

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office  
in Jefferson City on the 16th  
day of April, 2008.

In the Matter of Proposed Rules	)	
4 CSR 240-3.162 and 4 CSR 240-20.091,	)	<b>Case No. EX-2008-0105</b>
Environmental Cost Recovery Mechanisms	)	

**ORDER DENYING APPLICATIONS FOR REHEARING**

Issue Date: April 16, 2008

Effective Date: April 16, 2008

On February 28, 2008, the Commission, at its Agenda session, voted to issue two Final Orders of Rulemaking regarding electric utility environmental cost recovery mechanisms. Those rules are 4 CSR 240-3.162 and 4 CSR 240-20.091 both of which deal with Environmental Cost Recovery Mechanisms. Chapter 20 is about the substantive requirements, treatment and effect; Chapter 3 sets out the application procedure; they are referred to collectively as the rules. On March 3, 2008, Final Orders of Rulemaking were delivered to the Joint Committee on Administrative Rules ("JCAR"), pursuant to §536.024 and in compliance with §536.021(6)6, RSMo 2007. On March 5, the Final Orders of Rulemaking, date-stamped by JCAR, were posted to the Commission's web site. On April 2, at 11:55:52 pm, the Missouri Industrial Energy Consumers<sup>1</sup> filed an Application for Rehearing. On April 3, the Office of the Public Counsel filed an Application for Rehearing.

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<sup>1</sup> The Missouri Industrial Energy Consumers are: Anheuser-Busch, BioKyowa, Boeing, Cargill, Chrysler, Doe Run, Enbridge, Explorer Pipeline, Ford, General Motors, Hussman, JW Aluminum, Monsanto, National Starch, Nestle Purina, Pfizer, Proctor & Gamble, Solutia and US Silica.

It is reasonable to assert that the issue date of a Final Order of Rulemaking is the date on which it is filed with JCAR, and the Final Order becomes effective 30 days after that date.<sup>2</sup> The date on which the Commission votes to promulgate the rule is effectively the date on which it delegates the authority to the Secretary of the Commission to file the Final Order. The form of the Final Order is dictated by the Secretary of State, and bears neither an issue date nor an effective date. The date on which a Final Order is posted to the Commission's web site is irrelevant. A Final Order is not submitted to the Secretary of State until JCAR has had thirty days in which to review it and the final rule language, to determine that the proposed rule is not outside the scope of the agency's authority, does not conflict with state law, is not so arbitrary and capricious as to create such substantial inequity as to be unreasonably burdensome on persons affected, or has fiscal notes that do not properly reflect the actual public or private costs associated with the rule. (See §536.014 RSMo 2007.)<sup>3</sup>

Courts have determined that a Final Order of Rulemaking falls within the parameters of §386.500 concerning applications for rehearing. The Missouri Supreme Court noted that, with respect to Final Orders of Rulemaking,

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<sup>2</sup> Section 386.490.3. Every order or decision of the commission shall of its own force take effect and become operative thirty days after the service thereof, except as otherwise provided, and shall continue in force either for a period which may be designated therein or until changed or abrogated by the commission, unless such order be unauthorized by this law or any other law or be in violation of a provision of the constitution of the state or of the United States.

Section 386.500.2. No cause or action arising out of any order or decision of the commission shall accrue in any court to any corporation or the public counsel or person or public utility unless that party shall have made, before the effective date of such order or decision, application to the commission for a rehearing. Such application shall set forth specifically the ground or grounds on which the applicant considers said order or decision to be unlawful, unjust or unreasonable. The applicant shall not in any court urge or rely on any ground not so set forth in its application for rehearing.

<sup>3</sup> Both the MIEC and the Public Counsel requested and were granted such a hearing before JCAR, which did not find grounds for suspension of the rulemaking. That hearing was held on April 1, 2008.

The circuit court's jurisdiction derives from sections 386.500 and 386.510, which provide that an applicant may seek review in the circuit court of a PSC "order or decision" if the applicant has timely filed an application for rehearing and that application has been denied. In that regard, this Court has held "that the Legislature has provided a special statutory procedure for review of an 'original order or decision' of the Commission...and that procedure [is] provided for in [section] 386.510 [and] is exclusive and jurisdictional." Moreover, this Court determined that the agency action at issue in the case "whether it be called a rule or an order, is clearly within the term 'original order or decision' as used in [section] 386.510." The clear import of our decision in *Clark* is that, when confronted with a challenge to a rule promulgated by the PSC, a circuit court is vested with jurisdiction to review the rule if the challenging parties have complied with the rehearing procedures set forth in section 386.510.

As noted above, the Final Orders were served on JCAR on March 3, as required by Chapter 536 RSMo 2007. The Public Counsel asserts that he has not yet been served with the Final Orders. The service requirement, as it pertains to rulemaking, can only mean service on JCAR or the Secretary of State (whichever applies). To find otherwise would preclude effectiveness of Commission Orders of Rulemaking, as the Commission cannot physically serve all those who may be affected by a rule. In the present instance, the rule arguably affects every consumer of electricity in the State of Missouri. As the Western District noted:

[A]ppellants argue that the Commission acted unlawfully in adopting the New Rules and the circuit court erred in affirming the decision of the Commission because the Commission's Order of Rulemaking was invalid in that the Commission failed to send a copy of the Order of Rulemaking to all effected parties as required by §386.490, RSMo 1986.

