

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 23rd day of November, 2009.

In the Matter of the Consideration of Adoption of the PURPA **Section 111(d)(16)** Integrated Resource Planning Standard as Required by Section 532 of the Energy Independence and Security Act of 2007.)
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File No. EW-2009-0290

In the Matter of the Consideration of Adoption of the PURPA **Section 111(d)(17)** Rate Design Modifications to Promote Energy Efficiency Investments Standard as Required by Section 532 of the Energy Independence and Security Act of 2007.)
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File No. EW-2009-0291

In the Matter of the Consideration of Adoption of PURPA **Section 111(d)(18)**, Smart Grid Investments Standard, and PURPA **Section 111(d)(19)**, Smart Grid Information Standard, as Required by Section 1307 of the Energy Independence and Security Act of 2007.)
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File No. EW-2009-0292

**ORDER FINDING CONSIDERATION/IMPLEMENTATION OF NEW
FEDERAL STANDARDS THROUGH WORKSHOP AND RULEMAKING
PROCEDURES IS REQUIRED**

Issue Date: November 23, 2009

Effective Date: December 1, 2009

Background

On December 15, 2008, the Staff of the Missouri Public Service Commission filed requests for the Commission to open dockets for the purpose of establishing records of consideration as to whether to adopt the new standards encompassed within the Energy Independence and Security Act of 2007 ("EISA") as captioned above. The new EISA

standards amend the Public Utilities Regulatory Policy Act of 1978 (“PURPA”). Pursuant to EISA, the Commission was required to commence consideration of these standards no later than December 19, 2008, and was further required to make a determination regarding acting upon the new standards no later than December 19, 2009. On December 17, 2008, the Commission granted Staff’s motions and provided notice of opening the PURPA workshops.¹

On May 6, 2009, the Commission consolidated the PURPA workshops with the Commission’s ongoing workshops involving revisions to Chapter 22 of the Commission’s rules concerning integrated resource planning.² Workshops were held on May 18-19, 2009, June 29-30, 2009, and on October 19-20, 2009. An on-the-record presentation for the combined workshops was held on August 31, 2009.

The Prior State Action Exemption

Although EISA does not establish specific guidelines for the Commission to evaluate the new standards, it does incorporate PURPA’s established standard for evaluating prior amendments to its statutory scheme. First, the Commission is required to determine if prior state action prohibits consideration of the standards.³ Next the Commission must proceed

¹ Workshop Participants included: (1) Dogwood Energy, L.L.C.; (2) The Empire District Electric Company; (3) Missouri Department of Natural Resources; (4) Southwest Power Pool, Inc.; (5) Union Electric Company, d/b/a AmerenUE; (6) Missouri Industrial Energy Consumers; (7) Praxair, Inc.; (8) Sedalia Industrial Energy Users’ Association; (9) Noranda Aluminum, Inc.; (10) The Missouri Energy Group; (11) Walmart Stores East, L.P.; (12) Sam’s East, Inc.; (13) AARP; (14) Kansas City Power and Light Company; (15) KCP&L Greater Missouri Operations; (16) the Midwest Independent Transmission System Operator, Inc.; (17) Staff; and (18) Public Counsel. Any interested individual, group or entity could attend the workshops.

² See Commission File No. EW-2009-0412.

³ It should be noted that EISA expressly incorporates the “Prior State Actions” provisions of PURPA for the Smart Grid Investment and Smart Grid Information standards, but is silent as to the application of this evaluation to the Integrated Resource Planning and Rate Design Modifications to Promote Energy Efficiency Investments Standards. Nevertheless, the Commission has examined all four new EISA standards to

to formal adoption/implementation of the standard. The prior state action exemption can be summarized as follows:

The procedural requirements for consideration, determination and implementation of the new PURPA standards shall not apply:

in the case of any electric utility in a State if, before the enactment of these subsections --

(1) the State has implemented for such utility the standard concerned (or a comparable standard);

(2) the State regulatory authority for such State or relevant nonregulated electric utility has conducted a proceeding to consider implementation of the standard concerned (or a comparable standard) for such utility; or

(3) the State legislature has voted on the implementation of such standard (or a comparable standard) for such utility.⁴

The Commission must decide if it, or the Missouri legislature considered, voted upon or implemented a comparable standard to determine if the prior state action exemption applies. PURPA Section 124 (while not referenced in EISA with regard to the new PURPA standards, i.e. 11(d) (16-(19)) offers guidance for determining if a “comparable” standard has been considered that would constitute prior state action and exempt or prohibit the Commission from taking any further action in relation to the newly adopted standards. That section provides:

