BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

EARTH ISLAND INSTITUTE d/b/a/ RENEW MISSOURI, et. al.	)	
COMPLAINANTS	)	
v.	)	**Case No. EC-2013-0379, et al.**
KANSAS CITY POWER & LIGHT COMPANY	)	
RESPONDENTS.	)	

COMPLANANTS' RESPONSE IN OPPOSITION TO
RESPONDENTS' MOTIONS FOR SUMMARY DETERMINATION

COME NOW Earth Island Institute d/b/a Renew Missouri, Missouri Coalition for the Environment, Missouri Solar Energy Industry Association, Wind on the Wires, The Alternative Energy Company, StraightUp Solar, and Missouri Solar Applications (collectively referred to herein as "Complainants"), and pursuant to 4 CSR 240-2.117, hereby submit this response to Respondents' Motions for Summary Determination, and respectfully pray that the Commission deny Respondents' requests for summary determination as prayed in Respondents' motions.

INTRODUCTION

Summary determination is only proper when there are (a) no genuine issues of material fact and (b) the movant is entitled to judgment as a matter of law. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 377 (Mo. banc 1993). *Unice Harris v. Southern Union Company d/b/a Missouri Gas Energy,* 2013 Mo. PSC LEXIS 257, [5] n.4 (effective Apr. 19, 2013) (adopted by the full Commission at 2013 Mo. PSC LEXIS 305).

Summary Determination shall not be granted unless the Commission determines that it would be in the public interest.[1]

Movants bear the burden of establishing a legal right to judgment and the absence of any genuine issue of material fact required to support that judgment. *ITT Commercial Fin*., 854 S.W.2d, at 378. Respondents Empire District Electric Company ("Empire"), Kansas City Power & Light Company ("KCP&L") and KCP&L Greater Missouri Operations Company ("GMO") filed their motions for summary determination on August 23, 2013. Based on their motions and memoranda in support, Respondents have failed to establish an absence of genuine issues of material fact and have failed to establish why they are entitled to a legal judgment in their favor.

With regard to genuine issues of material fact, Complainants agree that there are no genuine issues of material fact in this case. However, Respondents' motions mistakenly list certain legal issues as undisputed material facts. Respondents also incorrectly summarize the language of Commission rule 4 CSR 240-20.100(5)(B).[2] In addition, KCP&L claims it does not propose to add incremental renewable energy resource generation attributable to the RES during 2012-2014. While Complainants dispute the accuracy of these claim, they regard them not as statements of fact, but rather as questions of law requiring a determination from the Commission. With regard to Respondents arguments as to why they are entitled to a legal judgment, Respondents provide insufficient evidence to support their legal conclusion regarding the meaning of Subsection (5)(B) of the Commission's rule. Moreover, KCP&L fails to establish why its solar rebate payments do not qualify as adding renewable energy resource generation attributable to the RES.

[1] See Commission rule 4 CSR 240-2.117(E).

[2] Case No. EC-2013-0379, et al. "The Empire District Electric Company's Motion for Summary Determination," August 23, 2013, ¶6; Case No. EC-2013-0379, et al. "Motion for Summary Disposition and Legal Memorandum of Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company," August 23, 2013, ¶5.6).

I. Genuine Issues of Material Fact

Set forth below in numbered paragraphs are Complainants' specific responses to the factual allegations contained in Respondents' motions.

a. Response to Empire's Factual Allegations

1. "Respondent is an electrical corporation and public utility within the meaning of §386.020 RSMo and engaged in the business of the manufacture, transmission and distribution of electricity subject to the regulatory jurisdiction of the Commission as provided by law."

Complainants do not dispute this factual allegation and agree it does not constitute a genuine issue of material of fact.

2. "Pursuant to its authority under §393.1030.2 RSMo, the Commission promulgated 4 CSR-240-20.100."

Complainants do not dispute this factual allegation and agree it does not constitute a genuine issue of material of fact.

2. **"Respondent filed its 2012 Annual Renewable Energy Standard Compliance Plan ("Plan") with the Commission on or about April 11, 2012."**

Complainants do not dispute this factual allegation and agree it does not constitute a genuine issue of material of fact.

3. "The Commission docketed the filing of the Plan as Case No. EO-2012-0336."

Complainants do not dispute this factual allegation and agree it does not constitute a genuine issue of material of fact.

4. "The planning interval covered by the Plan includes the years 2012, 2013 and 2014."

Complainants do not dispute this factual allegation; Complainants agree it does not constitute a genuine issue of material of fact.

5. "The Plan filed by Respondent does not include a comparison of the rate impact of renewable and non-renewable energy resources."

Complainants do not dispute this factual allegation; Complainants agree it does not constitute a genuine issue of material of fact.

