BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

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

APPLICATION FOR REHEARING AND REQUEST FOR STAY

COMES NOW the Union Electric Company d/b/a AmerenUE ("AmerenUE") pursuant to § 386.500 RSMo, 4 CSR 240-2.080, and 4 CSR 240-2.160, and for its Application for Rehearing and request for a stay of the effectiveness of its Order of Rulemaking in the captioned case, states the following:

1. On June 2, 2010, the Missouri Public Service Commission ("Commission") issued an Order of Rulemaking in the above-captioned case, to be effective on July 2, 2010. The rule purports to implement renewable energy resources standards pursuant to Proposition C, which is codified at §§ 393.1020 through 393.1050, RSMo. (Cum. Supp. 2009) (the "Act"). The Commission should rehear this matter and thereafter revoke and rescind its Order of Rulemaking because it is unconstitutional, unlawful, unjust and unreasonable, arbitrary and capricious, and constitutes and abuse of discretion for all the reasons set forth herein.

2. The Order of Rulemaking requires a linkage of Renewable Energy Credits ("RECs") or 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 purpose and letter of the enabling legislation. The Act 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. The obvious purpose of including an option to buy RECs instead of energy was to "unbundle" the benefit of renewable energy production from the requirement that energy actually be delivered to a Missouri customer. In other words, the legislation allows electric utilities to comply with the renewable energy portfolio requirements by purchasing tradable certificates instead of arranging for the delivery of a specific resource's output into a particular service territory. The RES rule's requirement for physical delivery of power to Missourians directly contradicts the language of the Act. This is unlawful. *See* § 536.014.2 RSMo ("No department, agency, commission or board rule shall be valid in the event that: The rule is in conflict with state law."); *State ex rel. Springfield Warehouse & Transfer Co. v. Public Serv. Comm'n*, 225 S.W.2d 792, 794 (Mo. App. W.D. 1949) ("Respondent is merely the instrumentality of the Legislature, created for the purpose of carrying out that policy. It has no power to adopt a rule, or follow a practice, which results in nullifying the expressed will of the Legislature. It cannot, under the theory of 'construction' of a statute, proceed in a manner contrary to the plain terms of the statute.")

3. 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." The Commission's linkage or bundling of renewable energy generation with associated RECs has the practical and unlawful effect of limiting the geographic area within which electric utilities may secure renewable energy or RECs. This geographic sourcing requirement is unlawful because it is at odds with the enabling legislation. The statutory

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. Not only does the plain language of the Act not impose such a geographic restriction, but other provisions of the Act make even more clear that a geographic restriction does not exist. Section 393.1030.1, RSMo provides an incentive to electric utilities to favor Missouri generation by providing 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.

If all energy, and all RECs, were required by the statute to be sourced in Missouri, Section 393.1030.1 would be unnecessary and would have no effect. However, this would violate one of the most basic of principles of statutory construction, that is, that every word, phrase and provision of a statute be given effect. *See Neske v. City of St. Louis*, 218 S.W.3d 417, 424 (Mo. 2007) ("The primary rule of statutory construction is to determine the legislature's intent by considering the plain and ordinary meaning of the words used in the statute and by giving each word, clause, sentence, and section of the statute meaning"). Section 393.1030.1 can only be given effect if energy not generated in Missouri counts as 1 kilowatt hour, with non-Missouri sourced energy counting as 1.25 kilowatt hours. Thus, the law provides for an incentive for electric utilities to use Missouri generation sources, but importantly it specifically does not mandate it and affirmatively contemplates that energy (and RECs) can come from non-Missouri sources.

4. The Commission's rationale for the geographic sourcing limitation in the RES rule is based on an inventive, unjustified, and incorrect reading of the Act. On page

8 of its Order, the Commission attempts to rationalize its restriction on geographic sourcing on the following language in §393.1030.1 RSMo:

> 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 clearly unreasonable. Because this language addresses the portfolio requirements (which are tied to a starting point – a baseline) the plain language of the statute demonstrates that the reference to Missouri customers relates only to establishing a demand baseline for how the Commission is to determine whether the stair- stepped portfolio objectives have been achieved. In other words, 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. The base amount of megawatt-hours is the amount of power that the utility sells to its Missouri customers. This language in no way can be fairly read limit the ability of the utility to obtain REC certificates from the lowest cost source. This too demonstrates that the geographic limitation imposed by the Commission is directly adverse to the letter and purpose of the Act, and is thus unlawful.

5. 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.

6. There is also the reality 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.

7. As noted in paragraph 2, supra, the Act 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 the 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.[1] There is no requirement in the Act that electric utilities use RECs and, consequently, there can be no requirement in the implementing rule that they do so.

[1] 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). Although The Act was adopted by initiative petition rather than by the General Assembly, a statute adopted by initiative petition is to be "judged on the same basis as any other statute passed by the legislature." *Labor's Educ. and Political Club-Independent, et al. v. Ashcroft et al.*, 561 S.W.2d 339, 343 (Mo. 1977).

8. The Commission's mandate at 4 CSR 240-20.100(4)(H) that electric utilities extend to solar energy developers a so-called "standard offer contract" has no basis in the enabling legislation and, consequently, exceeds the Commission's statutory authority. The only financial incentive contemplated by the Act is a limited $2.00 per watt subsidy found in § 393.1030.3, RSMo. Requiring the standard offer contract constitutes a separate and additional subsidy on top of the $2.00 per watt rebate authorized by law.

