

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

**EARTH ISLAND INSTITUTE d/b/a
RENEW MISSOURI, et al.,**

Complainants,

v.

**THE EMPIRE DISTRICT ELECTRIC
COMPANY,**

Respondent.

Case No. EC-2013-0378

**MEMORANDUM IN SUPPORT OF
THE EMPIRE DISTRICT ELECTRIC COMPANY'S RESPONSE IN OPPOSITION TO
COMPLAINANTS' MOTION FOR SUMMARY DETERMINATION**

I. INTRODUCTION

Missouri law governing motions for summary judgment – the civil law equivalent of a motion for summary determination under 4 CSR 240-2.117 -- is well settled. A party seeking such relief must establish both a right to a judgment as a matter of law and the absence of a genuine issue regarding any material fact necessary to establish the right to a legal judgment. *Whelan Security Co. v. Kennebrew*, 379 S.W.3d 835, 841 (Mo. banc 2012). The law is equally clear that the absence of a factual dispute is of only secondary importance, because, as the Missouri Supreme Court stated in *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371 (Mo. banc 1993) – the leading Missouri case on summary judgment law – “[t]he key to summary judgment is *the undisputed right to judgment as a matter of law.*” (emphasis added) *Id.* at 380.

In *ITT Commercial Finance* the court also addressed how an affirmative defense affects the disposition of a motion for summary judgment. Where the party against whom summary judgment is sought has asserted an affirmative defense – as Empire did in its Answer to the Complaint – “a claimant’s

right to judgment depends as much on the non-viability of that affirmative defense as it does on the viability of claimant's claim." *Id.* at 381. In addition, the court held "a claimant moving for summary judgment in the face of an affirmative defense must also establish that the affirmative defense fails as a matter of law." *Id.*

Complainants' Motion for Summary Determination satisfies none of these legal requirements. *The critical issues presented to the Commission in this case are purely legal issues; consequently, facts are neither material nor necessary to the Commission's resolution of those issues.* Nevertheless, Complainants' motion fails to establish in the manner required by law that no genuine issues of fact remain. Complainants' motion also fails to establish that any of the affirmative defenses asserted by Empire are non-viable or otherwise fail as a matter of law. In fact, the motion does not address those affirmative defenses in any manner or even acknowledge their existence. But by far the most critical defect in Complainants' motion is that it fails to establish an undisputed right, as a matter of law, to the judgment it seeks on any of the claims presented in the Complaint. Each and all of these failures are fatal to Complainants' motion as a matter of law.

Because Complainants' motion fails to satisfy the minimum requirements that Missouri law imposes on those seeking summary adjudication, the Commission must deny the Motion for Summary Determination.

1. Complainants' Motion for Summary Determination Fails to Establish, in the Manner Required by Law, the Absence of Any Genuine Issue of Material Fact Necessary to Establish the Legal Right to A Judgment.

Rule 74.04, MRCP, governs summary judgment motions in civil cases, and there are numerous similarities – and no material differences – between that rule and 4 CSR 240-2.117, the Commission's rule governing motions for summary determination.¹ Perhaps the most significant similarity is that both rules require a party seeking summary resolution to state, with particularity, in separately numbered

¹ The Commission has recognized the similarities between Rule 74.04, MRCP, and 4 CSR 240-2.117 in numerous orders. For example, in *Unice Harris v. Southern Union Compay d/b/a Missouri Gas Energy*, 2013 Mo. PSC LEXIS 257, [5] n. 4 (effective April 19, 2013), the Commission noted the two rules are "sufficiently similar . . . to make cases interpreting [Rule 74.04] helpful in understanding [the Commission's rule]."

paragraphs, each material fact to which the movant claims there is no genuine issue. Both rules also require a movant to support those factual statements with specific references to pleadings, testimony, discovery, or affidavits that demonstrate the lack of a genuine issue of fact.

It is far from clear that Complainants' motion complies with these basic requirements of the Commission's rule. But even if it does, based on the language of the rule itself, as well as established legal principles governing motions for summary judgment in civil cases, Complainants' motion fails to satisfy the minimum requirements of law. More specifically, Complainants' motion (i) fails to establish, in the manner required by law, that no genuine issues of material fact remain, and (ii) fails to establish that Complainants have a legal right to a judgment in their favor on any claim raised by the Complaint.

