

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

In the Matter of a Proposed Rulemaking)	
Regarding Electric Utility Renewable)	<u>File No. EX-2010-0169</u>
Energy Standard Requirements)	

**DISSENTING OPINION OF
COMMISSIONER TERRY M. JARRETT**

The law is not a thing to be skirted, diverted or maneuvered; instead, it must be followed. In issuing the “Order Withdrawing Geographic Sourcing Provisions (2)(A) and (2)(B)2 of 4 CSR 240-20.100 Pursuant to the Actions Of JCAR,” the majority of this Commission has side-stepped the law and acted without legal authority. The law provides that the time for this Commission to withdraw two provisions of a rule it has adopted expired six months ago. The only lawful way for the Commission to “withdraw” the two rule provisions which are being held in abeyance by the Joint Committee on Administrative Rules (“JCAR”) is to initiate a subsequent Order of Rulemaking that is first published as a proposed rule, permitted to be commented on by the public, and is published as adopted in a Final Order of Rulemaking in the Missouri Register.

Section 536.021.5, RSMo 2000, is clear that withdrawing a rule must be done within a certain window of time:

Within ninety days after the expiration of the time for filing statements in support of or in opposition to the proposed rulemaking, **or within ninety days after the hearing on such proposed rulemaking if a hearing is held thereon**, the state agency proposing the rule shall file with the secretary of state a final order of rulemaking either adopting the proposed rule, with or without further changes, **or withdrawing the proposed rule**, which order of rulemaking shall be published in the Missouri Register. Such ninety days shall be tolled for the time period any rule is held under abeyance pursuant to an executive order. If the state agency

fails to file the order of rulemaking as indicated in this subsection, the proposed rule shall lapse and shall be null, void and unenforceable.

(emphasis added).

The Commission held its hearing on the proposed rule on April 6, 2010, meaning that the ninety day window to withdraw expired on July 6, 2010. On July 7, 2010, the Commission filed with the Secretary of State its final Order of Rulemaking adopting 4 CSR 240-20.100, including the two provisions at issue. Once the Commission issued the final Order of Rulemaking adopting the rule, the Commission lost any authority to withdraw the rule or provisions of the rule that have been adopted. Verbal representations by other agency personnel that we have such authority are not the law. As I made clear during the agenda discussion on the Order of Withdrawal, the only legal way to “withdraw” at that point is to initiate a new rule making process.

An agency cannot unilaterally repeal provisions of a regulation merely by declaring that the portions are withdrawn. While I believe the Order issued by the Commission today is void, what that Order seems to be doing is promulgating a new rule, without any notice, opportunity for comment or other due process protections contained in Chapter 536. I agree with the majority’s position that the provisions should be repealed. However, it must be done in accordance with the requirements of Chapter 536 so that the law is followed and due process is ensured to all interested persons.

Sincerely,

A handwritten signature in black ink, reading "Terry M. Jarrett". The signature is written in a cursive, flowing style with a large initial "T" and "J".

Terry M. Jarrett
Commissioner