

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

In the Matter of a Workshop File to Explore	)	
Legislative and Regulatory Means to Improve	)	
and Clarify Missouri's Renewable Energy	)	Case No. EW-2011-0031
Standard Law, Mo. Rev. Stat. §§ 393.1020 to	)	
393.1030.	)	

**COMMENTS OF ELEMENT POWER**

Element Power files these comments in response to the Public Service Commission's order dated August 5, 2010. Element Power appreciates the opportunity to submit comments on the issues identified in the order and to participate in this workshop generally.

**Element Power's Operations Globally and in Missouri**

Element Power ("Element") is a global renewable energy company that develops, acquires, builds and operates utility-scale wind and solar power projects. Element creates clean, renewable sources of energy to meet the increasing demand for green electricity and to address the pressing challenges of global warming and energy security. Through partnerships with landowners, other developers, utilities, government entities and equipment manufacturers, Element develops projects that are both profitable and sustainable. Owned by [Hudson Clean Energy Partners](#), a leading global private equity firm dedicated solely to investing in renewable power, alternative fuels, energy efficiency and storage, Element Power is pursuing projects in the European, North American, and South American energy markets. Element Power's principal offices are located in London, Madrid, and Portland, Oregon.

Element is currently involved in one 250 MW wind installation project located in Northwest Missouri. The company is currently moving the project through environmental studies and in the process of working with utilities for off take for the project. In addition, Element is considering additional investments in wind and solar installations elsewhere in Missouri, but its

decision to continue pursuing these opportunities will depend in large part upon the outcome of these deliberations.

### **Responses to Requests for Comment**

The Public Service Commission (Commission) requested comment concerning the legal economic and public policy consequences and implications of requiring electric energy or Renewable Energy Credits (RECs) associated with electric energy for compliance with the Renewable Energy Standard (RES) under four scenarios. The Commission also sought comment concerning the legal permissibility of any of the four scenarios based upon the current statute.

It is Element's position that only one scenario is legally permissible under the current statute and for the reasons stated below, geographic sourcing must be limited to scenario B as described in the Commission's Order establishing this workshop.

**A. What are the legal, economic and public policy consequences and implications of requiring electric energy or Renewable Energy Credits (RECs) associated with electric energy for compliance with the Renewable Energy Standard (RES) to come from a generation facility located in Missouri?**

Legal: The statute specifically contemplates that the power to which the RES applies could take place outside Missouri. Section 393.1030.1 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.” Likewise the RECs used to satisfy the RES may come from power generated outside the state as long as that power is sold to Missouri consumers. Given this express recognition that power may be delivered from a source outside

the state, the Commission should avoid the limited interpretation of the REC requirements contemplated in option A.

Economic: Because the legal implications of this limited interpretation are likely to further delay if not derail Missouri's RES if it is contested, Element reserves further comment on the economic impacts of requiring that all eligible power generation take place in Missouri except to observe that new renewable energy projects would have to quickly emerge in order to satisfy the resultant demand created by such a requirement.

Public Policy: Public policy considerations favor an interpretation that is consistent with the statutes. Therefore, public policy does not support option A.

**B. What are the legal, economic and public policy consequences and implications of requiring electric energy or Renewable Energy Credits (RECs) associated with electric energy for compliance with the Renewable Energy Standard (RES) to come from a generation facility located outside of Missouri, only if the energy for compliance with the RES is sold to Missouri customers?**

Legal: Element believes that option B is the only legally permissible interpretation of the geographic sourcing requirement according to the statute.

**The relevant statutory language supports the interpretation that RECs used to satisfy the RES should come from power generated in Missouri.**

Section 393.1030 governs the geographic sourcing requirement:

At least two percent of each portfolio requirement shall be derived from solar energy. 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. Each kilowatt-hour of eligible energy generated

in Missouri shall count as 1.25 kilowatt-hours for purposes of compliance. (Mo. Rev. Stat. §393.1030).

The portfolio standard applies to all power sold to Missouri customers. Utilities can satisfy the standard by delivering power that has been generated from a renewable source directly to the Missouri customer, or purchase renewable energy credits. But, those credits must have come from the same type of power - i.e., renewable power delivered to Missouri customers. The utility may or may not have generated or delivered the power itself to the customer, but the power that created the REC must have been sold to a Missouri customer.