Cases interpreting Rule 74.04, MRCP, consistently hold that only evidentiary materials that are admissible at trial can be used to sustain a motion for summary judgment. *American Family Mutual Insurance Co. v. Lacy*, 825 S.W.2d 306, 311 (Mo. App. 1991). For example, hearsay that would not be admissible at trial is not competent to support such a motion. *Scott v. Ranch Roy-L, Inc.*, 182 S.W.3d 627, 635 (Mo. App. 2005). The same is true for uncertified or improperly certified documents that cannot be admitted in evidence. *Blunt v. Gillette*, 124 S.W.3d 502, 504 (Mo. App. 2004). Courts also require affidavits supporting a motion for summary judgment to be made on personal knowledge, to set forth facts that would be admissible in evidence, and to show affirmatively that the affiant is competent to testify on the matters stated in the affidavit. *St. Charles County v. Dardenne Realty Co.*, 771 S.W.2d 828, 830 (Mo. banc 1989); *Sygenta Crop Protection, Inc. v. Outdoor Equipment Co.*, 241 S.W.3d 425, 428 (Mo. App. 2007). Affidavits not based on personal knowledge are considered to be inadmissible hearsay and cannot be used to support a motion for summary judgment. *Midwest Precision Casting Co. v. Microdyne, Inc.*, 965 S.W.2d 393, 396 (Mo. App. 1998). And because the function of an affidavit is to establish facts, conclusions stated in affidavits — legal or otherwise — also cannot be used to support a dispositive motion. *Scott v. Ranch Roy-L, Inc.*, 182 S.W.3d 627, 635 (Mo. App. 2005); see *Fitzpatrick v. Hoen*, 746 S.W.2d 652, 654 (Mo. App. 1988). More fundamentally, all affidavits must be sworn; unsworn

affidavits are not competent to support a motion for summary judgment. *Mueller v. Bauer*, 54 S.W.3d 652, 657 (Mo. App. 2001).

None of the exhibits that Complainants submitted as support for their motion satisfy either the requirements or 4 CSR 240-20.2.117 or the legal principles governing motions for summary adjudication described in the two preceding paragraphs. For example, not one of Complainants' Exhibits 1 through 16 qualifies as "pleadings, testimony . . . or affidavits." Yet those are the types of support the Commission's rule specifically requires. Although the documents comprising Exhibit 17 are responses to several data requests that Empire sent to Complainants – which means the exhibit may technically qualify as "discovery" under the Commission's rule – Exhibit 17 still fails to satisfy the legal requirement that materials offered in support of summary judgment motions must be capable of being received into evidence. Not one of the discovery responses in Exhibit 17 is supported by a sworn affidavit. At a bare minimum, therefore, Complainants' motion fails to establish that any of the discovery responses is based on personal knowledge. Without a basis in personal knowledge, the information in Exhibit 17 is nothing more than inadmissible hearsay. *See Cooper v. Albacore Holdings, Inc.*, 204 S.W.3d 238, 245 (Mo. App. 2006). Further, because none of the information in Exhibit 17 was provided under oath, it is the equivalent of an unsigned affidavit, which the law also considers incompetent support.

In addition to the seventeen exhibits, Paragraph 11 of Complainants' motion also relies on portions of the pre-filed direct testimony of its sole witness in this case Edward A. Holt. Because, as required by 4 CSR 240-2.130(8), Mr. Holt filed his testimony with an accompanying affidavit, that testimony may satisfy the minimum requirements of an affidavit in support of a motion for summary judgment. But even if the Commission chooses to view Mr. Holt's testimony as an affidavit, that testimony, there are at least two reasons why that testimony, like the exhibits previously discussed, is incompetent as a matter of law to provide the support for which it was offered.

First, cases discussed earlier in this response hold that the purpose of an affidavit is to present facts not conclusions. Certain of Mr. Holt's statements that Complainants cite as support of their motion –

such as his *opinion* that the terms “nameplate rating” and “nameplate capacity” are synonymous – are not facts but are, instead, general conclusions. Other of his statements – such as his opinion regarding the meaning of the phrase “nameplate rating” as used in §393.1025(5), RSMo – are legal conclusions.² But *Scott v. Ranch Roy-L, Inc., supra*, holds that conclusions are not competent to support motions for summary judgment. The court in that case further held that “[l]egal conclusions are not admissible facts.” *Id.* at 635. In addition, *St. Charles County, supra*, requires an affiant to be competent to testify on matters stated in his affidavit. So even apart from the fact that Mr. Holt lacks even the minimal qualifications necessary to offer legal conclusions or opinions,³ both his general and legal conclusions are admissible as support for a motion for summary determination.

