

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

In the Matter of Proposed Rules)	
4 CSR 240-3 .162 and 4 CSR 240-20.091,)	Case No. EX-2008-0105
Environmental Cost Recovery Mechanisms.)	
)	

DISSENTING OPINION OF COMMISSIONER ROBERT M. CLAYTON III

This Commissioner dissents from the majority's April 16th Order denying Public Counsel's and the Missouri Industrial Energy Consumers' ("MIEC") applications for rehearing. This Commissioner reaffirms substantive concerns raised in his Dissent filed on February 28, 2008. While this opinion will not repeat those suggested consumer protections, the Commission should take the opportunity to "rehear" its Order to reevaluate its position to include language limiting inappropriate rate increases associated with the Environmental Cost Recovery Mechanism (ECRM) or surcharge.¹

Additionally, this Commissioner believes procedural concerns have also been raised suggesting a need for clarification of the record and the Final Order of Rulemaking or possibly abandoning this case in favor of a new docket. Procedural errors in the rulemaking process have stalled or invalidated proposed rules relating to vegetation management as well as electric utility infrastructure inspection and investment in the last year.² Those rulemaking dockets were scrapped in favor of a new process, a fresh record and a clean Final Order of Rulemaking. Similar procedural concerns in this case may require this Commission to also begin a new rulemaking process and comment period.

¹ The Commission declined rehearing on two occasions, the first by Order Denying the Applications of Rehearing, and the second occasion by failing to address Public Counsel's Motion for Reconsideration on which the Commission is deadlocked. *See* PSC Minutes of May 12, 2008.

² *See* Case Nos. EX-2007-0214, EX-2008-0234, EX-2008-0231, EX-2008-0230.

Unfortunately, in denying the Applications for Rehearing, the majority ignored both substantive and procedural issues raised by the parties. Instead, the majority rejected the Applications as untimely and chose not to refute or address the other concerns. While the majority's theory of timeliness is one plausible interpretation of several statutes in procedurally rejecting the Applications, the Commission should have taken the opportunity to address all of Public Counsel and MIEC's concerns and improve the Commission's final product.

Rules may only be promulgated by state agencies if authorized by the General Assembly and those rules must be adopted with strict adherence to provisions found in the Administrative Practice Act in Chapter 536.³ Rules adopted by the Public Service Commission must also adhere to provisions found within Chapter 386.⁴ The rulemaking process is designed to afford all affected parties minimum standards of due process, give the public a full and fair opportunity to present its comments and establish a record on which a reviewing court can evaluate the rule.⁵ If the Commission departs from the requirements of the statutes and the courts, it could call into question the legitimacy of the rule through court invalidation by declaratory action.⁶

TIMING OF APPLICATION FOR REHEARING

The majority ignored each of the concerns raised by Public Counsel and MIEC⁷ and found the Applications to have been untimely filed. The MIEC filed their Application at 11:55 pm on April 2, 2008, while Public Counsel filed his Application at 4:43 pm on April 3, 2008. The majority found each of the filings occurred on the 31st day of the effective date of the Order and that they were, consequently, out of time. As a result, if the Applications were out of time,

³ §536.010, *et seq.*, RSMo. 2000.

⁴ See *State ex. rel. Atmos Energy Corp. v. Public Service Comm'n*, 103 S.W.3d 753, 758 (Mo. 2003).

⁵ Administrative Practice & Procedure, Vol. I, MoBarCLE §2.7 (3rd ed.).

⁶ §536.050, RSMo. 2000.

⁷ This dissent does not address in detail the concerns of the MIEC which are generally substantive in nature and addressed by this Commissioner's Dissent to the Final Order of Rulemaking dated Feb. 28, 2008.

then the parties may lose their right to appeal or to request judicial review of any of the substantive or procedural errors alleged.⁸

While this Commissioner does not necessarily agree with the majority's interpretation of statute and typical rulemaking practice, the majority's Final Order of Rulemaking sets out one potentially valid interpretation of a combination of several statutory provisions and various appellate opinions in evaluating the filing of Applications for Rehearing. It is unfortunate that the issue of time becomes the focus of debate rather than the other legitimate substantive and procedural grounds. Public Counsel's decision to wait until April 3rd to file his Application may ultimately be very costly to ratepayers and may prove to be a tremendous strategic error in allowing the rules to avoid judicial scrutiny.

There are several competing and potentially conflicting statutes in play within Chapters 536 and 386. Rulemaking procedures found in Chapter 536 must be followed as well as the Rehearing process associated with Commission orders in §§386.490, 386.500 and 386.510.⁹ Rights of judicial review stem not from §536.050, but rather from §386.510, which, for appellate jurisdiction, requires a prerequisite Application for Rehearing by a party with reasons to be raised on appeal.¹⁰

Applications for Rehearing are required to be filed prior to the effective date of Commission orders.¹¹ Typically, Commission orders specifically identify the effective date so that parties can be prepared to file their Applications for Rehearing in a timely manner. The effective date must give parties a reasonable opportunity to prepare their applications and must

⁸ §386.500.2, RSMo. 2000.

