

This section may contain notice of hearings, correction notices, public information notices, rule action notices, statements of actual costs, and other items required to be published in the *Missouri Register* by law.

**Title 4—DEPARTMENT OF ECONOMIC
DEVELOPMENT
Division 240—Public Service Commission
Chapter 20—Electric Utilities**

IN ADDITION

**4 CSR 240-20.100 Electric Utility Renewable Energy Standard
Requirements**

On January 26, 2011, the Office of the Secretary of State, Administrative Rules Division received an order from the Public Service Commission relating to 4 CSR 240-20.100. The Public Service Commission ordered that subsection (2)(A) and paragraph (2)(B)2. of 4 CSR 240-20.100 not be published by the secretary of state. Previously, on July 6, 2010, the Public Service Commission filed a final order of rulemaking with the secretary of state for 4 CSR 240-20.100 that contained subsection (2)(A) and paragraph (2)(B)2. with a letter requesting that subsection (2)(A) and paragraph (2)(B)2. not be published with the rest of the order. Additionally, the Joint Committee on Administrative Rules (JCAR) on July 1, 2010, forwarded a letter to the secretary of state indicating that subsection (2)(A) and paragraph (2)(B)2. were disapproved and should not be published. Subsection (2)(A) and paragraph (2)(B)2. were not published in the order of rulemaking which appeared in the August 31, 2010 *Code of State Regulations* and were shown as reserved. Subsection (2)(A) and paragraph (2)(B)2. will not now be published and will remain reserved. The order filed by the Public Service Commission on January 26, 2011, appears below. The action of the general assembly and governor relating to subsection (2)(A) and paragraph (2)(B)2. of 4 CSR 240-20.100 are noted in a separate filing following this filing.

At a session of the Public Service Commission held at its office in Jefferson City on the 26th day of January, 2011.

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

**ORDER WITHDRAWING GEOGRAPHIC SOURCING PROVISIONS (2)(A)
AND (2)(B)2 OF 4 CSR 240-20.100 PURSUANT TO THE ACTIONS OF JCAR**

Issue Date: January 26, 2011

Effective Date: January 26, 2011

By this order, the Public Service Commission withdraws subsection (2)(A) and paragraph (2)(B)2. of 4 CSR 240-20.100 pursuant to the disapproval of the Joint Committee on Administrative Rules(JCAR) under Section 536.021, RSMo Supp. 2009. A notice of proposed rulemaking containing the text of the proposed rule was published in the *Missouri Register* on February 16, 2010 (35 MoReg 365). The Order of Rule-making was published in the *Missouri Register* on August 16, 2010 (35 MoReg 1183). With the exception of the two provisions being withdrawn by this order, the final rule was published in the *Code of State Regulations* on August 31, 2010, and became effective on September 30, 2010.

Subsection (2)(A) and paragraph (2)(B)2. of 4 CSR 240-20.100 were not published in the *Code of State Regulations* because of the disapproval of those provisions on July 1, 2010, by JCAR. The Commission is therefore withdrawing those provisions in compliance with this action.

The Commission has not presented the disapproved provisions to the Secretary of State for publication and will not do so in the future. On July 6, 2010, the Commission submitted a letter to the Secretary of State¹ in which it explained that even though the Order of Rulemaking included the disapproved portions, because of the Joint Committee on Administrative Rules' action the Commission was not filing those provisions for publication. The Commission is withdrawing those provisions and again requests that subsection (2)(A) and paragraph (2)(B)2. of 4 CSR 240-20.100 not be published or become effective.

THE COMMISSION ORDERS THAT:

1. Subsection (2)(A) and paragraph (2)(B)2. of 4 CSR 240-20.100 relating to geographic sourcing are withdrawn.
2. Any implied request for publication of subsection (2)(A) and paragraph (2)(B)2. of 4 CSR 240-20.100 as a part of this rulemaking is withdrawn.
3. This order shall become effective upon issuance.

BY THE COMMISSION



Steven C. Reed
Secretary

(S E A L)

Clayton, Chm., Gunn and Kenney, CC., concur.
Davis, C., dissents in part, concurs in part,
with separate opinion to follow.
Jarrett, C., dissents, with separate dissenting
opinion attached.

Dippell, Deputy Chief Regulatory Law Judge

¹ Attached hereto as Attachment A.



Commissioners
ROBERT M. CLAYTON III
Chairman
JEFF DAVIS
TERRY M. JARRETT
KEVIN GUNN
ROBERT S. KENNEY

Missouri Public Service Commission

POST OFFICE BOX 360
JEFFERSON CITY MISSOURI 65102
573-751-3234
573-751-1847 (Fax Number)
<http://www.psc.mo.gov>

WESS A. HENDERSON
Executive Director
DANA K. JOYCE
Director, Administration and
Regulatory Policy
ROBERT SCHALLENBERG
Director, Utility Services
NATELLE DIETRICH
Director, Utility Operations
STEVEN C. REED
Secretary/General Counsel
KEVIN A. THOMPSON
Chief Staff Counsel