Opponents of this interpretation attempt to divide the language into two separate and distinct sections -- one addressing the RES requirement and the other addressing the REC option. However, as the language indicates, the two are related and, in fact, the REC option is a subset of the RES requirement. To satisfy scenarios C or D (below), the statute would have to read something like the following:

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, which credits may be associated with power generated and sold to end-users located outside Missouri. Each kilowatt-hour of eligible energy generated in Missouri shall count as 1.25 kilowatt-hours for purposes of compliance.

**Compliance with this interpretation is technically feasible and not unduly burdensome.**

Opponents of the geographic sourcing requirement have argued that it is not practical to track the power from the generation source to the Missouri consumer for purposes of verifying

compliance with the RES. This argument is a red-herring and is contradicted by the basis on which sales and transmission of electricity have been regulated historically in the U.S.

In Order No. 888, the Federal Energy Regulatory Commission's (FERC's) landmark electric restructuring order, the Commission affirmed that "the longstanding approach used in the electric industry" is contract path pricing. *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,668 (1996).<sup>1</sup> According to FERC, "[a] contract path is simply a path that can be designated to form a single continuous electrical path between the parties to an agreement. The laws of physics dictate that it is unlikely that the actual power flow will follow that contract path." Order No. 888 at 31,667 n.184-5. FERC in Order No. 888 specifically rejected the urgings of some to switch from contract-based to electron flow-based pricing under the agency's wholesale electric industry unbundling initiative, explaining that such a change would be a "dramatic overhaul of the traditional [regulatory] approach." *Id.* at 31,668. The "development of a generic flow-based pricing methodology," explained FERC, "could severely slow, if not derail for some time, the move to open access and more competitive wholesale bulk power markets." *Id.*

Various states that have sought to impose a retail electric deliverability requirement have similarly recognized that this regulatory objective can be met through reliance on a contract path. To name just a few examples, New York has recognized that regulation of the electric industry is based on contract, not electron, path tracking. *See* New York Public Service Commission, Order

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<sup>1</sup> *Order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC P 61,046 (1998), *aff'd in relevant part*, *Transmission Access Policy Study Group, v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

Regarding Retail Renewable Portfolio Standard in Case 03-E-0188 at 63 (Sept. 24, 2004) (hereinafter New York PSC Order). The Montana Public Service Commission specifically recognized that although it is not possible to track electrons, the state's deliverability requirement is met if the facility is located within the same balancing area, there is a contract path, and there is a reasonable physical path from the generation to the Montana load. *In The Matter of the Petition by Black Hills Power, Inc. for Certification of an Eligible Renewable Resource*, Order No. 6988, 2009 Mont. PUC LEXIS 30. Thus, while it may not be possible to track the physical flow of electrons sold to the Missouri retail customer, it is possible to demonstrate contractually that particular sales of power to Missouri retail customers has occurred.

**This scenario is consistent with the legislative intent of the statute as approved by the voters.**

The RES was adopted by voter initiative in November, 2008 with 66% of the vote. The measure repealed Missouri's voluntary renewable energy and energy efficiency objectives in favor of the portfolio requirement. In so doing, Missouri voters required the covered utilities to integrate renewable energy into their electric power portfolios and agreed to pay more for the energy in return for this mandate. The framework described in Scenario B appropriately effectuates the voters' intent.

Economic: The Commission should implement the state's renewable energy standard in a manner that maximizes the benefits to Missouri. As the New York Public Service Commission determined in its rulemaking to implement that state's renewable portfolio standard, "since we are likely mandating an increase in costs, it is important that we structure the RPS [renewable portfolio standard] in a manner that maximizes the benefits that can accrue to New York from an RPS, consistent with all applicable laws and treaties." New York PSC Order *supra*. Scenario B

is the only interpretation that supports implementation in a manner that will bring economic benefit to Missouri.

Despite the presence of renewable energy resources within the state, few installations exist in Missouri as compared to other states with similar supplies. As illustrated by the map on Exhibit 1, Missouri's solar resources are similar to those of Spain, which accounted for 40% of the solar installation market globally in 2009. Yet, according to statistics tracked by the National Renewable Energy Lab, Missouri has only 5 solar installations in operation and ranks 36<sup>th</sup> in the United States. <http://openpv.nrel.gov/rankings> .Although wind is a more established industry within the state, Exhibits 2 and 3 show that wind installations in Missouri lag significantly behind states with similar levels of available wind resources such as Illinois and Indiana.