⁹ *State ex. rel. Atmos*, 103 S.W.3d at 758 (citing *Union Electric Company v. Clark*, 511 S.W.2d 822, 825 (Mo. 1974).

¹⁰ *Id.*

¹¹ §386.500.2.RSMo 2000.

provide a reasonable time for the parties to file their motions.¹² If an order is silent as to its effective date, then orders become effective 30 days from the date of issue.¹³ A Final Order of Rulemaking is an order subject to the requirements of §386.510 for judicial review, and may also be an order referenced in §386.490.3. In light of this analysis, if the Final Order of Rulemaking was voted from the Commission on February 28, 2008, and thirty days from that date is March 29, 2008, then this suggests both Applications were out of time.

However, the majority considers the effective date of the Final Order of Rulemaking to be the date it was delivered to the Joint Committee on Administrative Rules (JCAR), a legislative body within the General Assembly as required by §536.024. JCAR then has 30 days to act within its statutory role and the Commission cannot send the rule to the Secretary of State any sooner than 30 days from the date JCAR receives the rule.¹⁴ The majority concludes that the 30 day period begins on the date of delivery to JCAR or March 3, 2008. Thirty days from March 3rd suggests a deadline of April 2, 2008. Under this reasoning, Public Counsel is again out of time. MIEC's Application, filed in the middle of the night after the close of business, may also be out of time under Commission practice. Under past PSC practice and according to Commission rules, electronic filings that occur after 5:00 pm are deemed filed on the next business day.¹⁵ While this conclusion has been part of PSC practice, there may be arguments to the contrary necessitating the Commission to reconsider this interpretation.¹⁶

¹² *State ex. Rel. OPC v. Pub. Service Comm'n*, 236 S.W.3d 632, 637 (Mo. banc 2007).

¹³ §386.490.3, RSMo 2000.

¹⁴ §536.024, RSMo 2000.

¹⁵ 4 CSR 240-2.045(2); see Order Denying Respondent's Motion For Reconsideration and Application for Rehearing, Case No. WC-2007-0452.

¹⁶ "The Commission shall at all times, except Saturdays, Sundays and legal holidays, be open and in session for the transaction of business and the Commissioners shall devote their entire time to the duties of their office." §386.120.2, RSMo 2000. The Commission has an electronic filing system which allows filing at any time regardless of whether during the Commission's regular business hours. Commission rules must be updated to accommodate technology rather than rely on archaic and arbitrary standards of time.

Following the Order Denying Applications for Rehearing, Public Counsel filed a Motion for Reconsideration raising other plausible interpretations of timeliness and describing confusing advice from Commission staff. First, if one reviews the actual Final Order of Rulemaking delivered to the Secretary of State, it clearly identifies that the effective date of the Final Order of Rulemaking is the statutory 30 days from publication in the Code of State Regulations.¹⁷ The rule was published in the Missouri Register on May 15, 2008, and is to be published in the Code of State Regulations on May 31, 2008. Thirty days later, the rule takes effect suggesting that the deadline for applying for rehearing is June 30, 2008. This interpretation is also suggested by the Commission Secretary as the effective date for the rule in responses to electronic mail.¹⁸ If this is the proper interpretation, then both Applications may be timely filed and the majority erred in its denial of the Applications for Rehearing based purely on procedural grounds.

In prior cases, the Commission has denied a Motion for Rehearing on the procedural ground that it was untimely filed but has proceeded to address the concerns raised in the motion in the Commission's order denying such motion.¹⁹ This Commissioner believes that the Commission should have addressed each concern raised by Public Counsel and MIEC in its Order Denying Applications for Rehearing and not rested on its denial based on an untimeliness argument. The Commission is authorized to act on any rulemaking until ninety days after the hearing or comment period.²⁰ For a case with such a significant impact on Missouri consumers, the Commission should have found a way to address all of the concerns raised in the Applications for Rehearing, rather than relying on technical, procedural points to conclude the debate.

¹⁷ Final Order of Rulemaking, p. 2; *see also* §536.021.8, RSMo. 2000.

¹⁸ *See* Public Counsel's Application for Rehearing, Exhibits 2 and 3.

¹⁹ *See* Order Denying Respondent's Motion for Reconsideration and Application for Rehearing, WC-2007-0452.

²⁰ §536.021, RSMo. 2000.

