

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

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

APPLICATION FOR REHEARING

COMES NOW the Office of the Public Counsel and for its Application for Rehearing states as follows:

1. On March 5, 2008 the Commission issued two final orders of rulemaking. Those orders are unjust, unreasonable, arbitrary and capricious, and unlawful for the following reasons.

2. The Commission lacked the statutory authority to adopt the proposed rules. The Truly Agreed and Finally Passed version of Senate Bill 179, passed in 2005, stated that

Prior to the effective date of this section, the commission shall have the authority to promulgate rules under the provisions of chapter 536, RSMo, as it deems necessary, to govern the structure, content and operation of such rate adjustments, and the procedure for the submission, frequency, examination, hearing and approval of such rate adjustments.

...

The provisions of this section shall take effect on January 1, 2006....

As codified, the statute replaces the phrase “Prior to the effective date of this section” with “Prior to August 28, 2005.” In any event, the Commission did not promulgate rules until more than two years after either of these dates. When the Commission finally issued its Final Orders of Rulemaking on March 5, 2008, the authority to issue rules had long since expired.

Furthermore, Section 386.266.9 requires that “Such rules shall be promulgated no later than one hundred fifty days after the initiation of such rulemaking proceeding.” While it can be argued that this rulemaking proceeding was initiated over a year ago when the Commission first convened roundtable discussions, it certainly was initiated no later than October 15, 2007 when

the Commission issued a Notice Opening Case. One hundred fifty days after October 31, 2007 is March 13, 2008. No rules were promulgated before March 13, 2008.

3. Section 536.021.6(4) RSMo 2000 requires that the Commission provide in these orders:

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....

In its orders of rulemaking, the Commission failed to properly identify to which rule certain comments applied. In the order of rulemaking concerning 4 CSR 240-3.162 the Commission discusses some comments that pertain only to 4 CSR 240-20.091, and *vice versa*. In fact, the Commission's orders of rulemaking are virtually identical for each proposed rule, so parts of each final order of rulemaking necessarily do not apply to the rule addressed by that final order of rulemaking. This "shortcut" has caused at least one clear error in the final rules: the Commission intended to modify 4 CSR 240-20.091(4)(B) and did so, but it also unintentionally replaced 4 CSR 240-3.162(4)(B) with the language from 4 CSR 240-20.091(4)(B). As a result, in the final Chapter 3 (Filing Requirements) rules, the Commission deleted the following "A complete explanation of how the over-collection or under-collection of the ECRM that the electric utility is proposing to discontinue shall be handled" and replaced it with the following: "The periodic adjustment shall reflect a comprehensive measurement of both increases and decreases to the environmental revenue requirement established in the prior general rate proceeding plus the additional environmental costs incurred since the prior general rate proceeding." If one looks at both rules as the Commission has adopted them, it is clear that the

Commission mistakenly removed a sentence from a list of filing requirements in Chapter 3 and replaced it with a completely inapposite sentence that should only appear in Chapter 20.

4. In its orders of rulemaking, the Commission made changes to the published proposed rule without identifying any comments upon which the changes were based. In one of the most egregious examples, 4 CSR 240-20.091(4)(A) has been significantly and substantively changed from the proposed rule. The orders of rulemaking¹ do not even mention that these changes are being made, much less identify any comments on which the changes might have been based. Furthermore, at least one section in the proposed rule (4 CSR 240-3.162(5)(C)) was deleted in the final orders of rulemaking without discussion or explanation. Section 536.021.6(2) requires “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.”

5. The Commission’s approval of the final orders of rulemaking was unlawful in that the Commission voted to approve the final orders of rulemaking at a public meeting² the morning of February 28, 2008, but those orders were still being drafted as of the following

¹ The rule transmittal form does list this change, as well as a number of others that are not addressed in the Final Orders of Rulemaking. In fact, the transmittal cover sheets identify 13 changes and the Final Orders of Rulemaking only identify 5. Furthermore, even some of those 5 are not identified as required with the preface “RESPONSE AND EXPLANATION OF CHANGE” but simply with the incorrect preface “RESPONSE.” In some instances there is no explanation of why changes were made.