Second, Mr. Holt’s statements are contradicted by affidavits of Tim N. Wilson,⁴ offered in support of Empire’s Motions to Dismiss Complaint in Case No. EC-2013-0378, and Warren Witt, offered in support of the Motion to Dismiss filed by Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri”) in Case No. EC-2013-0377. These two affidavits – which are competent because they are based on the personal knowledge and experience of each affiant, are given under oath, and signed – each state that the phrase “nameplate rating” means the capacity rating of an individual generator as shown on the nameplate that is physically attached to the generator. Each affidavit also is based on demonstrable fact, as evidenced by the picture attached to each of a nameplate of a hydroelectric generator operated, respectively, by Empire, at its Ozark Shores facility, and by Ameren Missouri, at its Keokuk Energy Center.

A motion for summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant. *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 664 (Mo. 2009). For

² Mr. Holt’s specific testimony, as stated at page 8, lines 5-8, is as follows: “The two terms ‘nameplate rating’ and ‘nameplate capacity’ are used interchangeably. Both are used in Missouri and Federal law to refer to a utility’s aggregate generating capacity in various contexts.” §393.1025(5), §393.1050, RSMo.”

³ Mr. Holt’s pre-filed testimony does not indicate that he is a licensed attorney, that he has any formal legal training, or that he is otherwise qualified to testify as an expert on legal issues.

⁴ Empire’s response incorporates by reference Mr. Wilson’s affidavit in its entirety.

purposes of evaluating such motions, courts consistently hold that a genuine issue of fact exists when there is even the slightest doubt about a fact. *Gast v. Ebert*, 739 S.W.2d 545, 546 (Mo. banc 1987). It is equally well-settled that where the record contains competent evidence establishing two plausible but contradictory accounts of an essential fact, a genuine issue of material fact exists. *Montgomery v. South County Radiologists, Inc.*, 49 S.W.3d 191, 193 (Mo. 2001). Moreover, when faced with contradictory accounts, a tribunal is not allowed to make credibility determinations. *United Missouri Bank v. City of Grandview*, 105 S.W.3d 890, 898 (Mo. App. 2003). Instead, it is the tribunal's duty to simply determine if controversy exists, because summary judgment tests the existence, not the extent, of genuine disputes. *ITT Commercial Finance, supra* at 378.

Complainants' motion fails under each and all of these standards. The evidence the Commission must consider in evaluating the motion -- the pre-filed testimony of Mr. Holt and the controverting affidavits offered by Empire and Ameren Missouri -- unquestionably establish two opposing viewpoints regarding the meaning of the phrase "nameplate rating," as used in §393.1025(5), RSMo. These competing viewpoints create an inference in favor of the interpretation articulated by both Empire and Ameren Missouri that creates doubt regarding Complainants' contrary interpretation. That inference, alone, is sufficient to defeat Complainants' motion. In addition, the competent evidence presented by Empire and Ameren Missouri most certainly establishes that the definition of the phrase "nameplate rating" advocated by those parties is at least as plausible as the alternate definition promoted by Mr. Holt. Therefore, based on applicable law, the Commission cannot conclude that no genuine issue of fact remains between the adversaries in the two consolidated complaint cases.

2. Complainants' Motion for Summary Determination Does Not Establish That Any of Empire's Affirmative Defenses Are Non-Viable Or Otherwise Fail As a Matter of Law.