The future for renewable energy projects in Missouri depends upon support from within the state. Many states have approached renewable energy standards as an economic development strategy. Texas, for example, has committed to increasing wind power so that it can be a net energy exporter and keep the state's energy sector strong. Graham Jesmer, *Wind Power Helps Texas Move Past Oil*, Renewable Energy World.com, (Nov. 28, 2007) <http://www.renewableenergyworld.com/rea/news/article/2007/11/wind-power-helps-texas-move-past-oil-50675>. The state's new RPS law calls for doubling renewal power generation over the next decade. The Comptroller of the state of New York estimated that meeting the state's goal of deriving at least 25% of the state's electricity from renewable energy by 2013 will create almost 16,000 direct jobs and 43,000 jobs overall. *Id.* Element and other companies rely upon support from state governments to encourage further development in this burgeoning industry. Scenario B is the only interpretation that provides the requisite level of support to foster meaningful future investment in renewable energy.

Public Policy: Public policy interests can only be satisfied by adopting regulations that are consistent with this option B. The voters approved rate increase in return for the renewable energy standard as an investment in future electric power production. If the covered utilities are permitted to satisfy the RES by purchasing REC according to the criteria set forth in options C or D, their own economic interests require that they seek the least expensive solution to comply with the standard. As stated above, renewable energy production in Missouri lags behind over half the other states in the country. Other states produce renewable energy at lower costs and pursuant to more stringent standards than Missouri. Some of these states fall within the Regional Transmission Organization or Independent Transmission System Operator in which the covered utilities participate. Therefore, the RECs associated with the power produced in these states are both readily available and relatively inexpensive as compared to the cost of either investing in renewable energy generation or purchasing RECs sold to Missouri customers.

Adopting implementation standards under either scenarios C or D will permit the utilities to fully satisfy the RES by purchasing RECs associated with power production and delivery that has no nexus to Missouri ratepayers and taxpayers. To suggest that the voters approved a 1% increase in their electricity rates and contemplated that the 1% would be paid to businesses located any where in the country or around the world defies logic and clearly contradicts public policy. To accept that premise, one must assume that Missouri voters essentially voted to gift 1% of their utility bill to the renewable energy industry.

**C. What are the legal, economic and public policy consequences and implications of requiring electric energy or Renewable Energy Credits (RECs) associated with electric energy for compliance with the Renewable Energy Standard (RES) to come from a generation facility located outside of**



**Missouri, only if the energy for compliance with the RES is sold to retail customers located within the Regional Transmission Organization or Independent Transmission System Operator in which Missouri is located?**

**D. What are the legal, economic and public policy consequences and implications of requiring electric energy or Renewable Energy Credits (RECs) associated with electric energy for compliance with the Renewable Energy Standard (RES) to come from a generation facility located outside of Missouri irrespective of the location of the delivery of the energy?**

For the reasons stated above in response to options A and B, interpretations of the RES based upon options C or D are neither legal nor are they consistent with the state's economic or public policy interests. In order to ensure that meaningful investment in renewable energy takes place in Missouri, the covered utilities should not be permitted to satisfy the standard established by Missouri voters by purchasing RECs associated with power generated and sold outside the state from which neither Missouri nor its tax payers will derive any economic benefit. The rules approved by the Commission in its order dated July 7, 2010, appropriately reflect that the energy must be geographically sourced to Missouri consumers in order to satisfy the RES standard. Elimination of the geographic sourcing requirement would not only be bad policy, but would also require the Commission to disregard the statutory requirement that power be "sold to Missouri consumers." It is axiomatic in Missouri that rules which conflict with statutes are invalid. Mo. Rev. Stat. § 536.014 (2000). In its order of rulemaking, the Commission carefully considered the statutory language. Public Service Commission, Order of Rulemaking, 35 Mo. Reg. 1183, 1186 (Aug. 16, 2010). The Commission correctly concluded that utilities could be deemed to meet their portfolio requirements by purchasing RECs for electricity that was not

delivered into Missouri only if one portion of the statute was “read in isolation.” *Id.* The Commission properly rejected that narrow approach:

But every word, clause, and sentence in the statute should be given effect and harmonized. Subsection 393.1030.1, RSMo, also requires that the portfolio requirements apply to the utility’s “sales” and to “all power sold to Missouri consumers whether the power is self-generated or purchased from a source in or outside of this case.” . . .

