

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Establishment of a Working)
Case for the Review and Consideration of)
Amending the Commission’s Rule on Electric)
Utility Renewable Energy Standard Requirements)

File No. EW-2020-0377

COMMENTS OF SIERRA CLUB

Sierra Club takes the opportunity afforded by this docket to address issues raised by Staff’s Proposed Amendment to 20 CSR 4240-20.100 appended to its Motion for Comments filed May 26, 2021.

In Staff’s “Motion to Establish Working Case” it raised an Issue D regarding renewable resources not “directly related” to the RES, either because the utility already exceeds the mandate or because voluntary renewable energy goals “outside of” the RES.

Staff’s proposed solution is:

(3)(M) Green pricing programs and voluntary utility renewable goals. Renewable resources, not directly related to RES compliance, such as those used in green pricing programs and voluntary utility renewable goals, shall be designated to those programs or goals unless otherwise approved by the commission. All RECs derived from utility offered green pricing programs and voluntary utility renewable goals shall be retired in a separate retirement account within the commission-approved tracking system and designated as public.

This amendment appears to give the Commission a standardless discretion to “approve” the use of these programs and goals for RES compliance. Sierra Club agrees entirely that these extraneous resources should be treated and retired separately. Perhaps the Club is being unduly alarmist in questioning how or why the Commission would approve them for the RES.

Staff raised this “problem” as issue D in its “Motion to Establish Working Case”:

Several utilities are in an excess position on RES compliance which leads to confusion regarding which renewable resources are considered to be “directly related” to RES compliance. Additionally, utilities are expressing greater interest in supporting customer renewable goals or their own outside of the Renewable Energy Standard.

The term “directly related” does not occur in the statute and appears in the current rule only at 20 CSR 4240-20.100(1)(Q), the definition of RES compliance costs. Under the statute and rule, renewable resources are certified by DNR-DE. The utility registers RECs with the tracking registry (the North American Renewables Registry or NAR) and demonstrates compliance by retiring RECs through NAR.¹

Staff has not pointed to any lacuna in the compliance process that needs to be fixed. Instead, they have identified a non-problem that could become a problem if Staff’s recommendation is followed.

As for green pricing programs, by which a utility arranges for customers to pay for unbundled RECs so that they can feel they are contributing to the adoption of renewable energy, the statute is clear: “An electric utility may not use a credit derived from a green pricing program” to comply with the RES.² The rule must remain free of any intimation that it could be so used.

What is “directly related” to the RES can be defined as renewable energy needed and offered by a utility to meet the standard, which tops out at 15% commencing in 2021. The whole issue should be moot when Ameren comes into belated compliance this year.

¹ 20 CSR 4240-20.100(3)(A), (F) and (J).

² § 393.1030.2, RSMo.

Still, the Commission could allow for an increase in the standard by legislation, e.g. to 50% or 100%, as has been repeatedly proposed, but that increase alone would require no change in the rule regarding qualified energy.

An example of a “voluntary renewable utility goal” is a company pledge of 80% carbon-free electricity by 2050. The goal itself is irrelevant to the RES, but the resulting energy can be used to comply with the RES. The **sales** used to meet the goal must consist of energy that complies with the Standard, i.e., MWh of electricity from qualifying renewable resources sold to the utility’s customers without a retail rate impact greater than 1%. The statute allows the Commission no discretion to deviate from these standards.

If a utility submitted RECs in excess of what was needed for compliance, they would simply be surplus to requirements and would have no effect other than perhaps to exceed the 1% retail rate impact. The proper thing to do with excess RECs is to disregard them as unnecessary, being careful that those which remain for compliance purposes are within the allowed rate impact.

Staff does raise an issue that was not foreseen when the RES was passed in 2008: green tariffs, a way of satisfying **customers’** voluntary renewable energy goals. The Commission has approved green tariff programs for Ameren³ and Evergy⁴ that are very similar in their terms. Both are subscription services ring-fenced from other utility investments. Ameren’s Renewable Choice program, as originally approved, was excluded

³ Second Non-unanimous Stipulation and Agreement, ET-2018-0063.

⁴ Non-unanimous Partial Stipulation Concerning Rate Design Issues, ER-2018-0145 and 0146.

from revenue requirement and was expressly not intended for RES compliance. RECs are either conveyed by the utility to the subscribers or retired on their behalf for the purpose of demonstrating compliance with their renewable energy goals; they cannot be retired by the utility on its own behalf. Under these terms, the Commission could not approve the use of a green tariff program for compliance.