² The minutes of that meeting are attached as Exhibit 1.

evening, February 29, 2008. Exhibits 2 to 6³ hereto clearly show that the final orders of rulemaking were not completed until the day after the Commission voted to approve them. Exhibit 5 (the final order of rulemaking for 4 CSR 240-3.162) shows that, although portions of the document were created on February 4, 2008, the bulk of it was added on February 29, 2008. Although the same level of detail about the drafting process is not preserved in Exhibit 6 (the final order of rulemaking for 4 CSR 240-20.091), that document's properties show that it was not even created until February 29, 2008 at 11:46 A.M., on the same day at about the same time that the addition of most of the text of Exhibit 5 began. Thus there was no valid Commission action on February 28, 2008 to approve the final orders of rulemaking because they did not exist at that time. There has been no subsequent vote of the Commission to approve the final orders of rulemaking once they did exist. The Commission's minutes of the February 28, 2008 public meeting do not reflect that the Commission delegated any authority to anyone to draft the final orders after the Commission voted on them, nor was any such delegation discussed at that meeting. The February 28, 2008 memos signed by the Commissioners indicate that, for each rule, they were voting to approve "the following Final Order of Rulemaking" even though neither Final Order of Rulemaking then existed.

6. The orders are unlawful and unreasonable because the Commission relied upon the comments and testimony of Warren Wood, the representative of the Missouri Energy Development Association (MEDA). The Commission quotes much of his testimony/comments

³ Exhibit 2 is an email message from the Secretary of the Commission concerning the final orders of rulemaking. Exhibit 3 is the email conveying the final orders of rulemaking. Exhibit 4 is an email confirming that the documents attached to Attachment 3 are the actual final orders of rulemaking. Exhibit 5 is the first Microsoft Word document attached to Exhibit 3. Exhibit 6 is the second Microsoft Word document attached to Exhibit 3.

verbatim in its orders of rulemaking and uses them as reason for not making changes to the proposed rule. Such action is contrary to Commission rule 4 CSR 240-4.020(3) which provides:

No person who has served as a commissioner or as an employee of the commission, after termination of service or employment, shall appear before the commission in relation to any case, proceeding or application with respect to which s/he was directly involved and in which s/he personally participated or had substantial responsibility in during the period of service or employment with the commission.

The MEDA representative who provided substantive testimony/comments was directly involved and personally participated in this matter as an employee of the Commission, having participated in the drafting of the rules and having conducted workshops with stakeholders in the development of the proposed rules all while a Commission employee prior to his employment at MEDA.

It appears that the Commission tried to mask the role its former employee took in this proceeding on behalf of MEDA. Eleven witnesses testified at the hearing; in the Final Orders of Rulemaking, the Commission specifically lists ten of them and identifies them by name. Only Mr. Wood, the MEDA representative prevented from testifying by 4 CSR 240-4.020(3), is not mentioned. Furthermore, as noted above, the Commission quotes Mr. Wood at length – an 80-word *verbatim* quote of Mr. Wood’s hearing testimony appears in the order of rulemaking at the bottom of page three⁴ – but this lengthy quote is not attributed to Mr. Wood. Its origin is obscured in two ways: first, it is not identified as a direct *verbatim* quote; and second, it is not attributed to Mr. Wood or even the organization he represents. It is simply referred to as something noted by “another commenter.”

⁴ In fact, most of the final orders of rulemaking from the last paragraph on page three through the middle of page four consists of unattributed quotes from Mr. Wood.

7. The rules as adopted by the Commission do not comply with the requirement of Section 386.266.4 that:

The Commission may approve such rate schedules after considering all relevant factors which may affect the costs or overall charges of the corporation, provided that it finds that the adjustment mechanism set forth in the schedules:

(1) Is reasonably designed to provide the utility with a sufficient opportunity to earn a fair return on equity....

Nothing in the Commission's rules as adopted would require a utility's rate schedules to ensure that they are reasonably designed to provide the utility with a sufficient opportunity to earn a "fair return on equity." Indeed, nothing in the Commission's rules as adopted would prevent a utility from increasing rates through an adjustment mechanism when the utility is already earning a fair return.

