BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

EARTH ISLAND INSTITUTE d/b/a RENEW MISSOURI, et al.,	)	
Complainants,	)	
vs.	)	File No: EC-2013-0377
UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI,	)	
Respondent.	)	

AMEREN MISSOURI'S REPLY TO COMPLAINANTS' ANSWER TO RESPONDENTS' MOTIONS TO DISMISS

COMES NOW Union Electric Company d/b/a Ameren Missouri (Ameren Missouri or Company), and for its Reply to Complainants'[1] Answer to Respondents'[2] Motions to Dismiss (Complainants' Answer) states as follows:

COUNT I - HYDROPOWER

A. Complainants Are Collaterally Attacking the Commission's RES Rule.

1. Complainants claim that they are not collaterally attacking the Commission's RES rule (and the Order of Rulemaking that adopted it). That claim is incorrect, and indeed the Complaint is necessarily a collateral attack on the Commission's RES rule, because it is clear under the Commission's rule that so long as each generator at Ameren Missouri's Keokuk Energy Center is less than 10 megawatts, the power from those generators qualifies as power from a renewable energy resource.

[1] Earth Island Institute d/b/a Renew Missouri (Renew Missouri), the Missouri Coalition for the Environment, the Missouri Solar Energy Industries Association, Wind on the Wires, the Alternative Energy Company, StraightUp Solar and Missouri Solar Applications, LLC.
[2] Ameren Missouri and The Empire District Electric Company.

2. Indeed, the Complaint recognizes this because it attacks the Commission's rule by complaining that the Commission added the word "generator" "despite the word appearing nowhere in the RES statute." Complaint ¶ 27.

3. Counsel for Complainant has admitted as much. During the August 30, 2011 oral argument in Case No. ER-2011-0275 (involving Ameren Missouri's 2011 RES Compliance Plan), Chairman Kenney rightly pointed out that short of changing the Commission's rule (and the Missouri Department of Natural Resources (MDNR) rule as well), there was nothing the Commission could do to give Complainant Renew Missouri the relief it seeks regarding Keokuk.[3] Complainants' counsel even told the Commission at that time what it would need to do to "fix" the Commission's rule so that Complainants' position regarding Keokuk could prevail: "It might be as simple as striking the word 'generator,' or maybe one or two other words."[4] He continued: to make the Commission's rule consistent with what Complainants' claim to be the meaning of the RES statute the Commission need only "[s]ubstitute 'aggregate' for 'generator.'"[5]

4. As outlined in our Motion to Dismiss, the Commission, Ameren Missouri and Complainants are bound by the Commission's rule (and the Order of Rulemaking that was long ago made final and that was never appealed on this issue). That rule, by Complainants' counsel's own admission (and by its plain terms) provides that the Keokuk generators do qualify as renewable energy resources. Complainants cannot prevail except by collaterally attacking the rule, and they are precluded from doing so as a matter of law. Section 386.500, RSMo. That

[3] Tr. p. 32, l. 1-22 (Case No. ER-2011-0275 (Aug. 30, 2011)).
[4] Id. p. 34, l. 10-11.
[5] Id. p. 34, l. 19-20. If Complainants "absolutely dispute" that Keokuk's generators qualify as renewable energy resources under the Commission's rule (Complainants' Answer to Respondents' Motions to Dismiss p. 4), then why did Complainants' counsel agree that the Commission's rule needed to be changed and why did he tell the Commission how to change it? And, why does the Complaint attack the Commission's inclusion of the word "generator" in its rule?

fact alone means that Count I of the Complaint (hydropower) fails to state a claim upon which relief can be granted, necessitating its dismissal as a matter of law.

B. <u>Complainants Ignore or Fail to Recognize that the RES Statute is Unambiguous.</u>

5. Complainants next claim (wrongly, as noted earlier) that they "have rigorously based their case on the language of the statute, resolving ambiguities with the rules of statutory construction."[6] Aside from the falsity of that statement, it also assumes that "nameplate rating" is ambiguous, which is also a false assumption as our Motion to Dismiss demonstrates.

6. For the same reason Complainants' extended discussion of statutory interpretation at pages 7 to 10 of their Response to Respondents' Motions to Dismiss, which they premise on ambiguity in the statute that does not exist, misses the mark. Their attempt to analogize "credit rating" to "nameplate rating" fails because unlike the total phrase "nameplate rating" the phrase "credit rating" has its own dictionary definition. *Webster's New World Collegiate Dictionary*, (4th ed. 2001) ("the rating given an individual or business firm as a credit risk, based on past records of debt repayment, financial status, etc."). Complainants ignore this, and act as though the word "credit" is being used as a noun; a tangible object, when it is not. No one disputes that generators at power plants have a nameplate on them and that power plants composed of multiple generators do not. Nor does anyone dispute that those nameplates have ratings (capacity of the generator to which they are affixed) printed or stamped on them. The phrase "credit rating" has nothing to do with the rating stamped on the physical nameplate on a generator.