PUBLIC COUNSEL OBJECTIONS

Public Counsel's Application for Rehearing asserts that procedural missteps and errors have caused significant flaws in the rulemaking process. Each issue standing alone raises sufficient concern for the Commission, at the very least, to revisit and vote again on the Final Order of Rulemaking, to be published by the Secretary of State. The Final Order of Rulemaking contains the final rule language, the record on which amendments were based and the Commission's responses to the parties' filed Comments. If the Final Order of Rulemaking is found to be defective, the entire case could be invalidated. This Commissioner believes that Public Counsel's concerns necessitate a fresh review by the Commission.

Public Counsel's procedural concerns may be summarized as follows. Public Counsel argues in ¶3 of the Application for Rehearing that inappropriate changes occurred in sections 4 CSR 240-20.091(4)(B) and 4 CSR 240-3.162(4)(B) in the drafting process questioning the actual, final version of the rules. In ¶5, Public Counsel again questions the actual final version of the rule compared to the version approved by the Commission majority on February 28, 2008. Public Counsel suggests that the final documents supporting the draft rule were not even created until the next day with significant amounts of substantive additions added on the day after the public vote. In ¶4, Public Counsel charges that section 4 CSR 240-20.091(4)(A), was substantively and significantly modified in the rulemaking process, yet the comment and response section is without a sufficient reference to what testimony led to the amendments and why they were adopted. These omissions or errors could suggest a violation of §536.021.6(2), causing the rule to be found void. While each of these issues could have been effectively addressed through rehearing of the Final Order of Rulemaking, the majority chose to ignore the concerns.

Public Counsel also challenges the comment and response sections in ¶8 in which he questions the use of vague references associated with “consumer protections” or “safeguards.” Each time the majority rejected suggestions for “consumer protections” or “safeguards,” the Final Order cited the reasons by reference to other unidentified sections with use of language such as “noted above” or “noted elsewhere.” Each reference can be traced back to a single self-serving, unsupported and conclusory sentence which includes a statement that, “[t]he 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.” This Commissioner endorsed several consumer protections that the majority rejected and questions what benefits or protections remain in the final proposal. Aside from this Commissioner’s disagreement on substantive grounds, if the Final Order of Rulemaking inadequately addresses issues raised by the parties, Chapter 536 may mandate a new rulemaking.

Lastly, Public Counsel raises a concern regarding testimony or comments vaguely referenced in the Final Order of Rulemaking associated with a witness sponsored by the Missouri Energy Development Association. Apparently, the Final Order of Rulemaking quotes part of this witness’ testimony verbatim and without attribution for passages of over 80 words. Public Counsel highlights that the Commission’s reliance on this testimony is unique in several ways. First, he suggests that this witness is the only witness not mentioned specifically by name in the Final Order of Rulemaking. The Final Order of Rulemaking specifically identified and referenced the comments offered by all of the other ten hearing participants. Secondly, large passages of this witness’ testimony were used in support of the Final Order of Rulemaking without identification in the record that the language came specifically from this witness in

verbatim form. The Final Order of Rulemaking merely refers to this witness as “another commenter.”

While these observations alone raise unique questions in this rulemaking process, Public Counsel then cites 4 CSR 240-4.020(3) which reads as follows:

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.

Public Counsel identifies the witness as a former employee of the commission who provided the testimony in the case and upon whom the majority relied so heavily. Public Counsel claims that the witness worked for the Commission during the pre-case workshops associated with the ECRM after passage of SB179.²¹ At the very least, this issue should be acknowledged by the Commission in its Order Denying Rehearing and each of Public Counsel’s concerns should be addressed with an explanation .

IN CONCLUSION

The ECRM has the potential to shift substantial risk and cost to ratepayers. The Commission should grant rehearing to add consumer protections and safeguards to protect the interests of the ratepayers. The Commission should also rehear the Final Order of Rulemaking to address flaws in the rulemaking process including drafting errors or mistakes, address last minute changes to the Final Order of Rulemaking, complete its explanations of amendments, including an inadequate Comment and Response section, and address incomplete references and alleged rule violations relating to a witness’ testimony. By addressing these issues, the majority could


²¹ Tr. 1, p. 60 at ln. 16-18.

have removed a number of procedural allegations that will, at the very least, serve as a distraction to the public debate. At worst, these missteps may undo the entire rulemaking.

Additionally, by dismissing the Applications as untimely, the public may be deprived of its right of judicial review. Regardless of one's position in the public debate, the concerns raised in the Applications for Rehearing warrant the Commission's evaluation and correction. The procedural and substantive questions must be answered for the public to have confidence in the majority's Final Order of Rulemaking.

For the foregoing reasons, this Commissioner dissents.

Respectfully submitted,


Robert M. Clayton III
Commissioner

Dated at Jefferson City, Missouri,
on this 3rd day of June 2008.