Empire's Answer asserted several affirmative defenses to Complainants' claims. The Company's affirmative defenses, which directly or indirectly address each of those claims, are as follows:

- The Complaint fails to state a claim on which the Commission can grant relief because the Commission has the authority, under 4 CSR 240-20.100(10), to grant waivers from

compliance of any or all of the requirements of the RES Rule, 4 CSR 240-20.100 (Empire's Answer, ¶46);

- The Commission lacks jurisdiction to decide one or more of the counts raised in the Complaint because, without limitation, the Commission has no statutory authority to (i) void any legislative enactment; (ii) consider challenges to the Commission's final order of rulemaking in Case No. EX-2010-0169 after the date fixed by statute for filing applications for rehearing; or (iii) to void or refuse to enforce rules adopted by the Missouri Department of Natural Resources ("the Department") that were adopted under authority of §393.1030.4, RSMo, to establish a certification process for electricity generated by hydropower and other renewable resources (Empire's Answer, ¶47);
- The Commission lacks jurisdiction to decide the lawfulness of any rule adopted by the Department, including 10 CSR 140-8.010(2)8, which defines "hydropower," because, without limitation, (i) Complainants have not demonstrated that they have standing under §536.053, RSMo, to challenge that rule; and (ii) §536.050.1, RSMo, vests the judicial branch with exclusive jurisdiction to determine the validity of that rule (Empire's Answer, ¶48);
- Count I of the Complaint is an unlawful collateral attack on the Commission's final order of rulemaking in Case No. EX-2010-0169 – more specifically, the definition of "hydropower" adopted in 4 CSR 240-20.100(1)(K)8 – because none of the Complainants filed for reconsideration of that order or timely sought judicial review of the order in the manner prescribed in §386.550, RSMo (Empire's Answer, ¶49); and
- Some or all of Complainants' claims are barred by the doctrines of res judicata and collateral estoppel because in *State ex rel. Missouri Energy Development Assn. v. Public Service Commission*, 386 S.W.3d 165 (2012), the Missouri Court of Appeals determined that the rules adopted by the Commission in its final order of rulemaking in Case No. EX-2010-0169 are lawful and reasonable (Empire's Answer, ¶50).

As discussed earlier in this response, Missouri law requires a party who seeks summary judgment or summary determination to establish not only that it has an undisputed right to judgment on its own claims but also that all affirmative defenses raised by the opposing party are non-viable or otherwise fail as a matter of law. *ITT Commercial Finance, supra* at 381. Not only does Complainants' motion fail to establish that any of Empire's affirmative defenses are nonviable or invalid, the motion does not even address or acknowledge those defenses. Applicable law therefore prohibits the Commission from granting summary determination of any claim raised in the Complaint.

3. Complainants' Motion for Summary Determination Does Not Establish An Undisputed Legal Right to Judgment in Their Favor.

Without minimizing the significance of Complainants' failure (i) to establish that no genuine issue of material fact remains in dispute or (ii) to address or overcome any of Empire's affirmative defenses, the most serious defect in the motion is that it fails to establish that Complainants have an undisputed legal right to a favorable judgment on any of their claims. The primacy of a movants need to establish a legal right to a judgment is clear from the Missouri Supreme Court's statement in *ITT Commercial Finance*, that "[t]he key to summary judgment is the undisputed right to judgment as a matter of law." *Id.* at 380. That importance is underscored in this case because the issues the Commission must decide are legal, not factual, in nature. Indeed, no issue of fact is either relevant or material to the Commission's resolution of those legal issues.

In order to find that Complainants are entitled to a judgment as a matter of law the Commission must assume, as Complainants have done, (i) that the phrase "nameplate rating" used in §393.1025(5), RSMo, as well as in rules adopted by both the Commission and the Department to implement that statute,⁵ can be interpreted to mean something other than the capacity printed on the nameplate that is physically attached to each hydroelectric generator at Empire's Ozark hydropower generating facility; (ii) that §393.1030.2, RSMo, can be interpreted to include a limitation on when a renewable energy credit ("REC") used to comply with Missouri's Renewable Energy Standard can be created, even though the statute includes no such limiting language; and (iii) that §393.1050, RSMo, is unlawful, even though no court of competent jurisdiction has declared it to be so. But legal arguments presented in Empire's Motion to Dismiss Complaint show that none – much less all – of those assumptions is valid. For the sake of brevity, the Company will not repeat those arguments in this response, although it incorporates each and all of those arguments into this response by reference. But, even a brief summary of those arguments shows that Complainants have not – and cannot – establish a legal right to the judgment they seek on their claims against Empire.

⁵ 4 CSR 240-20.100(1)(K)8 and 10 CSR 140-8.010(2)(A)8, respectively.