Moreover, Empire's admission of this fact alone is sufficient for the Commission to find a violation of rule 4 CSR 240-20.100(7)(B)1.F, provided that the Commission also make the legal determination that Empire is not exempt from the requirements of Subsection (7)(B)1.F.

6. **"Subsection (5)(B) of Commission rule 4 CSR 240-20.100 exempts an electrical corporation from making a detailed retail rate impact calculation *and from including that calculation as part of its RES Compliance Plan filing* if it does not propose to add incremental renewable energy resource generation directly attributable to RES compliance through the procurement or development of renewable energy resources."** (emphasis added)

This is not a statement of fact, but rather a conclusion of law, which Complainants dispute.

Empire incorrectly summarizes the language of Subsection (5)(B) of the Commission's rule. The relevant language is the last sentence of Subsection (5)(B), which states:[3]

[3] 4 CSR 240-20.100(5)(B).

> The comparison of the rate impact of renewable and non-renewable energy resources shall be conducted only when the electric utility proposes to add incremental renewable energy resource generation directly attributable to RES compliance through the procurement or development of renewable energy resources.

The language of Subsection (5)(B) includes no mention whatsoever about a utility's obligation to include a detailed description of its 1% retail rate impact calculation as part of its annual RES compliance plan. Subsection (5)(B) concerns itself only with the specific comparison referred to in Section (5). Nevertheless, Empire claims in its Motion that the above language also exempts it from the requirements of Subsection (7)(B)1.F.

Empire's statement regarding Subsection (5)(B) involves a conclusion of law that has no place in a discussion of whether there are genuine issues of material fact. As stated above, Subsection (5)(B) contains no explicit language that exempts a utility from the requirements of Subsection (7)(B)1.F. Empire may arrive at this conclusion by inferring from the language of the rule, and Empire may present its legal theory to the Commission. But Empire cannot successfully claim it is an undisputed fact that Subsection (5)(B) gives it an exemption where no such exemption is stated in the rule.

7. "The Plan states that Respondent "will fully meet the RES Compliance requirements for 2012, 2013 and 2014 with its current purchased power contracts and hydroelectric facility."

Complainants do not dispute the above factual allegation to the extent that it accurately quotes what is stated in Empire's 2012-2014 RES Compliance Plan. Elsewhere Complainants do

dispute that Empire has met the RES Compliance requirements for 2012, although those questions of law are not at issue in this case.[4]

8. "Respondent does not propose to add incremental renewable energy resource generation attributable to RES compliance through the procurement or development of renewable energy resources during the planning interval covered by the Plan."

Complainants do not dispute the above factual allegation to the extent that it accurately describes Empire's proposed actions attributable to RES compliance in its 2012-2014 RES Compliance Plan.

b. Responses to KCP&L and GMO's Factual Allegations

1) **"The Companies are electrical corporations and public utilities within the meaning of § 386.020 RSMo and engaged in the business of the manufacture, transmission and distribution of electricity subject to the regulatory jurisdiction of the Commission as provided by law."**

Complainants do not dispute this factual allegation; Complainants agree it does not constitute a genuine issue of material of fact.

2) **"Pursuant to its authority under §393.1030.2 RSMo, the Commission promulgated 4 CSR-240-20.100."**

Complainants do not dispute this factual allegation; Complainants agree it does not constitute a genuine issue of material of fact.

3) **"The Companies filed their 2012 Annual Renewable Energy Standard Compliance Plans ("Plans") with the Commission on or about April 11, 2012."**

[4] See Case No. EC-2013-0377, et al.

Complainants do not dispute this factual allegation; Complainants agree it does not constitute a genuine issue of material of fact.

4) **"The Commission docketed the filing of the Plans as Case No. EO-2012-0348 and EO-2012-0349."**

Complainants do not dispute this factual allegation; Complainants agree it does not constitute a genuine issue of material of fact.

5) **"The planning interval covered by the Plans includes the years 2012, 2013 and 2014."**

Complainants do not dispute this factual allegation; Complainants agree it does not constitute a genuine issue of material of fact.

6) **"Subsection (5)(B) of Commission rule 4 CSR 240-20.100 exempts an electrical corporation from making a detailed retail rate impact calculation *and from including that calculation as part of its RES Compliance Plan filing* if it does not propose to add incremental renewable energy resource generation directly attributable to RES compliance through the procurement or development of renewable energy resources."** (emphasis added.)

This is not a statement of fact, but rather a conclusion of law, which Complainants dispute.