Several statutes are relevant to this point. First of all, §386.490, RSMo 1986, relates to the procedure for contested hearings before the Commission. See §§386.390-386.610, RSMo 1986. Section 386.490.1, RSMo 1986, requires that orders of the Commission shall be served on every person or corporation to be effected thereby. The purpose of §386.490.1, RSMo 1986, is to allow effected parties the opportunity to request rehearing and review of the Commission's Orders in accordance with the provisions of §386.500, RSMo 1986 (Rehearing before commission) and §386.510, RSMo 1986 (Review by circuit court).

Furthermore, §386.610, RSMo 1986, provides that the provisions of Chapter 386, RSMo 1986, are to be liberally construed and that substantial compliance with the provisions of Chapter 386, RSMo 1986, is sufficient. On the other hand, §536.021 relates specifically to the procedure applicable to state agencies when making, amending or rescinding rules.

A Rule is defined as an "... agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of an agency." §536.010(4), RSMo 1986. The term "rule" as used in Chapter 536, RSMo 1986, does not include a determination, decision or order in a contested case. §536.010(4)(d), RSMo 1986. A "contested case" is defined under §536.010(2), RSMo 1986, as "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after a hearing."

In accordance with §536.021.1<sup>[4]</sup>, notice of proposed rulemaking and a subsequent order of rulemaking are to be published in the Missouri Register. Section 536.021.6<sup>[5]</sup>, directs that rules of state agencies are void unless made in compliance with §536.021.

The Commission complied with the statutory requirements applicable to notice of proposed rulemaking and for the subsequent order of rulemaking by publication of said notice and order in the Missouri Register as specifically

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<sup>4</sup> Section 536.021.1. No rule shall hereafter be proposed, adopted, amended or rescinded by any state agency unless such agency shall first file with the secretary of state a notice of proposed rulemaking and a subsequent final order of rulemaking, both of which shall be published in the Missouri Register by the secretary of state as soon as practicable after the filing thereof in that office; except that a notice of proposed rulemaking is not required for the establishment of hunting or fishing seasons and limits or for the establishment of state program plans required under federal education acts or regulations. The secretary of state shall not publish any proposed rulemaking or final order of rulemaking that has not fully complied with the provisions of section 536.024 or an executive order, whichever appropriately applies. If the joint committee on administrative rules disapproves any proposed order of rulemaking, final order of rulemaking or portion thereof, the committee shall report its finding to the house of representatives and the senate. No proposed order of rulemaking, final order of rulemaking or portion thereof shall take effect, or be published by the secretary of state, so long as the general assembly shall disapprove such by concurrent resolution pursuant to article IV, section 8 within thirty legislative days occurring during the same regular session of the general assembly. The secretary of state shall not publish any order, or portion thereof, that is the subject of a concurrent resolution until the expiration of time necessary to comply with the provisions of article III, section 32.

<sup>5</sup> Section 536.021.6. The final order of rulemaking shall contain: (1) Reference to the date and page or pages where the notice of proposed rulemaking was published in the Missouri Register; (2) An explanation of any change between the text of the rule as contained in the notice of proposed rulemaking and the text of the rule as finally adopted, together with the reason for any such change; (3) The full text of any section or subsection of the rule as adopted which has been changed from that contained in the notice of proposed rulemaking; (4) A brief summary of the general nature and extent of comments submitted in support of or in opposition to the proposed rule and a concise summary of the testimony presented at the hearing, if any, held in connection with said rulemaking, together with a concise summary of the state agency's findings with respect to the merits of any such testimony or comments which are opposed in whole or in part to the proposed rule; and (5) The legal authority upon which the order of rulemaking is based.

required by §536.021.1. The Commission was not required to send a copy of the Order of Rulemaking to all effected parties as argued by appellants.<sup>6</sup>

Therefore, the Final Order of Rulemaking was issued and served on March 3, 2008 and became effective at 12:01 am on April 3, 2008 (pursuant to 4 CSR 240-2.050(2)). The Application for Rehearing filed by the Public Counsel was untimely and will be denied. The only remaining question is whether the MIEC Application for Rehearing, filed four minutes and nine seconds before the Final Order became effective, was timely.

As the Missouri Supreme Court so recently noted:

The PSC has two filing mechanisms: electronic and paper. The electronic filing system time-stamps all filings made after regular business hours, considered any time after 5 p.m. on weekdays, with the date of the next business day. See 4 CSR 240-2.045.2. Paper filings that are received by the commission's records room after 4 p.m. are stamped as "filed" on the next business day. See 4 CSR 240-2.080.11. The PSC's records room closes by 5 p.m. and is not open on weekends. *State ex rel. Office of Public Counsel v. Public Service Com'n*, 236 S.W.3d 632, 634 (Mo. banc 2007)

As MIEC's Application for Rehearing was filed after 5 pm on the last day on which to request rehearing, it was also untimely and will be denied.

**IT IS ORDERED THAT:**

1. The Office of the Public Counsel's Application for Rehearing is denied.
2. The Missouri Industrial Energy Consumer's Application for Rehearing is denied.

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<sup>6</sup> *State ex rel. City of Springfield v. Public Service Com'n of State of Mo.*, 812 S.W.2d 827, 833-834 (Mo.App. W.D. 1991) (This case was overruled on other grounds (Hancock Amendment violation) in *Missouri Municipal League v. State*, 932 S.W.2d 400 (Mo. banc 1996) (NO. 78567))

3. This order shall become effective on April 16, 2008.

**BY THE COMMISSION**

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', with a stylized, cursive script.

Colleen M. Dale  
Secretary

( S E A L )

Murray, and Jarrett, CC., concur.  
Clayton, C., dissent, with dissenting opinion to follow.  
Davis, Chm., absent.

Dale, Chief Regulatory Law Judge