BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

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

APPLICATION FOR REHEARING OF REVISED ORDER OF RULEMAKING AND REQUEST FOR STAY, OR IN THE ALTERNATIVE, REQUEST FOR CLARIFICATION

COMES NOW the Office of the Public Counsel and for its Application for Rehearing and Request for Stay, or in the Alternative, Request for Clarification states as follows:

1. On June 2, 2010 the Commission issued a final order of rulemaking on 4 CSR 240-20.100. The Commission issued a revised final order of rulemaking on July 1, 2010. Public Counsel filed an application for rehearing of the June 2 order on July 1. Without waiving any arguments made in its July 1 application for rehearing, Public Counsel hereby requests rehearing of the revised order. That revised order is unjust, unreasonable, arbitrary and capricious, and unlawful for the following reasons.

Geographic Limitations

2. The Order of Rulemaking marries Renewable Energy Credits (RECs) and Solar Renewable Energy Credits (S-RECs) with the electricity from the associated renewable energy resource by requiring that not only the RECs but also the associated energy be sold to Missourians. This requirement is contrary to the enabling legislation.[1] Proposition C specifically contemplates that an electric utility "may comply" with its renewable energy portfolio requirements "in whole or in part by purchasing RECs." The option to buy RECs instead of energy was intended to "unbundle" the benefit of renewable energy production from the

[1] Sections 393.1025 and 393.1030 (the "Renewable Energy Standard" or "Proposition C").

deliverability requirement. This concept of divorcing the renewable attributes of renewable energy from the energy itself is well-established.[2] The legislation was intended to allow electric utilities to comply with RES requirements by purchasing tradable certificates instead of buying (or producing) energy from a renewable resource. The rule allows the use of RECs from an out-of-state generating facility only if the energy associated with those RECs is sold to Missouri customers.

3. The theory underlying RECs is that their use will allow the "renewable attributes" of energy to be divorced from the energy itself, and that there will be a liquid market for RECs that will encourage the development of renewable resources. By restricting the RECs that Missouri utilities can use to satisfy the portfolio requirements, the Commission has created a rule that is more restrictive than is necessary to carry out the purpose of the statute. In addition, by restricting the market, the Commission has virtually guaranteed that Missourians will pay more for the RECs used to comply with the portfolio requirements. Proposition C gives an explicit advantage to renewable energy generated in Missouri by providing that "Each kilowatt-hour of eligible energy generated in Missouri shall count as 1.25 kilowatt-hours for purposes of compliance." The Commission relies on this explicit statutory preference to add additional preferences. By adding its own restrictions to the RECs that can be used, the Commission has not only exceeded the scope of the statute but has also ensured that Missourians will pay more and get less.

[2] See, *e.g.*, www.epa.gov/grnpower/gpmarket/rec.htm, a copy of which is attached hereto as Attachment 1. See also http://en.wikipedia.org/wiki/Renewable_Energy_Certificates#, a copy of which is attached hereto as Attachment 2. Both attachments have been formatted for readability.

4. The restriction on the geographic area within which electric utilities may secure renewable energy or RECs also impermissibly burdens interstate commerce and is a violation of the dormant Commerce Clause of the United States Constitution. U.S. Const. Art. I, § 8, cl. 3.

Retail Rate Impacts

5. Public Counsel appreciates that the Commission revised the rule to establish the "cumulative" calculation of retail rate impacts. The revisions that the Commission made to the rule definitely help in that regard, and the Commission's response to comments in the order of rulemaking make the Commission's intent to use a cumulative approach very clear. There is no consensus, however, as to exactly how the percentage is to be calculated under the cumulative approach. Henry Robertson, a principal drafter of Proposition C and a lawyer for Renew Missouri (which was the driving force behind Proposition C), testified at the Joint Committee on Administrative Rules that the rate cap language means that rates will not **ever** be more than one percent higher because of the RES requirements. Public Counsel submits that that is the proper way to calculate the percentage. It became apparent over the course of the week of June 28 that certain interests will not concede that this is what the rate cap in Proposition C means, or even what the cumulative approach means. Thus despite the intent of the drafter of Proposition C, and despite the intent of the Commission as expressed in the order of rulemaking, the lack of clarity in the rule itself will lead to unnecessary and resource-consuming fights over how to implement the RES requirements. As shown in the attachment to the MIEC's application for rehearing filed on July 1, certain interests will calculate "averages" – even under something denominated cumulative – that far exceed the actual impact. As that chart indicates, a utility can have costs for RES compliance (under either the "Build and Own" scenario or the "Enter into PPA" scenario) that, as a percent of "Revenue Requirement Under Non-Renewable Case" **exceed two**

percent every year.[3] And yet the calculation of "% RENEWABLE IMPACT (Cumulative with 10-year averaging)" shows those impacts to be well **under one percent** for the first seven years and not above two percent until after year ten. The Rule adopted by the Commission is not sufficiently clear to preclude a party from arguing – based on some alchemy of algebra – that utilities must incur costs far in excess of one percent to meet the RES requirements. Even if the Commission does not grant rehearing, it should take the opportunity to clarify exactly how it intends the one percent cap to be calculated under the rule.