July 6, 2010

Robin Carnahan
Secretary of State
Administrative Rules Division
600 West Main Street
Jefferson City, Missouri 65101

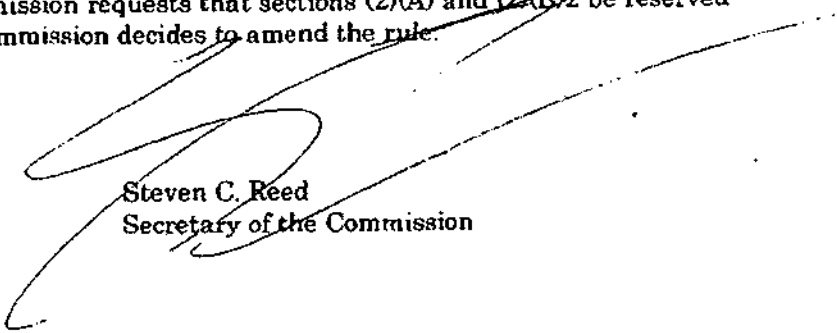
Re: **4 CSR 240-20.100 Electric Utility Renewable Energy Standard Requirements**

Dear Secretary Carnahan,

On July 1, 2010, the Public Service Commission voted to submit a Revised Order of Rulemaking for publication. Later on July 1, the Joint Committee on Administrative Rules voted to disapprove sections (2)(A) and (2)(B)2 of that rule, which contain provisions regarding geographic sourcing. JCAR approved the other portions of the rule and waived any further time JCAR may have to conduct hearings on the rule.

At its agenda meeting on July 6, 2010, the majority of the Commission voted to submit the Revised Order of Rulemaking for publication. This rule includes the portions disapproved by JCAR but, in accordance with section 536.073.8, the Commission is not filing those sections for publication. Rather, the Commission expects that the disapproved portions of the rule will be held in abeyance by JCAR and continue to work through the process set forth in Chapter 536 for the General Assembly to act.

The Public Service Commission requests that sections (2)(A) and (2)(B)2 be reserved for later use in the event the Commission decides to amend the rule.


Steven C. Reed
Secretary of the Commission

Attachment A

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of a Proposed Rulemaking)	
Regarding Electric Utility Renewable)	<u>File No. EX-2010-0169</u>
Energy Standard Requirements)	

**DISSENTING OPINION OF
COMMISSIONER TERRY M. JARRETT**

The law is not a thing to be skirted, diverted or maneuvered; instead, it must be followed. In issuing the "Order Withdrawing Geographic Sourcing Provisions (2)(A) and (2)(B)2 of 4 CSR 240-20.100 Pursuant to the Actions Of JCAR," the majority of this Commission has side-stepped the law and acted without legal authority. The law provides that the time for this Commission to withdraw two provisions of a rule it has adopted expired six months ago. The only lawful way for the Commission to "withdraw" the two rule provisions which are being held in abeyance by the Joint Committee on Administrative Rules ("JCAR") is to initiate a subsequent Order of Rulemaking that is first published as a proposed rule, permitted to be commented on by the public, and is published as adopted in a Final Order of Rulemaking in the Missouri Register.

Section 536.021.5, RSMo 2000, is clear that withdrawing a rule must be done within a certain window of time:

Within ninety days after the expiration of the time for filing statements in support of or in opposition to the proposed rulemaking, or within ninety days after the hearing on such proposed rulemaking if a hearing is held thereon, the state agency proposing the rule shall file with the secretary of state a final order of rulemaking either adopting the proposed rule, with or without further changes, or withdrawing the proposed rule, which order of rulemaking shall be published in the Missouri Register. Such ninety days shall be tolled for the time period any rule is held under abeyance pursuant to an executive order. If the state agency

fails to file the order of rulemaking as indicated in this subsection, the proposed rule shall lapse and shall be null, void and unenforceable.

(emphasis added).

The Commission held its hearing on the proposed rule on April 6, 2010, meaning that the ninety day window to withdraw expired on July 6, 2010. On July 7, 2010, the Commission filed with the Secretary of State its final Order of Rulemaking adopting 4 CSR 240-20.100, including the two provisions at issue. Once the Commission issued the final Order of Rulemaking adopting the rule, the Commission lost any authority to withdraw the rule or provisions of the rule that have been adopted. Verbal representations by other agency personnel that we have such authority are not the law. As I made clear during the agenda discussion on the Order of Withdrawal, the only legal way to “withdraw” at that point is to initiate a new rule making process.

An agency cannot unilaterally repeal provisions of a regulation merely by declaring that the portions are withdrawn. While I believe the Order issued by the Commission today is void, what that Order seems to be doing is promulgating a new rule, without any notice, opportunity for comment or other due process protections contained in Chapter 536. I agree with the majority’s position that the provisions should be repealed. However, it must be done in accordance with the requirements of Chapter 536 so that the law is followed and due process is ensured to all interested persons.

Sincerely,

A handwritten signature in black ink, reading "Terry M. Jarrett". The signature is written in a cursive, flowing style.

Terry M. Jarrett
Commissioner