8. The Commission obviously considers safeguards to prevent overearning to be important, but never explains what safeguards are contained in the rule. Instead, it continuously refers to a discussion of these safeguards that supposedly occurs somewhere in the Final Orders of Rulemaking, but in actuality never appears. To cite a few examples, on the fourth page, the Commission refers to a discussion of safeguards that is "noted elsewhere." And on page five, the Commission states that the discussion is "noted above." On page six, the Commission again refers to a discussion of safeguards that is "noted elsewhere." On page eight, the Commission once again states that the discussion of safeguards is "noted above." The only possible passage that all these references could point to is the following unexplained assertion in a single sentence on page two: "The rule contains many ratepayer safeguards, all of which appear to be appropriate, and none of which appear to be unreasonable or overly burdensome to the utilities." Although the Commission clearly recognizes that safeguards against overearning are important,

it fails to address – beyond the one conclusory sentence quoted here – the many comments pointing out that safeguards are lacking.

9. Section 386.490 requires that “Every order of the Commission shall be served upon every person or corporation to be affected thereby, either by personal delivery of a certified copy thereof, or by mailing a certified copy thereof....” Section 386.710.2 provides that “The public counsel shall be served...with a copy of all orders of the commission. Public Counsel has never been served with a copy of either Final Order of Rulemaking, either by mail or by personal delivery.

WHEREFORE, Public Counsel respectfully requests that the Commission grant rehearing of its March 5, 2008 Final Orders of Rulemaking.

Respectfully submitted,

OFFICE OF THE Public Counsel

/s/ Lewis R. Mills, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the following this 3rd day of April 2008:

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/s/ Lewis R. Mills, Jr.

Missouri Public Service Commission - Minutes of Agenda Meeting

Thursday, February 28, 2008
09:30 AM

PSC Agenda Room, Governor Office Building, 200 Madison Street, Suite 900

Jeff Davis (JD): P, Connie Murray (CM): P, Robert Clayton (RC): P,
Linward Lin Appling (LA): P, Terry Jarrett (TJ): P, Staff: P

Approval of Minutes of Last Agenda Meeting

Agenda Date	JD	CM	RC	LA	TJ	Action
2/27/2008	Y	Y	Y	Y	Y	Approved as amended.
2/26/2008	Y	Y	Y	Y	Y	Approved as submitted.

WD Withdrawn

★ For Good Cause

Tariff and New Orders

Item No.	Commissioner Votes					Case/Tracking No.	Company Name/Brief Description
1.	JD Y	CM Y	RC Y	LA Y	TJ Y	ET-2008-0271	Aquila, Inc. – Order Approving Tariff And Granting Variance – Woodruff
Action:		Approved as submitted.					
2.	JD Y	CM Y	RC Y	LA Y	TJ Y	WM-2008-0229	Kimberling Investments, Inc. – Order Approving Sale of Assets and Discontinuance of Service – Dippell
Action:		Approved as submitted.					
3.	JD Y	CM Y	RC Y	LA Y	TJ Y	WO-2007-0424	Meadows Water Company, The – Order Approving Transfer of Assets – Pridgin
Action:		Approved as submitted.					
4.	JD Y	CM Y	RC N	LA Y	TJ Y	EX-2008-0105	Commission – Environmental Cost Recovery Mechanism Rule – Dale
Action:		Voted to send to Sec. of State for final publication					
Dissent:		Clayton - to attach					

Case Discussion

Item No.	Commissioner Votes	Case No.	Company Name/Brief Description
1.		WR-2008-	Commission – SR-2008-0267, SR-2008-0268, WR-2008-0269 – Aqua Missouri – Local

- 0266

Public Hearings – *Dippell*
- Action:

Discussed
2.

AX-2008-0201

Commission – Ex Parte Communication Rulemaking - Case Discussion – *Dale*
- Action:

Discussed
3.

ER-2006-0315

Empire District Electric Company, The – All Pending Applications for Rehearing – *Dippell*
- Action:

Discussed

Other Discussion

Item No.	Commissioner Votes	Brief Description
1.		
Description:	Commission Scheduling Matters	
Action:	Discussed	
2.		
Description:	Legislation	
Action:	Discussed	
3.		
Description:	Budget	
Action:	Not discussed	
4.		
Description:	Other	
Action:	N/A	
5.		FCC comments forbearance petitions. – <i>Van Eschen, Kliethermes</i>
Description:	Other	
Action:	Discussed. Directed Staff to file comments.	
6.	JD Y	CM Y
	RC Y	LA Y
	TJ Y	

Description: Litigation

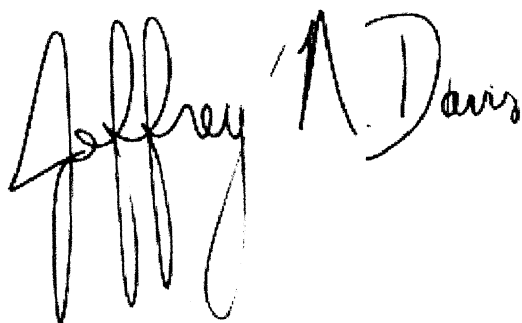
Action: Voted to close for Litigation and Personnel under RSMo 610.021(1), (3) and/or (13).
Discussed.