Count I: Complainants' Motion Fails to Establish, as a Matter of Law, That the Hydro Generators at Empire's Ozark Beach Facility Do Not Qualify as Renewable Resources Under Rules Adopted by the Department and the Commission or Under §393.1025(5), RSMo.

Under Missouri law, the primary rule governing the interpretation of statutes is to ascertain the intent of the legislature from the language used, to give effect to that intent, and to consider the words used in the statute according to their ordinary meanings, which is derived from the dictionary. In addition, questions of statutory interpretation are questions of law not fact. *State v. Simmons*, 270 S.W.3d 523, 531 (Mo. App. 2008). Applying that rule, the phrase “nameplate rating,” as used in §393.1025(5), RSMo, means the rating of an individual hydroelectric generator as printed or engraved on the nameplate affixed to that generator.

The alternate definition urged by Complainants is not based on the plain and ordinary meaning of the words used in the statute but is, instead, based on the alleged “common industry practice to use the word ‘nameplate’ to refer to the combined turbine rating of a hydroelectric facility.”⁶ As noted earlier in this response, affidavits submitted by Empire and Ameren Missouri dispute that allegation. But even if Complainants’ allegation is accepted as accurate, the industry practice usage is not a definition of the word “nameplate” or of the phrase “nameplate rating.” It is, instead, nothing more than a metaphorical reference employed for the convenience sake. Consequently, metaphorical references or industry usage are not the types of definitions courts rely on when called upon to interpret statutes because courts cannot assume that such definitions accurately reflect either the legislative intent embodied in a statute or the plain and ordinary meaning of the words used in the statute .

Complainants proposed interpretation also is inconsistent with rules adopted by both the Commission and the Department to implement the RES. The Commission’s rule defines “hydropower” that qualifies as a renewable resource as electricity produced by generators that have “generator nameplate ratings of ten (10) megawatts or less.” The Department’s definition is even more specific: its

⁶ Complaint, ¶26.

definition of “hydropower” states that “each generator” can have a nameplate rating of ten megawatts or less.

But beyond the claim that Empire violated §393.1025(5), RSMo, when it used RECs from the Ozark Beach hydroelectric facility to comply with the RES, the Complaint also challenges – either directly or by implication – the definitions of the phrase “nameplate rating” included in both the Commission’s and the Department’s rules. But, as Empire discussed at length in its Motion to Dismiss Complaint, the Commission has no authority to consider those challenges. Regarding the Commission’s rule, none of the Complainants sought reconsideration of the Commission’s final order of rulemaking in Case No. EX-2010-0169 or timely-filed an appeal of that order in the manner prescribed by §386.510, RSMo. Consequently, Complainants’ attempt to challenge the rule in Count I of the Complaint constitutes an unlawful collateral attack on the Commission’s order. Complainants’ challenge also is barred by the doctrines of res judicata and collateral estoppel because the Missouri Court of Appeals already has determined that the Commission’s final order of rulemaking in Case No. EX-2010-0169 is lawful and reasonable, and that determination is conclusive for purposes of this case. As for Complainants’ claims related to the Department’s rule, Empire’s motion also shows that the Commission has no authority to consider any challenge of that rule because §536.051(1), RSMo, vests the judicial branch with exclusive jurisdiction to determine the validity of rules adopted by the Department.

Because §393.1025(5), RSMo, and rules adopted by both the Commission and the Department allow Empire to use RECs from its Ozark Beach hydroelectric facility to comply with the RES, Complainants’ motion fails to establish the legal right to a judgment on the claims contained in Count I of the Complaint.

Count II: Complainants’ Motion Fails to Establish, as a Matter of Law, That §393.1030(2), RSMo, Prohibits Empire from Using RECs Created Prior to 2011 to Comply with the RES.

In Count II Complainants allege that Empire violated or failed to comply with the requirements of the RES when (i) the Company began unlawfully “banking” RECs prior to 2011, and (ii) when Empire used those unlawfully-banked RECs to comply with its RES obligations for Compliance Year 2011. The

basis for Complainants' allegation is their assumption that for purposes of complying with the RES utilities are not permitted to utilize RECs created prior to 2011. But that assumption is incorrect as a matter of law.