9. The standard offer contract provision contained in the Order of Rulemaking is also in excess of Commission's statutory authority in that it purports to manage the business of electric utilities. 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. Nothing could be more intrusive to the manner in which an electric utility operates and manages its enterprise than the person or entities with whom it contracts and under what terms it makes such contracts. By extension, does the Commission have the power to direct electric utilities to enter into contracts with any other power or fuel supplier?

10. 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 while also being in the position of regulating the utility. In effect, the Commission is binding itself in subsequent rate cases concerning the "decisions" the Commission has "made" through its rule about the business and management practices it has mandated with its rule. 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 (or put itself) 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) ("the Commission's authority to regulate does not include the right to dictate the manner in which [a regulated utility] shall conduct its business."). 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 extraordinary generous standard solar contract subsidies when it has mandated the contract offers in the first place? The answer: it can't.

11. The Order of Rulemaking impermissibly restricts Missouri utilities from contracting with an affiliate, even when that contract would be the most cost-effective option to comply with its RES requirements. 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). First, this restriction is unnecessary, as the Commission already has rules governing transactions between a

utility and its affiliate to ensure the utility does not favor its affiliate to the determinant of its customers. 4 C.S.R. 240-20.015

Additionally, this prohibition is squarely at odds with Proposition C which permits "electric utilities to generate or purchase electricity from renewable energy resources." (emphasis added) Clearly, the Act 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. Nor, as discussed above, does the Commission have the authority to impose a requirement that is correctly left to the management of the utility. *Harline v. Public Service Commission*, supra.

12. The Order of Rulemaking is also unlawful because it allows electric utilities to exceed the 1% statutory cap. Section 393.1030 (2)(1) requires the Commission to develop rules that include "[a] maximum average retail rate increase of one percent determined by estimating and comparing the electric utility's cost of compliance with least-cost renewable generation and the cost of continuing to generate or purchase electricity from entirely nonrenewable sources, taking into account future environmental regulatory risk including the risk of greenhouse gas regulation." The rules require a 10-year comparison of the cost of adding renewables versus using an entirely non-renewable portfolio. This period of time is not included in the statute, it would require arbitrary and unsupportable assumptions about regulation far into the future, and as a consequence is unlawful, arbitrary, capricious, and constitutes an abuse of discretion.

Moreover, although it is not completely clear in the rules, the rules arguably permit a 10-year averaging of then annual cost impact of adding renewables. In other words, arguably the renewables could cause a 10% increase in year one, if there were no additional cost increases over the next nine years. Such an interpretation is clearly inconsistent with the statutory requirement. The rules should be modified so that rates including the renewables can never, at any point in time be more than 1% higher than they would be without renewables.

13. In addition, 4 CSR 240-20.100(5)(A) provides that the calculation of the 1% cap "…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." This provision completely eviscerates the 1% cap and would allow increase after increase as more and more renewable resources are placed on line and are determined not to exceed the 1% cap. This provision is clearly contrary to the letter and spirit of the statutory 1% cap, is unlawful, and should be eliminated.

14. The rate recovery provisions of the rules also are also inconsistent with the Proposition C in that the rules make them discretionary, whereas the Act mandates that cost recovery must be provided outside a rate case – not that a mechanism to do so "may" be used, but that it must be used. In this regard, section 393.1030(2)(4) RSMo provides that the Commission must enact rules to provide "…for the recovery outside the context of a regular rate case of prudently incurred costs and the pass through of benefits to customers of any savings achieved by an electrical corporation in meeting the requirements of this section." The Commission's rules, on the other hand, provide a

mechanism, which may be approved at the Commission's discretion. Proposition C entitles electric utilities to a mechanism that allows for compliance cost recovery outside of a regular rate case, and to the extent the Commission's rules allow the Commission discretion to deny a properly filed request for such a cost recovery mechanism, they are unlawful.

15. The fiscal note accompanying the Commission's notice of rulemaking was deficient in several respects. The total amount of the fiscal impact was materially under-estimated in that the fiscal note only listed the impact of this rule upon investor-owned utilities. This cannot be true, as the costs incurred by the utility will ultimately be borne by the utility's customers. Section 536.205.1(1) requires "An estimate of the number of persons, firms, corporations, associations, partnerships, proprietorships or business entities of any kind or character by class which would likely be affected by the adoption of the proposed rule…" Clearly, the fiscal notice attached to this proposed rule did not even attempt to take into account the fiscal impact on small businesses. For this reason as well the rule is unlawful.

16. The penalty provisions of the Order of Rulemaking found a 4 CSR 240-20.100(7)(C) of the rule are 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 RSMo.

17. 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.

18. The Order of Rulemaking contains many enumeration errors or omissions. For example, 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, there is no subsection (A) and the sequence thereafter jumps from (B) to subsection (G). There are similar problems throughout the rule 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 at best could result in future problems of compliance and administration, and at worst render the rules unreasonable and arbitrary.

19. Electric utilities should be excused from incurring the expense of complying with the RES rule until the important legal and policy issues identified in this

filing are resolved and the scope of RES obligations are settled. As a consequence, the Commission should exercise its discretion under §386.500.3 RSMo., and stay the effectiveness of its RES rule indefinitely and until further order of the Commission.

WHEREFORE, AmerenUE 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 raise herein, issue a new Order of Rulemaking consistent with this filing. Additionally, AmerenUE requests that the Commission stay the effectiveness of its order until such time as the issues identified hearing can be reheard and resolved in a many consistent with the language and intent of the Act.

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 30th day of June, 2010, to the following:

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