Evergy's Renewables Direct program exclusively uses power purchase agreements (PPAs), and at least half of Ameren's program was to consist of PPAs. The RES is a percentage of the utility's "sales" to Missouri consumers that have an impact on retail rates. When a PPA is involved, a utility is not making sales, and the RECs are not its to retire. It is acting as a conduit for RECs to the green tariff subscribers.

In summary, **Sierra Club asks that paragraph (3)(M) be stricken** because:

- a. Use of green pricing programs is forbidden by the statute;
- b. Green tariff programs as structured to date do not qualify for compliance with the RES;
- c. Renewable resources used for a voluntary utility goal may or may not be eligible for compliance, if needed, under the terms of the RES; there is no issue of their being "directly related" to the RES unless and until they are presented for compliance; and therefore
- d. Giving the Commission standardless discretion to approve the use of such programs for compliance is beyond the scope of the enabling statute.

At minimum, **the phrase "unless otherwise approved by the commission" should be stricken but the whole paragraph has no place in the rule.**

Staff Issue 1.A. Sierra Club agrees that REC revenue should not flow through the FAC, if only because the RES creates a specific rate adjustment mechanism that should not be confounded with the FAC and environmental cost recovery mechanisms created by § 386.266.1 and -.2, RSMo, which are governed by separate Commission rules. Furthermore, wind and solar energy are not normally considered fuels. Sierra Club therefore agrees with solution “(i)” proposed by Staff and now contained in proposed rule **20.100(6)(A)16**. This paragraph is inconsistent with the FAC rule 20.090(1)(M), which will have to be amended if this proposal is adopted.

Staff proposed a solution “(ii)” under this issue, which is now included as paragraph **20.100(8)(B)(5)**, a provision for the annual report to include “**Documentation that the utility has evaluated the value of selling RECs, such as a cost-benefit analysis, proof of solicited sale, or other steps undertaken.**” This raises the possibility that a utility could be challenged for imprudence for not attempting to realize value for ratepayers by selling excess RECs (surely excess, although this is not stated in the draft rule!).

As a general matter, Sierra Club believes that unbundled RECs have little to no value in accomplishing the goal of an RES to add renewable energy to the wires. While prices can vary widely, they are often cheap and dirty (under \$1.00 in value and derived from dirty sources such as pulp mills). Above all, unbundled RECs lack the quality of “additionality,” *i.e.* their purchase does not serve to add new renewable generation but merely represents the operation of an existing facility and is not intended to finance, or is of too little value to finance, additional renewable generation. Sierra Club believes that

customers benefit financially from the RES. Requiring RECs of dubious value to be sold on to other entities that might use them for complying with some other standard does not benefit anyone.

Staff Issue 1.B. The statute is clear that penalties must be based on the “average market value” of RECs, § 393.1030.2(2). The lack of information about the market value of RECs may be a problem, although Evergy denied this in its 2020 response, but Staff’s proposed solution is unclear. One possible source of information is NAR’s Bulletin Board, where account holders post RECs for sale.

In paragraph **20.100(9)(D)**, average market value is to be based on “**the values reported by all electric utilities under subsection (8)(A) of this rule.**” This appears to be a typo since (8)(A) does not provide such values; does Staff mean (8)(B), specifically (8)(B)4, which specifies market values?

Staff Issue 1.C. Sierra Club is disposed to agree that separate compliance reports and plans are unnecessary but does not agree that oversight can be reduced to a “simple form.” The RES should be completely irrelevant by now, but Ameren demonstrates that it is not. At this late date the spectacle of Ameren buying millions of bottom-of-the-barrel RECs on the market to meet a mere 10% RES in 2020 should be shocking.

Other comments on the proposed rule

20.100(3)(H) requires certification by DNR-DE of any RECS being retired that came from a facility since decertified. Certification is a matter on which the Commission must consult with DNR. § 393.1030.4. Has Staff done so, and has DNR agreed? DNR may need to adopt a consistent rule.

Penalties may be excused under the statute if the utility “proves to the commission that failure was due to events beyond its reasonable control.” § 393.1030.2(2), RSMo. The mere fact that the RECs in question were created before the facility was decertified does not relieve the utility of this burden of proof. Maintaining the burden of proof should motivate utilities to exercise some due diligence when they go to market for RECs.

20.100(6)(B)2. We would appreciate clarification of what is meant by a “RESRAM tariff mechanism.”

To return to the issue of what is a fuel under the RES, paragraph **20.100(8)(B)4**, and the appended form for a simplified annual report, call for RECs to be identified by “vintage and fuel source, for all types of RECs.” While a renewable resource may be a combustible fuel, the vast majority of compliance RECs will be for wind and solar, leaving vintage alone to identify the RECs for determination of market value under 20.100(8)(B)4. If Staff means for solar and wind energy to be considered fuel, it should say so in a definition. If the idea is to qualify RECs as fuel-related for FAC purposes, it is an exercise in hammering a square peg into a round hole.