7. As discussed in our Motion to Dismiss, all of Mr. Holt's testimony about what he claims a different phrase ("nameplate capacity," or the aggregate or sum of nameplate ratings)

[6] Complainants' Answer to Respondents' Motions to Dismiss p. 3.

means is completely irrelevant to the unambiguous meaning of "nameplate rating," and consequently cannot even be considered.

8. Finally, Complainants claim that the Commission can look to such extrinsic evidence if interpreting the statute according to its plain meaning would lead to an illogical or absurd result. But this argument rests on the purpose they ascribe to the RES statute – the promotion of "new" renewable generation only. That this is the purpose they ascribe to the RES statute is made plain by Complainants' Motion for Summary Determination filed in this case. Complainants' Legal Memorandum in Support of Motion for Summary Determination p. 7 ("The purpose of encouraging new renewable technologies not established in Missouri is obvious from the nature and context of the RES itself."). As we have previously indicated, that may very well have been Messrs. Robertson's and Wilson's subjective intention as the drafters of Proposition C, but it is not reflected in the language of the initiative adopted by the state's voters and consequently is irrelevant. *See, e.g., Missourians for Honest Elections et al v. Missouri Elections Comm'n et al.,* 536 S.W.2d 766, 774-75 (Mo. App. St. L. 1976). Therefore, there is no illogical or absurd result to be found in giving the phrase "nameplate capacity" its plain and ordinary meaning, and that meaning demonstrates that the Complaint on Count I must fail as a matter of law.

C. <u>The Commission Lacks the Power to Find Ameren In Violation of the RES Statute regarding Keokuk Without Effectively Engaging in the Judicial Function of Overruling MDNR's Rule.</u>

9. Complainants make no attempt to rebut the legal principles on this issue reflected in Ameren's Motion to Dismiss. They do not dispute that the Commission cannot declare MDNR's rule to be contrary to the RES statute or otherwise invalid or unenforceable. They do

not dispute that MDNR indeed certified the Keokuk generators as renewable energy resources. They do not dispute that MDNR has that power.

10. The best they could do is to weakly claim that because MDNR was to adopt its rule "in consultation with the Commission" that this somehow means that the Commission can, after the MDNR rule became law, ignore, disregard, and trump the MDNR rule by ruling against Ameren Missouri on Count I of the Complaint.

11. MDNR did consult with the Commission before it adopted its rule, and after that consultation, it used the exclusive authority given to it to adopt certification standards for renewable energy resources. Indeed, the fact that MDNR's rule prescribed that the determination of what is a renewable energy resource is to be made on a per-generator basis (Complainants make no attempt to claim that MDNR's rule does not so provide), and that it was promulgated as such *in consultation with the Commission*, is further demonstration that the Commission's rule also does exactly the same thing, as discussed above. Do Complainants really contend that the Commission's rule provides for one thing, that the Commission then consulted with MDNR whose rule was to provide something different, and that the Commission just let MDNR publish a rule contrary to its own without objection?[7] For this additional reason, the Commission cannot grant the relief Complainants seek on Count I, meaning the Count I of the Complaint fails to state a claim upon which relief can be granted and must be dismissed.

[7] The Commission's rule was proposed first, and became effective first (proposed January 8, 2010; effective September 30, 2010). The Commission issued its Final Order of Rulemaking on July 7, 2010, long before MDNR's rule was final. MDNR's rule was proposed June 14, 2010 and became effective January 30, 2011. It is obvious that the Commission's rule and MDNR's rule are consistent with each other, but in any event, the Commission cannot sustain Count I of the Complaint without ignoring and, effectively, determining that MDNR's rule conflicts with the RES statute. The Commission has no such authority.

COUNT II – BANKED RECS

12. As previously addressed in our response and legal memorandum opposing Complainants' Motion for Summary Determination – and as made clear in Complainants' Answer to Respondents' Motions to Dismiss – Complainants' argument on this issue is that the RECs can only be used to meet the RES statute's portfolio requirements if the RECs are associated with energy produced post-January 1, 2011. The RES statute neither expressly nor by implication contains such a limitation. Complainants make no attempt to claim there is an express limitation in the RES statute, but they obviously are claiming it is implied since they based their Motion for Summary Determination on the argument that if utilities could bank RECs there would have been no need to have a delay between the effective date of the RES (November 8, 2008) and the first year of compliance (2011). They find this implication in another purpose they ascribe to the delay, that is, their claim that the reason for the delay in implementing the statute was so utilities could "get new facilities built or line up sources of supply." Complainants' Legal Memorandum in Support of Summary Determination p. 9.

