no more than 1% any rate increase to consumers."

18. In its *Order or Rulemaking*, the Commission rejects this interpretation of the rate cap prescribed by Proposition C in favor of an alternate interpretation that would allow for an average increase in rates of one percent *per year*. Empire submits that there is no justification, either in the language of the statute or in its "legislative history," for the interpretation adopted by the Commission and incorporated in the final rule. Certainly

it is reasonable to believe that if the proponents of Proposition C had intended for the "maximum average retail rate increase of one percent" to be an *annual* increase the statute would have specifically said so. The fact that the statute contains no such language strongly suggests that an annual rate cap of one percent was not what the proponents – and the voters – had in mind. Because the Commission's interpretation of Section 393.1030.2(1), RSMo., is contrary to both the language of the statute and the reasonable expectations of the voters who adopted the initiative, the provisions of Section 5 of the final rule, which allow for rate increases of up to one percent per year, are unlawful.

19. Section 5 of the final rule also imposes an extraordinary and disproportionate burden on a company like Empire that already has the capacity to satisfy a substantial portion of its energy requirements with power generated by renewable resources. In order to develop the cost estimates necessary to comply with Section 5, the Company will be required to go back in time and create a cost baseline for non-renewable power that it must then compare to the cost of renewable energy actually in its portfolio. Empire also will be required to estimate the cost differential of renewable and non-renewable resources well into the future. Studies to establish the cost baseline and to project future costs of renewable and non-renewable resources likely will be expensive, yet there is no provision in the final rule that ensures the recovery of these costs either as part of the Company's normal cost of service or as a cost of compliance with the RES. Moreover, there is nothing in the final rule to assure Empire that the Commission will accept and use the Company's cost estimates as a basis for recovering RES-related

compliance costs. For all these reasons, the provisions of Section 5 of the final rule impose a significant burden on the Company that is both unfair and unlawful.

20. The provisions of Section 5 of the final rule also are so vague and ambiguous that they will be difficult, if not impossible, to comply with and enforce. For example, the formula set out in Section 5(A) for calculating the retail rate impact of complying with the RES states, in part, as follows:

> The retail rate impact shall be calculated on an 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.

The meaning of this passage is anything but clear. For example, what does the phrase "planning year" mean? If some renewable generation is "directly attributable to RES compliance" does that imply that other renewable generation is not? Section 5(B) is similarly obscure, including phrases such as "an incremental RES-compliant generation and purchased power portfolio" and "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." Yet, despite these and numerous other ambiguous passages and phrases within Section 5, Empire will be expected to comply with the rule and to rely on its provisions in order to recoup the costs associated with compliance with the RES. Add to this the threat that the Company may be subject to fines and penalties for failing to conform to the rule, and the potential risks and burdens to Empire and all other electric utilities become clear.

21. Section 8(D) of the final rule, which requires the Commission to impose penalties for failure to achieve the renewable energy objectives prescribed by Proposition C, is unlawful, unjust, arbitrary, and capricious because, under Article I, Section 31 of the Missouri Constitution, it is unlawful for an administrative agency, like the Commission, to "make any rule fixing a fine or imprisonment as punishment for its violation."

22. Section 393.1050, RSMo, provides certain exemptions from fees and rebates associated with the RES to any electric utility that, by January 20, 2009, incorporates renewable energy sources of fifteen percent (15%) or more in its energy portfolio. Empire has satisfied all of the conditions set by that statute and therefore qualifies for the exemptions provided therein. Yet there is no provision in the Commission's rule for such exemption. Subsection (9) of the proposed rule included the exemption provided in Section 393.1050, RSMo; however, the Commission chose to delete it from the final rule due to a pending legal challenge regarding the validity of the exemption. In its *Order of Rulemaking* the Commission stated that omitting the exemption from the rule "will do no harm" because regardless of the outcome of the legal challenge Empire can claim the exemption as long as the statute remains valid and enforceable. Although the Company believes the Commission's position is valid from a legal standpoint, failing to include the exemption in the final rule seems an odd way to treat a clear statutory exemption. Empire believes the objective of the final rule should be to comprehensively deal with all issues related to the RES, and that omitting a valid, statutory exemption is inconsistent with that objective.

23. Section 9 of the final rule, which requires the Commission to impose penalties for failure to achieve the renewable energy objectives prescribed by Proposition

C, is unlawful, unjust, arbitrary, and capricious because a utility should be able to present whatever evidence is relevant in any complaint case that alleges the utility is earning more than its authorized rate of return. Evidence regarding amounts collected under the RESRAM, to the extent they have an effect on a utility's earnings, could be both relevant and material to issues raised in the complaint, and it is a violation of a utility's due process rights to prohibit it from presenting such evidence.

WHEREFORE, for all the reasons stated herein, the Commission should grant this application and should issue an order providing for a rehearing or reconsideration of 4 CSR 240-20.100 in its entirety, as required by law. In addition, pending such rehearing or reconsideration, the Commission should stay implementation of the final order. Finally, the Commission should grant such other relief as its deems appropriate.

Respectfully submitted,

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ATTORNEYS FOR THE EMPIRE DISTRICT ELECTRIC COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was delivered by first class mail, electronic mail, or hand delivery, on the 30th day of June, 2010, to the all parties listed on the Commission's official service list for Case No. EX-2010-0169.

/s/ L. Russell Mitten