

## Wind Coalition and Polsinelli Shughart Join Forces to Protect Missouri's Renewable Energy Standard

Polsinelli Shughart was hired in late 2010 to represent the Wind Coalition with regulatory and legislative issues relating to Prop C in Missouri. The principal attorneys working with the Wind Coalition include Richard Brownlee, Rodney Gray and Susan Henderson Moore.

In response to the passage of Prop C in 2008, the Public Service Commission adopted the Renewable Energy Standards by administrative rule. Later, the legislative Joint Committee on Administrative Rules (JCAR) disapproved the rule relating to geographic sourcing. The legislative process recently culminated with the Governor refusing to sign the concurrent resolution adopted by the legislature approving JCAR's action; thus, allowing the resolution to become effective, but withholding his approval.

In addition, the Governor sent a strongly worded letter to the legislature urging the body to take action on the issue of where renewable energy must be located. He stated, "The people of the Show-Me state share a vision of a cleaner, greener, healthier and more prosperous Missouri. They made that abundantly clear with the passage of the renewable energy ballot measure ... This is a decisive moment for Missouri; we are poised to realize our potential to become a leader in the development, production, use and export of renewable energy. It is imperative that we pass legislation now that moves renewable energy forward in Missouri."

As the solution to address the Prop C issues now lies with the legislature, the team and representatives of the wind industry have met with potential Senate and House sponsors to work on drafting legislation. Joint meetings with wind, solar, and utility representatives have also been held with such legislators to educate them on the varied positions of the groups and to work on compromise legislation. ■

## DOD and FAA to Coordinate Review of Turbines and Towers through 'Energy Siting Clearinghouse'

On January 7, 2011, President Barack Obama signed the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 into law. Though you might not equate wind farms with national security threats, part of this Act authorizes the Department of Defense to create an organization that will serve as a clearinghouse to coordinate the DOD and FAA review of structures that could potentially interfere with air traffic pursuant

THE POLSINELLI SHUGHART WIND AND RENEWABLE ENERGY group is experienced in the areas of corporate/ transactions law, energy, real estate, construction, environmental, land use, zoning, finance, governmental affairs and litigation. With more than 500 attorneys in 14 cities stretching from Washington, D.C., to Phoenix, Polsinelli Shughart is where energy development is occurring. For more information and contacts within the Energy group, see page 4.

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## DOD and FAA to Coordinate Review of Turbines and Towers through “Energy Siting Clearinghouse”

to 49 USC § 44718, which includes certain wind turbines and transmission towers.

The objective of this “Energy Siting Clearinghouse” is to create a predictable, repeatable and timely process that coordinates and promotes renewable energy development and military readiness. Specifically, the Clearinghouse is authorized to, among other things,

(1) assess the likely scope and duration of any adverse impact on military operations and readiness, (2) identify any feasible and affordable actions that could be taken by DOD or the developer to mitigate such adverse impact while still allowing such project to proceed with development, and (3) develop, in coordination with other departments, an integrated review process for such developments. ■

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## Nuclear Energy

In 2009, AmerenUE proposed legislation to repeal the current “construction work in progress” (CWIP) laws. The bill, which did not pass, would have allowed the Public Service Commission (PSC) to grant rate increases to AmerenUE customers in order to underwrite interest costs incurred during the construction of its new proposed nuclear plant, known as Callaway II. The bill faced opposition in the Senate and did not pass.

In late 2010, AmerenUE and other Missouri energy providers unveiled a new proposal that would allow AmerenUE to recover the costs of obtaining an early site permit from ratepayers for

the construction of Callaway II. It is estimated that the cost to consumers would be approximately \$45 million.

The Governor has been publicly supportive of the legislation. Other proponents include Associated Electric Cooperative, Empire District Electric, the Association of Missouri Electric Cooperatives, Kansas City Power & Light and the Missouri Public Utility Alliance. The major opponent of the legislation is the Fair Energy Rate Action Fund (FERAF) representing many of Missouri’s large industrial electric power users, such as Noranda Aluminum and Anheuser Busch. ■

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## Don’t Overlook NEPA In Project Development

Energy developers confronted with the National Environmental Policy Act (NEPA) for the first time are often shocked at how it can knock their projects off schedule or, worse, stop a project in its tracks. NEPA, which was enacted at the dawn of environmental legislation in 1969, requires that federal agencies making decisions about “major federal actions” first examine the impacts of those federal actions. So how does NEPA come to bear in energy development? Examples of major federal actions that may arise in energy development include: a decision to allow the development on federal land; a decision to grant a federal permit such as a Section 404 permit from the Army Corps of Engineers or an incidental take permit under the Endangered Species Act; and a decision to provide a federal loan or grant, or for a federal agency to purchase power from the project. ■

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## Renewable Energy Standards Regulations Take Effect

In May 2009, the Kansas legislature adopted a renewable energy standard (RES) by passing House Bill 2369. This legislation set the basic ground rules for the RES, and required that the Kansas Corporation Commission (KCC) establish specific rules and regulations to administer the portfolio standard. After numerous rounds of input from stakeholders, the KCC adopted these regulations on October 27, 2010. These became effective on November 19, 2010 and are codified at K.A.R. 82-16-1 to 82-16-6.

Overview. Kansas bases its RES on a utility’s generation capacity (kilowatts), and the KCC’s 2010 rules include equations for calculating this capacity. The amount of electricity that each utility must provide from eligible renewable resources is as follows.