13. The problem for Complainants is that the statute does not limit the RECs that can be used for compliance to RECs generated post-January 1, 2011. It simply says: "A utility may comply with the standard in whole or in part by purchasing RECs." Section 393.1030.1 (next to last sentence). And the much more logical reason for the delay between the effective date and the compliance year is (to use Complainants' own theory), to "line up sources of supply [RECs]" so that they could, as the statute contemplates, comply with the RES using those RECs. The RES statute could have been written to limit lining-up RECs as a source of supply to comply with the RES, but it was not so written; it must be enforced as written.

14. The bottom line is that the RES statute expressly permits utilities to use RECs – any RECS (so long as they are not more than three years old) – to meet the portfolio requirements. This allowed utilities to bank RECs from 2008 through 2010, before the portfolio requirements kicked in on January 1, 2011, while the utilities lined up renewable energy supplies. RECs didn't come into being on January 1, 2011 – they have existed for years, as our Motion to Dismiss demonstrates.

15. One last point in response bears noting. Complainants take Ameren Missouri to task for its citation to *Missourians for Honest Elections*, which holds that a statute adopted by initiative petition must be interpreted according to its express terms, and not based upon some undefined intent of the voters. Ameren Missouri cited that case because *Complainants* have repeatedly argued that the purpose of the RES statute is to support "new" renewable generation; to "foster renewable energy going forward," the gist of Complainants argument being that the Commission must interpret the RES statute consistent with this claimed purpose even though the RES statute does not mention new renewable resources or the fostering of renewable energy "going forward" anywhere. Complainants' Legal Memorandum in Support of Summary Determination p. 9. It is ironic indeed that Complainants now claim that the "statute could not be clearer" and there "is no need for interpretation or evidence of intent." Complainants' Answer to Respondents' Motions to Dismiss p. 12. On this point, they are correct. RECs, if created within three years of their use can, by the express terms of the RES statute, be used to comply.

COUNT III – GEOGRAPHIC SOURCING

16. Little more needs to be said on this issue. Complainants simply re-argue the points they made in their Motion for Summary Determination. They effectively admit that their discussion of the Joint Committee on Administrative Rules and of how the geographic sourcing provisions that were not in the published rule (and thus not effective as a matter of law) are irrelevant to their Complaint now. Instead, their entire argument rests on the Commission concluding that (a) the RES statute restricts the geographic source of RECs, despite the complete absence of any such limitation therein, and (b) the RES rule now *implicitly* contains a geographic sourcing limitation.

17. On the latter point, we know that the Missouri[8] Court of Appeals has already stated that if the Commission wants to impose a geographic sourcing limitation in its rule it will "be *required* to do so pursuant to the rulemaking procedures of section 536.021" (emphasis added). On the former point, given the total absence of such a requirement in the statute and the Commission's explicit rejection of imposing such a requirement via its rules, one cannot seriously contend (yet Complainants do so) that there is an "implied" geographic sourcing limitation in the Commission's rule now.

18. The portfolio requirements do apply to all power sold to Missouri customers. That is, we must count all kilowatt-hours sold when we *calculate* what two percent (and eventually five, ten, and fifteen percent) of our sales are. The Commission's rules are consistent with this interpretation. 4 CSR 240-20.100(2) states, "The RES requirements and the RES solar energy requirements are based on total retail electric sales of the electric utility." It explains how

[8] *State ex rel. Missouri Energy Development Ass'n v. Pub. Serv. Comm'n*, 386 S.W.3d 165, 176 (Mo. App. W.D. 2012). The Court of Appeals did not conclude or even address that such a rule would be valid under the statute, but was just commenting on what it would take to impose, or attempt to impose, such a requirement in a rule.

the portfolio requirement is calculated but that has nothing to do with which RECs can be used to "comply with the standard in whole or in part." Section 393.1030.1.

CONCLUSION

19. Complainants' Answer to Respondents' Motions to Dismiss present nothing new, and fail to rebut the reality that Complainants are collaterally attacking the Commission's rule relating to nameplate rating, are asking the Commission to exercise the judicial function of in effect declaring MDNR's rule on that same topic to be contrary to the RES statute, are attempting to interpret the RES statute in a manner contrary to its plain meaning, are attempting to have this Commission amend the RES statute by imposing a start-date on which RECs can be used for compliance that is not in the RES statute, and are also ignoring the absence of a geographic sourcing limitation in either the RES statute or the Commission's rules. For these reasons, the Complaint seeks relief this Commission has no power to grant. Consequently, all three counts of the Complaint against Ameren Missouri fail to state a claim upon which relief can be granted, and the Complaint must therefore be dismissed.

Respectfully Submitted,

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Dated: August 30, 2013

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Reply was served on counsel of record for all of the parties of record to this case via electronic mail (e-mail) or via certified and regular mail on this 30th day of August, 2013.

/s/ Wendy K. Tatro
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