PURPA SECTION 124 (16 U.S.C. § 2634) Prior and pending proceedings

For purposes of subchapters I and II of this chapter, and this subchapter, proceedings commenced by State regulatory authorities (with respect to electric utilities for which it has ratemaking authority) and nonregulated

determine if the prior state consideration exemption applies. See Public Law 110-140, December 19, 2007, 121 STAT. 1791, Section 1307, “State Consideration of Smart Grid,” subsection (b)(3). See also 16 U.S.C. 2621(d).

⁴ See PURPA Section 112 (d), (e) and (f). See also 16 U.S.C. Section 2622(d), (e) and (f).

electric utilities before November 9, 1978, and actions taken before such date in such proceedings shall be treated as complying with the requirements of subchapters I and II of this chapter, and this subchapter if such proceedings and actions substantially conform to such requirements. For purposes of subchapters I and II of this chapter, and this subchapter, any such proceeding or action commenced before November 9, 1978, but not completed before such date, shall comply with the requirements of subchapters I and II of this chapter, and this subchapter, to the maximum extent practicable, with respect to so much of such proceeding or action as takes place after such date, except as otherwise provided in section 2631 (c) of this title. In the case of each standard established by paragraphs (11) through (13) of section 111(d), the reference contained in this subsection to the date of enactment of this Act shall be deemed to be a reference to the date of enactment of such paragraphs (11) through (13). In the case of the standard established by paragraph (14) of section 111(d), the reference contained in this subsection to the date of enactment of this Act shall be deemed to be a reference to the date of enactment of such paragraph (14). In the case of each standard established by paragraph (15) of section 111(d), the reference contained in this subsection to the date of enactment of the Act shall be deemed to be a reference to the date of enactment of paragraph (15).

Substantial is defined as relating to, or having substance; material; true or real; not imaginary; not illusive.⁵ Consequently, for a comparable consideration to have occurred, the Commission, or the state legislature, must have considered a law or regulation sufficiently similar in substance to the new PURPA regulations as to trigger the prior state action exemption.

The Commission's Legislative Record

Workshops do not constitute contested cases, even if they result in a determination that the Commission will engage in rulemaking.⁶ Rulemaking is an exercise of the

⁵ Black's Law Dictionary, Sixth Edition, West Publishing Co., 1990, p. 1428; The American Heritage College dictionary, 3rd Edition, Houghton Mifflin Company, 1993, p. 1354.

⁶ The Missouri Administrative Procedures Act defines a contested case as "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." Section 536.010(4), RSMo Supp. 2008. Contested cases involve the Commission's adjudicative power, applying existing law to past facts.

Commission's legislative power, making new law applying to future events.⁷ In contrast to an adjudicatory trial-like contested case, workshops and rulemakings contemplate that the Commission will meet interested members of the public face to face providing an opportunity for oral presentation and comment without the formality of a trial procedure.⁸

The Commission has satisfied the requirements for consideration of the new EISA standards, and on the basis of the quasi-legislative record created in these workshops, the Commission determines that no comparable standards have been considered that would constitute prior state action and prohibit the Commission from taking any further action in relation to the new EISA standards. Several participants have offered the Commission suggestions for how the Commission should proceed with the workshops leading to rulemakings. Additional procedural directions from the Commission shall follow in a subsequent order.

THE COMMISSION ORDERS THAT:

1. The workshops ongoing for consideration of the new standards encompassed within the Energy Independence and Security Act of 2007 ("EISA"), as captioned in this order, shall continue.

2. The Public Utilities Regulatory Policy Act's prior state action exemption is inapplicable to the new EISA standards.

⁷ "The identifying badge of a modern administrative agency is the combination of judicial power (adjudication) with legislative power (rulemaking)." *McNeil-Terry v. Roling*, 142 S.W.3d 828, 835 (Mo. App. 2004).

3. This order shall become effective on December 1, 2009.

BY THE COMMISSION



Steven C. Reed
Secretary

(S E A L)

Clayton, Chm., Davis, Jarrett, Gunn,
and Kenney, CC., concur.

Stearley, Senior Regulatory Law Judge

⁸ *State ex rel. Atmos Energy Corp. v. Public Service Com'n of State*, 103 S.W.3d 753, 759-760 (Mo. banc 2003).