Missouri voters passed a statute which specified that a renewable portfolio standard would apply to power sold to Missouri customers whether generated inside the state or outside. They did that because they wanted cleaner energy delivered to their homes and they wanted the economic advantages renewable energy generation will bring to the state. In order to achieve these goals, it is necessary to develop an in-state renewable energy industry. This rule recognizes that fact and sets its geographic sourcing in order to encourage and develop a wide-range of renewable energy resources in the state in conjunction with the requirements of the statute. Therefore, the commission makes no changes as a result of these comments.

35 Mo. Reg. at 1186.

The Commission’s rule still correctly interprets the statute. Nothing about the Joint Committee on Administrative Rules’ “disapproval” notice changes that. JCAR’s decision is only a “recommendation” to the legislature. Mo. Rev. Stat. § 536.028.5. To actually have legal effect, it must be passed by the full General Assembly and approved by the Governor. Mo. Rev. Stat. § 536.028.7; *Mo. Coalition for the Environment v. Jt. Comm. on Admin. Rules*, 948 S.W.2d 125, 134 (Mo. banc 1997).

Moreover, JCAR did not explain the basis for its decision and did not refute the Commission’s well-reasoned reconciliation of the statutory provisions. If the Commission were to repudiate its previous interpretation as would be required to implement options C or D, it would be acting in violation of the statutory language by misreading an isolated piece of the

statute and disregarding the voters' intent as reflected by Proposition C as a whole. An agency that changes its interpretation without a reasonable basis for doing so acts arbitrarily and capriciously. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Barry Serv. Agency Co. v. Manning*, 891 S.W.2d 882, 892, 894 (Mo. App. 1995). Options C or D are not permissible interpretations of Proposition C. They would fail to encourage development of renewable energy sources to serve Missouri and would frustrate the intent of the voters in adopting Proposition C.

The Commission posed additional questions in paragraphs 4.E, 4.F, and 5 of its order dated August 5, 2010, which relate to comparisons of the different options, their legal permissibility, and other legislative or regulatory solutions. As noted above, Element Power believes option B is the only permissible interpretation of Proposition C. When read as a whole, it is clear that Missouri voters intended to apply the RES standard to all power sold to Missouri consumers, including RECs purchased to comply with that standard. As noted above, the JCAR vote was only a recommendation and it would be inappropriate to treat that committee vote as an invitation to legislatively modify a voter-approved initiative or to revisit the Commission's well-reasoned interpretation of the statute.

### **Conclusion**

Accordingly, the Public Service Commission should reaffirm its commitment to the geographic sourcing provision of 4 CSR 240-20.100 as proposed in option B of its order dated August 5, 2010.

Respectfully submitted,

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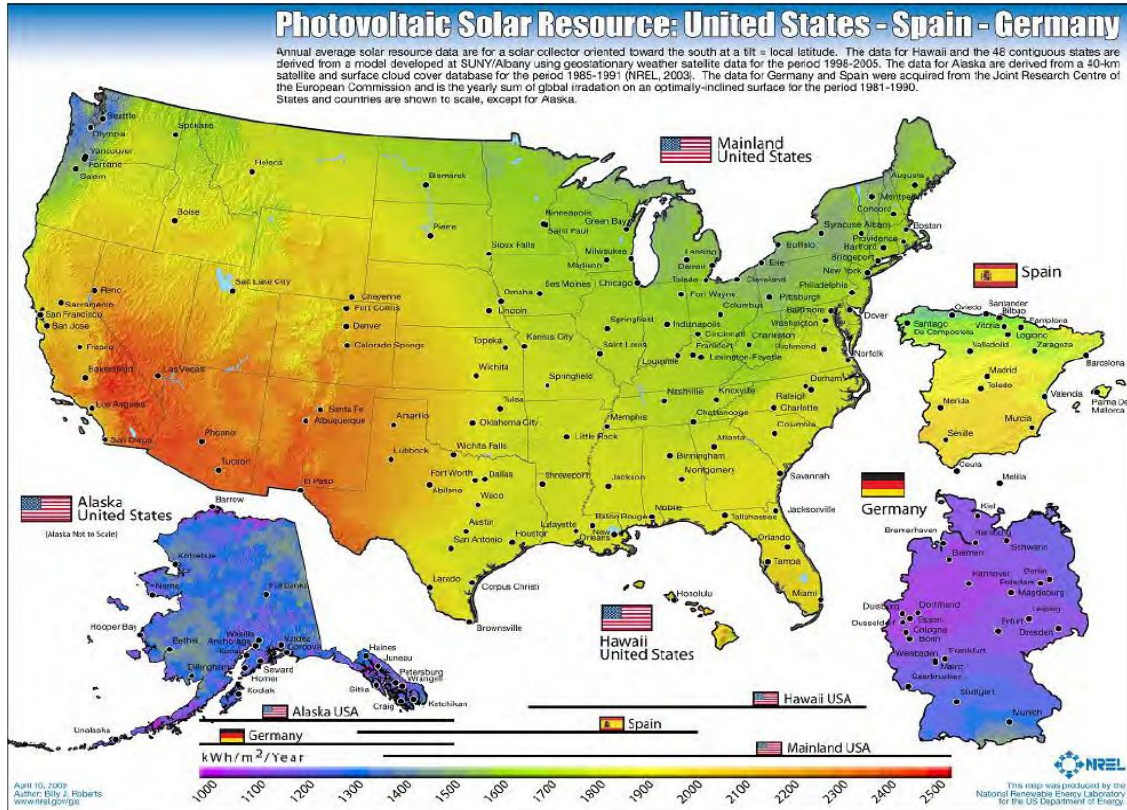
*ATTORNEYS FOR ELEMENT POWER*