Empire's Motion to Dismiss Complaint shows that the portion of the RES that governs the creation and use of RECs, §393.1030(2), RSMo, simply states that an unused REC can exist up to three years from the date it is created. There is no language in the statute that specifies a date when a utility may start creating or accumulating RECs it intends to use to comply with the RES, there also is no language in the statute that says a REC created prior to 2011 can't be used for compliance. Complainants claim that the voters intended such a limitation when they approved Proposition C. But the language of the initiative adopted by the voters belies that claim, and applicable law prohibits the Commission from reading into the statute a limitation that the voters did not expressly adopt.

Missouri law on this question is clear: when called upon to interpret a statute adopted by initiative a tribunal may *not* rely on representations of the proponents of an initiative regarding what the electorate intended. Instead, it must interpret the express language the voters approved. As the Missouri Court of Appeals observed in *Missourians for Honest Elections v. Missouri Elections Commission*, 536 S.W.2d 766 (1976), because it is impossible for a court to determine the precise intent of the electorate, courts have no authority "to ignore the express language of an initiative proposal and find a voter intent not expressed in the language of the proposition." *Id.* at 775. In addition, the court went on to state, "[w]e have no right to read into an act an intent contrary to the phraseology." *Id.*

Because §393.1030(2), RSMo, states that a REC "may exist for up to three years from the date of its creation," but is silent on the date on which the three-year period can begin, the law did not prohibit Empire from creating or accumulation RECs during 2008, 2009, and 2010, or from using those RECs to comply with its obligations under the RES for Compliance Year 2011. Therefore, because Empire's actions were not unlawful, Complainants' motion fails to establish the legal right to a judgment on the claims contained in Count II of the Complaint.

Count III: Complainants' Motion Fails to Establish, as a Matter of Law, that §393.1050, RSMo, Is Unlawful and that Empire is Therefore Barred from Claiming the Exemption That Statute Provides.

Complainants' claims in Count III of the Complaint are based entirely on the assumption that §393.1050, RSMo, which exempts Empire from complying with the solar energy provisions of the RES, is unlawful. But Complainants are not entitled to rely on that assumption because §393.1050, RSMo, remains valid and enforceable. Although the Commission has the authority to interpret that statute, it has no legal authority to invalidate it; the authority to invalidate a statute is vested exclusively in the judicial branch. Therefore, until a court of competent jurisdiction determines §393.1050, RSMo, is invalid Empire is legally entitled to claim the exemption the statute provides and to rely on that exemption for purposes of complying with the RES. And as long as that statute remains valid and enforceable, Complainants cannot establish a legal right to a judgment in their favor on Count III of the Complaint.

II. CONCLUSION

Empire's response clearly and conclusively establishes that Complainants' motion fails to establish, as required by law, that no genuine issues of material fact remain and that Complainants are legally entitled to a judgment in their favor on any claim raised in the Complaint. Therefore, the Commission cannot lawfully grant Complainants' Motion for Summary Determination.

But beyond Complainants' failure to carry the burden imposed by law on parties seeking summary adjudication, there is a more compelling reason to deny Complainants' motion; this is not a case where facts – material or otherwise – are critical. Instead, the issues in the Complaint are legal issues, and the proper vehicle for deciding legal issues is a motion to dismiss not a motion for summary determination.

Empire's Motion to Dismiss clearly establishes that none of Complainants' claims can be sustained or maintained under applicable principles of law. The Commission cannot grant Complainants the relief sought in Count I because the claims on which that count is based are beyond the Commission's jurisdiction, either because the questions presented are outside the scope of the Commission's statutory

authority or are time-barred because Complainants failed to timely pursue legal remedies available to them. But even aside from the jurisdictional obstacles, the Commission cannot grant Complainants the relief sought in Counts I and II because the law prohibits the Commission from interpreting the statutes at issue in those counts in the manner urged by the Complainants. The Commission cannot grant Complainants the relief sought in Count III because §393.1050, RSMo, is and will continue to be valid and enforceable law until a court of competent jurisdiction rules otherwise.

For all the reasons stated in this response, the Commission should deny Complainants' Motion for Summary Determination.

Respectfully submitted,

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**ATTORNEYS FOR THE
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Certificate of Service

I hereby certify that this 16th day of August, 2013, a true and correct copy of the foregoing document was sent via electronic mail to counsel of record for all parties.

/s/Paul A. Boudreau
Paul A. Boudreau