6. The one percent cap was clearly included in Proposition C as a consumer protection designed to insure that customers face expressly limited and modest price hikes from the increased use of renewable energy. Missourians voted for Proposition C knowing that it would increase the use of renewable energy and encourage the development of renewable energy, and that their costs would not increase by more than one percent. But the PSC in its order of rulemaking has created a scheme in which costs can increase by almost one percent every year, which conflicts with the Renewable Energy Standard.

7. In its Proposed Rule, the PSC included language at 4 CSR 240-20.100(5) to implement the cap required by Section 393.1030.2(1). That language was confusing and unclear, and appeared to allow retail rate increases of up to one percent per year. The proposed rule provided that:

> (A) The retail rate impact, as calculated in 5 (B), may not exceed one percent (1%) for prudent costs of renewable energy resources directly attributable to RES compliance. The rate impact shall be calculated on an incremental basis for each addition of renewable generation through procurement or development of renewable energy resources, averaged over a ten (10) year period, and shall exclude renewable energy resources under contract prior to the effective date of

[3] Under the "Enter into PPA" scenario, the payments under PPA hit nine percent of revenue requirement in just four years.

this rule and renewable energy resources previously determined not to exceed the one percent (1%) threshold.

The Commission did not adequately modify this language in its revised order of rulemaking.[4] The changes, including the deletion of the final phrase in the revised order, are helpful but insufficient.

8. The rule as adopted by the PSC can be interpreted to allow increases in retail rates in excess of one percent cumulatively over the period encompassed by the Renewable Energy Standard. The rule provisions arguably permitting such increases conflict with and exceed the clear language of Section 393.1030.2(1).

Revised Order Effective Date

9. The Commission made its revised order effective on July 6. The Commission, at the Agenda meeting at which it adopted the revised order of rulemaking, discussed waiving the application of 4 CSR 240-2.045(2). But the Order Setting Effective Date adopted at that same meeting does not waive the rule, and so it appears that the Commission intends the rule to apply to the filing of applications for rehearing of the revised order. Arguably that rule is unlawful as it applies to application for rehearing,[5] but the Commission's decision **not** to waive it after explicitly discussing doing so means that any reasonably prudent lawyer should abide by it. This is particularly so given the importance of the issues involved and the absolute bar on any appeal

[4] Public Counsel is aware that the Commission made this change based upon a suggestion in Comments filed by Public Counsel and testimony at the hearing by a Public Counsel witness. But Public Counsel made clear in discussions with the Commission at the Commission's June 30 Agenda meeting and in testimony at JCAR on June 30 that, given the hardened and intractable (not to mention unreasonable) position of certain interests, the simple deletion of the last part of 5(B) would be insufficient to establish how the rate cap is to be calculated.

[5] Such an argument would be based upon the Suburban Water Case (PSC Case No. WC-2007-0452; Circuit Court Case No. 07AC-CC00926; and Supreme Court Case No. SC89164.

in the absence of raising issues in a timely-filed application for rehearing.[6] Although the Commission took the unusual step of making the order effective at 12 noon on July 6, Section 386.500.2 provides that "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." (Emphasis added.) The statute makes no mention of an "effective time," and it would take a bold practitioner to attempt to make new law in this area, especially since Alton Railroad, *supra*, is so clear. The Commission posted the revised order on its Electronic Filing and Information System at approximately 12:44 on July 1, and an unofficial copy was provided about an hour earlier. In order to be filed before the effective date of July 6 under 4 CSR 240-2.045(2), an application for rehearing must be filed by 5:00 p.m. on July 2[7] – less than thirty hours after its issuance. Although Public Counsel has tried to address all issues raised in the revised order and still file within the strictures of 4 CSR 240-2.045(2), the Commission has unreasonably and unlawfully constrained the time allowed to prepare and file this application for rehearing.

Service

10. 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

[6] State ex rel. Alton R. Co. v. Pub. Serv. Comm'n, 155 S.W.2d 149, 154 (Mo. 1941)

[7] Or as early as 4:00 p.m., if 4 CSR 240-2.080(11) means that the "business hours of the commission's records room" end at 4:00 p.m.

has never been served with a copy of the Revised Order of Rulemaking, either by mail or by personal delivery.

Request for Stay

11. Electric utilities – and especially their customers – should be excused from incurring the expense of complying with the Order of Rulemaking and the RES rule adopted therein until the important legal and policy issues identified in this filing are resolved and the scope of RES obligations are settled. As such, the Commission should exercise its discretion under §386.500.3 and stay the effectiveness of the Order of Rulemaking and the order adopted therein indefinitely and until further order of the Commission.

WHEREFORE, Public Counsel respectfully requests that the Commission grant rehearing and a stay of its July 1, 2010 Revised Order of Rulemaking, or in the alternative, grant clarification.

Respectfully submitted,

OFFICE OF THE Public Counsel

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By:_____

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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 2nd day of July 2010:

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