**CERTIFICATE OF FILING**

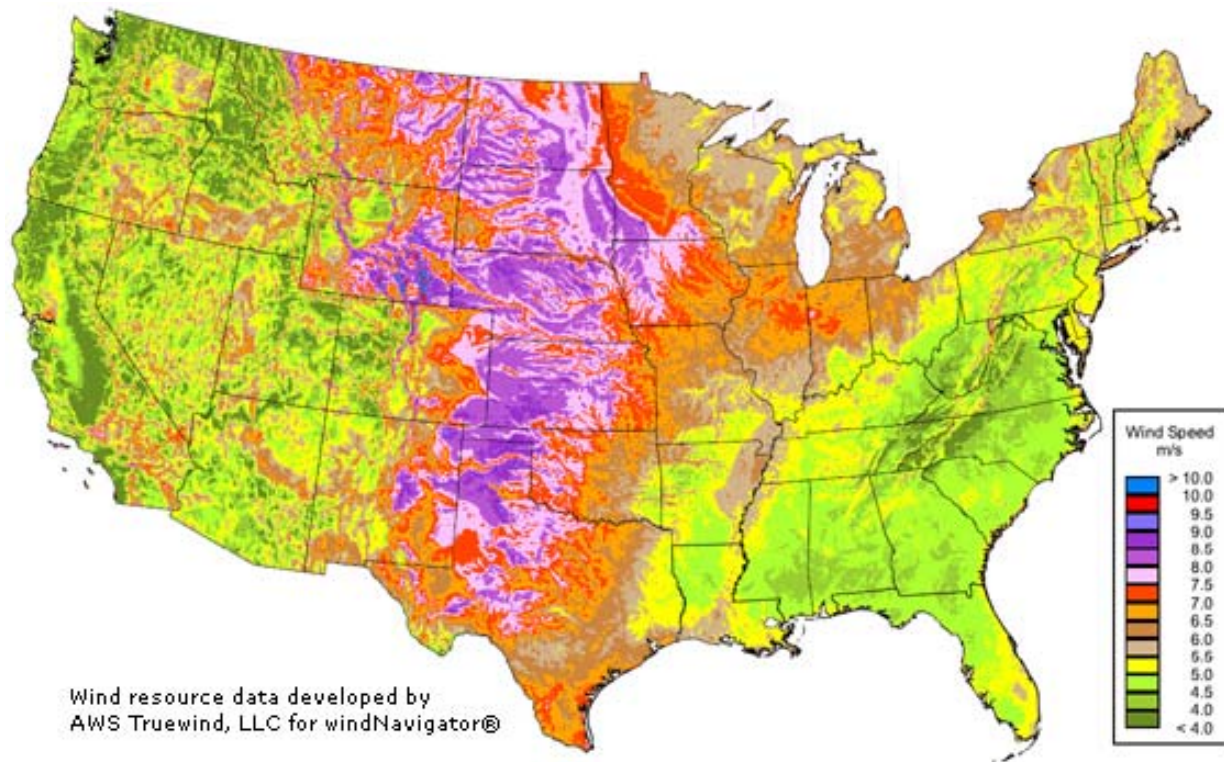
The undersigned hereby certifies that a true and accurate copy of the foregoing was electronically filed with the Public Service Commission on this 1<sup>st</sup> day of October, 2010.

/s/ Robert L. Hess II

## Exhibit A



## Exhibit B



## Exhibit C