7.

Description: Personnel

Action: Discussed in open session and in closed session.

P = Present A = Absent Y = Yea T = Present via telephone N = Nay X = Non Participating

Handwritten signatures of Jeffrey and A. Davis. The signature 'Jeffrey' is on the left and 'A. Davis' is on the right.

3/10/2008

Chairman

Mills, Lewis

From: Dale, Cully [cully.dale@psc.mo.gov]
Sent: Monday, March 03, 2008 4:42 PM
To: Mills, Lewis
Cc: Dottheim, Steve
Subject: RE: EX-2008-0105

It's been sent to JCAR (earlier today), and will be in EFIS as soon as we get the routed vote slip back (I forgot to give it to them in Agenda). I'll forward the filed copies to you in just a sec. -
cd

From: Mills, Lewis [mailto:lewis.mills@ded.mo.gov]
Sent: Monday, March 03, 2008 3:57 PM
To: Dale, Cully; Dottheim, Steve
Subject: EX-2008-0105

Cully and Steve,
Has the Commission issued a final order of rulemaking in this case? My understanding from reports about last Thursday's Agenda was that they had, and Commissioner Clayton's dissent seems to indicate that as well. But there is no such order in EFIS. If the Commission has issued such an order, can I please get a copy ASAP?
Thanks,
Lewis

4/2/2008

Mills, Lewis

From: Dale, Cully [cully.dale@psc.mo.gov]
Sent: Monday, March 03, 2008 4:43 PM
To: Mills, Lewis
Subject: FW: Final Orders of rulemaking 4 CSR 240- 3.162 and 20.091

Attachments: ECRM 3.162 final ord of rulemaking.doc; ECRM 20.091 Final Ord of Rule.doc

From: Dale, Cully
Sent: Monday, March 03, 2008 3:42 PM
To: 'rules@sos.mo.gov'
Subject: Final Orders of rulemaking 4 CSR 240- 3.162 and 20.091



ECRM 3.162 ECRM 20.091
al ord of rulemaal Ord of Rule.

Secretary/Chief RLJ
573-751-4255

Mills, Lewis

From: Dale, Cully [cully.dale@psc.mo.gov]
Sent: Monday, March 03, 2008 5:41 PM
To: Mills, Lewis
Subject: RE: Final Orders of rulemaking 4 CSR 240- 3.162 and 20.091

Attachments: ECRM both final complete.doc

Those are the rules alright, although perhaps you aren't looking at a final version - get rid of the marked changes (a feature I loathe). I've also attached a clean copy of both rules complete. Again.



ECRM both final
complete.doc (..

don't show the changes. just show final.

From: Mills, Lewis [mailto:lewis.mills@ded.mo.gov]
Sent: Monday, March 03, 2008 5:30 PM
To: Dale, Cully
Subject: RE: Final Orders of rulemaking 4 CSR 240- 3.162 and 20.091

Cully,
Are these the final orders? One seems to be a redline/strikethrough of a telco rule. My main concern is with the effective date; can you please tell me what the effective date of the orders will be?
Thanks,
Lewis

From: Dale, Cully [mailto:cully.dale@psc.mo.gov]
Sent: Monday, March 03, 2008 4:43 PM
To: Mills, Lewis
Subject: FW: Final Orders of rulemaking 4 CSR 240- 3.162 and 20.091

From: Dale, Cully
Sent: Monday, March 03, 2008 3:42 PM
To: 'rules@sos.mo.gov'
Subject: Final Orders of rulemaking 4 CSR 240- 3.162 and 20.091

<< File: ECRM 3.162 final ord of rulemaking.doc >> << File: ECRM 20.091 Final Ord of Rule.doc >>



Secretary/Chief RLJ
573-751-4255