Comments on issues not addressed in the draft rule

A. Unbundled RECs for compliance

Section 393.1030.1, RSMo states: “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. A utility may comply with the standard in whole or in part by purchasing RECs.” To read the second sentence as allowing

unbundled RECs is to contradict the basic meaning of the first sentence of 393.1030.1. Portions of an earlier rule that gave some meaning to this part of the statute were struck down in 2010 by the Joint Committee on Administrative Rules, but this action by JCAR was not reviewed in court because the Missouri Supreme Court held that it was moot. *MCE v. JCAR*, 519 S.W.3d 805 (2017).

Staff's draft retains at the end an earlier account of the events set in motion by JCAR, which does not include the Supreme Court's decision. The issue needs to be revisited. RECs that do not represent energy delivered to Missouri or that do not have the character of "additionality," *i.e.* whose purchase does not serve to add new renewable generation somewhere, do not satisfy the law.

B. Hydropower nameplate limit

Paragraph **20.100(1)(N)(9)** is based on an erroneous view of the law. Hydropower is intended by the statute, § 393.1025(5), RSMo, to mean a facility with a total, not per-generator, nameplate rating of 10 MW or less. This issue was raised in Case No. EC-2012-0377 but was removed from contention by stipulation and was never resolved. Renew Missouri thoroughly documented in that case that Ameren and Empire's claim that "nameplate rating" could **only** mean the rating on the physical nameplate of an individual generator was patently false. The record of the complaint proceedings is available for administrative notice, but the following summary from the Legal Memorandum in Support of Motion for Summary Determination lays out the argument.

The RES limits qualifying hydro to "hydropower (not including pumped storage) that does not require a new diversion or impoundment of water and that has a nameplate

rating of ten megawatts or less,” § 393.1025(5), RSMo. The Commission’s rule adds the word “generator” (i.e. “generator nameplate ratings,” 4 CSR 240-20.100(1)(K)8), but the Commission’s rule does not specify whether those ratings are to be segregated or aggregated. We believe the language of the rule is consistent with the latter and only needs to be interpreted correctly.

Ameren maintains that “only generators have nameplate ratings.” (Response to Comments, p. 7, June 15, 2012, EO-2012-0351.) Empire has adopted the same argument (Response to Comments, pp. 3–5, July 3, 2012, EO-2012-0336), while conceding that “nameplate rating” can mean aggregate generator capacity in “informal usage” (Id. at 7).

The utilities’ position is untenable in light of the Direct Testimony of Ed Holt, which demonstrates that “nameplate rating” and the synonymous term “nameplate capacity” are most commonly used to describe the total generating capacity of a facility (Direct Testimony of Ed Holt, at 8). This usage is not merely informal but is the usage of the Federal Energy Regulatory Commission (“FERC”) (Exhibits 1–3.), the Energy Information Administration (“EIA”)(Exhibit 4), the Public Utility Regulatory Policies Act (“PURPA”)(Exhibit 5), and the North American Renewables Registry (“NAR”)(Exhibits 9–11).

Mr. Holt further demonstrates that Ameren and Empire have acquiesced in this meaning and thereby admitted what their compliance filings deny (Direct Testimony of Ed Holt, at 12–14). Ameren has reported to FERC that Keokuk has “Total installed cap (Gen name plate Rating in MW)” of 127.20, while Empire has reported the capacity of Ozark Beach on the same form as 16 MW (Exhibits 2–3). NAR lists the “Nameplate

Capacity” of Keokuk as 134 and of Ozark Beach as 16 (Exhibit 11).

Other examples of “nameplate capacity” being applied as “aggregate nameplate capacity” can be found in § 393.1050 and in Empire’s 2011 Annual Renewable Energy Standard Compliance Report. The statute that Empire claims exempts it from the solar requirements of the RES, Section 393.1050, applies to “any electrical corporation... which... achieves an amount of eligible renewable technology nameplate capacity equal to or greater than fifteen percent of such corporation’s total owned fossil-fired generating capacity...” § 393.1050, RSMo. Here “nameplate capacity” clearly refers to “aggregate” or “total” nameplate capacity even though neither of those words is used to modify “nameplate capacity.” In Attachment 2 to its 2011 compliance report, Empire repeatedly uses “nameplate capacity” to refer to aggregate capacity, as in, “Empire’s renewable energy nameplate capacity as of January 20, 2009 is 255 MW,” referring to the two Kansas wind farms with which it has PPAs (2011 Empire RES Compliance Report, pp. 14–15, Case No. EO-2012-0336).