**2011 - 2015: 10 percent**  
**2016 - 2019: 15 percent**  
**2020 onward: 20 percent**

These thresholds refer to the average of each utility’s one-hour retail peak demand for the previous three years. ■

## Kansas State Law Update

In early January former U.S. Sen. Sam Brownback was sworn in as Governor of Kansas and immediately pledged support for the development of Kansas' wind resources and for Kansas to be a net exporter of wind power to other regions of the country. Not long after being sworn in Governor Brownback also told leading legislators and wind energy developers that the informal Heart of the Flint Hills Wind Development Moratorium will be expanded to more closely track the boundaries set forth by the U.S. Fish and Wildlife Services. This expansion could encompass more land and could extend South to the Oklahoma border and North nearly to the Nebraska border.

Gov. Brownback was one of the few Republican U.S. Senators to publicly support enactment of a national Renewable Energy Standard. ■

## Missouri State Law Update

In response to the passage of Prop C in 2008, the Public Service Commission (PSC) adopted the Renewable Energy Standard by administrative rule. During the June 2010 special legislative session, the Joint Committee on Administrative Rules (JCAR) voted to approve most of the PSC's rules; however, two provisions relating to geographic sourcing were disapproved by the committee.

In order for JCAR's disapproval to take effect the legislature had to take action. A concurrent resolution was filed at the beginning of session to ratify JCAR's disapproval. The concurrent resolution proceeded through the legislature and passed in the same manner as a regular bill.

The political power struggle between the legislature and the executive branch regarding JCAR's power over administrative

rulemaking has a long and embattled history in Missouri. It was stated repeatedly by several legislators that the vote to pass the concurrent resolution was about protecting the ability of JCAR to review administrative rules rather than the substantive issue of geographic sourcing. While the concurrent resolution moved through the legislature, the PSC chose to withdraw the geographic sourcing rule to allow the legislature to resolve the issue through a statutory change rather than by rule. However, there were varying legal opinions amongst the PSC, Secretary of State, and legislature regarding whether the PSC had the statutory authority to withdraw the rule at such point in the process. Despite the PSC's withdrawal of the rule, the legislature decided to continue with passage of the concurrent resolution in order to protect JCAR's authority. ■

## Oklahoma State Law Update

Oklahoma has undergone a significant legislative overhaul over the course of the last year to help advance its agenda of encouraging the development of renewable energy projects within the state. A few of the most important legislative measures for project developers are as follows:

**Renewable Energy Standard.** Oklahoma has established a RES (17 Okla. Stat. 801.1 et seq.), which calls for 15% of the total generation capacity to come from renewable sources by 2015. Energy efficiency may be used to meet up to 25% of the goal.

**Severance Prohibited.** Oklahoma has passed legislation that prohibits severance of wind rights in the state. 60 Okla. Stat. 820.1 et seq. Thus, any wind or solar leasing arrangements associated with the airspace must be made with the landowner that owns the land below the air.

**Oklahoma Wind Energy Development Act.** Another new piece of legislation known as the Oklahoma Wind Energy Development Act (17 Okla. Stat. 160.11 et seq.) specifies that, rather than utilizing RECs to track compliance with the state RES, each utility must file an annual report with the OCC which documents the total installed capacity and the energy source for each generation facility, as well as the number of kilowatt-hours (kWh) generated by those facilities during the prior year. ■

## Prominent Energy Attorneys, Public Policy Professional Join Polsinelli

### Anderson, Gibson Help Expand Energy Focus

Polsinelli Shughart PC welcomes attorneys Alan Claus Anderson and J. Britton Gibson to the firm's growing national Energy practice group. The addition of Anderson and Gibson complements the firm's existing energy attorneys, and will increase services for clients with expanding energy needs in development, finance and complex transactional work. The pair represents regional, national, and international energy companies, and will practice in the Kansas City and Overland Park offices of Polsinelli Shughart.

Anderson will serve as vice chair of the Energy practice group. He has extensive experience representing and serving as lead deal counsel and outside general counsel to public and private companies in the energy industry. Gibson brings extensive experience in mergers and acquisitions to the energy practice. He is responsible for more than \$5 billion in energy-related transactions.

### Stafford Joins Polsinelli Shughart Topeka Team

George Stafford, who served 14 years on (then) Sen. Sam Brownback's staff, the last 10 of which were as Deputy Chief of Staff, has joined Polsinelli Shughart's Public Policy team. Stafford served as a key political advisor and a conduit between the Senator and business and civic organizations, chambers of commerce and municipalities across the state. Brownback was elected Governor of Kansas in 2010. Stafford is based in Polsinelli Shughart's Topeka office. ■

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## About Polsinelli Shughart's Wind and Renewable Energy Development Group

With offices throughout the country, Polsinelli Shughart attorneys are able to offer services in the key renewable energy regions. We are currently involved in wind energy development projects in Texas, Oklahoma, Kansas, Colorado, Iowa, Nebraska, Arkansas, Indiana, Ohio, Illinois, Michigan and Missouri. Our attorneys' vast experience in real estate, environmental, construction, land use, zoning, finance, regulatory, general business and litigation is an invaluable resource for meeting our clients' objectives. Our wind and renewable energy team includes the former general counsel for the Kansas Corporation Commission, who has represented clients in nearly every major electric and natural gas proceeding in Kansas and numerous Missouri proceedings in the past 25 years.

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