Similarly, the Bureau of Reclamation refers to Hoover Dam with its 17 turbines: “The plant has a nameplate capacity of about 2080 MW” (Exhibit 16).

Case law supports this interpretation. In Don’t Waste Oregon Committee v. Energy Facility Siting Council, 320 Or. 132, 881 P.2d 119, 124 (1994), the “total generating capacity” of a plant is defined as the “nominal or nameplate capacity.” Another opinion of the same court refers to the “nameplate capacity” of the combined generating facilities of two separate dams. Portland General Electric Co. v. State Tax Commission, 249 Or. 239, 437 P.2d 827, 829 (1968).

In Philadelphia Corp. v. Niagara Mohawk Power Corp., 723 N.Y.S.2d 549, 550–1 (A.D. 2001), the opinion refers to the “nameplate capacity” as the total capacity of a “run of the river” hydro plant that originally had three generators, later replaced by a single large turbine.

The hydropower assets of two utilities are described thus in State ex rel. Utilities Commission v. Edmisten, 40 N.C.App.109, 252 S.E.2d 516, 521 (1979): “Tapoco’s two North Carolina facilities have a nameplate capacity of 155,000 KW; Nantahala’s eight plants (subject to New Fontana Agreement) have nameplate capacity of approximately 98,000 KW.”

In Madison Gas & Electric Co. v. USEPA, 25 F.3d 526, 529 (7th Cir. 1994), the terms “aggregate nameplate capacity” and “nameplate capacity” are used interchangeably.

RES statutes in other states commonly limit the size of qualifying hydro facilities or otherwise limit their environmental impacts (Direct Testimony of Ed Holt, at 16–9). Keokuk, with 15 generators, is a perfect example of how small hydro is not necessarily small if the megawatt limit is applied to the individual generators.

MDNR’s rule uses individual generator capacity. 10 CSR 140-8.010. However, MDNR is on record as urging the Commission to re-examine the issue, along with the issue of retroactive REC banking. EO-2011-0275, Transcript of August 30, 2011, pp. 69–72, comments of Asst. Attorney General Mangelsdorf; MDNR Comments in EO-2012-0351 (Ameren) and EO-2012-0336 (Empire).

- a. Aggregate nameplate rating is the intent of the statute.

“Nameplate rating” indisputably has at least two technical meanings. The remaining questions are which interpretation is intended by the RES statute, and which interpretation will the Commission choose to assign to its own rule.

The limitations on hydro that are common in RES laws nationwide have the primary purpose of avoiding environmental damage. Dams flood land and wildlife habitat (Holt at 17). An additional purpose is excluding existing facilities that have long since been amortized so as to encourage the development of renewable technologies not yet established (Direct Testimony of Ed Holt, at 17–19). Many states have limited the size of qualifying hydro facilities for similar purposes (Id. at 16–18). The Missouri RES has the same intent.

The purpose of environmental protection in the Missouri RES is shown by two passages in the law. First, hydropower must “not require a new diversion or impoundment of water,” § 393.1025(5), RSMo. Second, “Renewable energy facilities shall not cause undue adverse air, water, or land use impacts,” § 393.1030.4, RSMo. The environmental purpose is met primarily by the size limitation that the RES statute places upon qualifying hydro sources.

The purpose of encouraging new renewable technologies not yet mature is obvious from the nature and context of the RES itself. The intent of the RES could not be to allow all or almost all of the portfolio requirements to be met with hundred-year-old hydro facilities. It would have been unnecessary to pass an RES law in Missouri if that were the intent. Creating demand for new renewable energy development is the primary purpose of the law. An interpretation that would allow hydro plants larger than 10 MW to qualify

for RES compliance would frustrate this basic purpose.

Furthermore, there exists the general legal principle in Missouri that a statute is not presumed to enact useless provisions. Wollard v. City of Kansas City, 831 S.W.2d 200, 203 (Mo. banc 1992). When a word has an uncertain meaning, courts look to the subject matter of the statute, the object it is meant to accomplish, and the consequences of any proposed interpretation. State ex rel. Slinkard v. Grebe, 249 S.W.2d 468, 470 (Mo.App. ED 1952). The RES allows only small hydro in order to prevent the environmental impacts of large dams and to encourage the development of renewable sources not yet established. Accordingly, the 10 MW capacity limit must be interpreted to mean the aggregate capacity of all generating units at a hydro facility. Any other reading defeats the primary purpose of the RES.

Respectfully submitted,

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