Like Empire, KCP&L and GMO incorrectly summarize the language of Subsection (5)(B) of the Commission's rule. Subsection (5)(B) includes no mention whatsoever about a utility's obligation to include a detailed description of its 1% retail rate impact calculation as part of its annual RES compliance plan. Subsection (5)(B) concerns itself only with the specific

comparison referred to in Section (5). Nevertheless, KCP&L and GMO claim in their Motion that Subsection (5)(B) also exempts them from the requirements of Subsection (7)(B)1.F.

Also like Empire, KCP&L and GMO's statement regarding Subsection (5)(B) involves a conclusion of law that has no place in a discussion of whether there are genuine issues of material fact. KCP&L and GMO may arrive at this conclusion by inferring from the language of the rule, and they may present their legal theory to the Commission. But KCP&L and GMO cannot successfully claim it is an undisputed fact that Subsection (5)(B) gives them an exemption where no such exemption is stated in the rule.

7) **"The Companies will meet the RES Compliance requirements for 2012, 2013 and 2014 with its current facilities. No new renewable generation attributable to RES compliance was planned for any of those years."**

Complainants dispute the second sentence of the above factual allegation only insofar as it ignores KCP&L and GMO's payment of solar rebates. Whether solar rebate expenditures qualify as "new renewable generation attributable to RES compliance" is a question of law that requires a Commission decision.

8) **"The Companies do not propose to add incremental renewable energy resource generation attributable to RES compliance through the procurement or development of renewable energy resources during the planning interval covered by the Plan."**

Complainants dispute the above factual allegation only insofar as it ignores KCP&L and GMO's payment of solar rebates. Both utilities have offered and paid out solar rebates to their customers since 2012. Whether solar rebate expenditures result in adding "incremental renewable energy resource generation attributable to RES compliance through the procurement

or development of renewable energy resources" is a question of law that requires a Commission decision.

II. Respondents are Not Entitled to Judgment as a Matter of Law

Pursuant to rule 4 CSR 240-2.117(1)(C), Complainants address the arguments of Empire, KCP&L and GMO for why they are entitled to a legal judgment from the Commission. There are two issues in this case requiring a Commission determination: a) whether the last sentence of Subsection (5)(B) removes Respondents' obligation to comply with Subsection (7)(B)1.F; and b) whether solar rebate payments result in the addition of "incremental renewable energy resource generation attributable to RES compliance through the procurement or development of renewable energy resources."

a. Subsection (5)(B) does not remove Respondents' obligation to comply with Subsection (7)(B)1.F.

Apart from the question of whether Respondents have met the prerequisites of the last sentence of Subsection (5)(B), the Commission must determine exactly what affect such alleged exemption has. The last sentence of Subsection (5)(B) states:[5]

> The comparison of the rate impact of renewable and non-renewable energy resources shall be conducted only when the electric utility proposes to add incremental renewable energy resource generation directly attributable to RES compliance through the procurement or development of renewable energy resources.

In their motions for summary determination, Respondents argue that the above language exempts them from having to comply with the requirements of Subsection (7)(B)1, which states:[6]

[5] 4 CSR 240-20.100(5)(B).
[6] 4 CSR 240-20.100(7)(B)1.

> The RES compliance plan shall include, at a minimum– … F. A detailed explanation of the calculation of the RES retail impact limit calculated in accordance with section (5) of this rule. This explanation should include the pertinent information for the planning interval which is included in the RES compliance plan.

In its memorandum in support of its motion, Empire reasons from the above language that: "any utility whose RES compliance plan does not include a proposal to add incremental renewable energy resource generation… is exempt from the requirement to include a detailed rate retail rate impact calculation as part of its RES compliance plan."[7] Similarly KCP&L and GMO claim in their memorandum in support: "If there is no retail rate impact calculation, then there is no explanation required in Section (7)(B)1.F."[8]

As Complainants have already observed, the language of Subsection (5)(B) contains no explicit exemption from including a detailed explanation of the RES retail rate impact in their annual RES compliance plans. The last sentence of Subsection (5)(B) only refers to the "comparison" of scenarios referred to throughout Subsection (5)(B). In order to claim an exemption from Subsection (7)(B)1.F, Respondents rely on an inference that is unsupported by the language of the rule.

Sections (5) and (7) involve different aspects of the Commission's rule. Section (5) establishes the details on how the 1% retail rate impact limit is to be calculated, including the specific "comparison" laid out in Subsection (5)(B). The last sentence of Subsection (5)(B) only pertains to subject matter of Section (5), i.e. how the retail rate impact limit is to be calculated.

[7] EC-2013-0379, et al. "Memorandum of Law In Support of the Empire District Electric Company's Motion for Summary Determination," August 23, 2013, pp. 3-4.
[8] KCP&L and GMO's Motion and Memorandum in Support, August 23, 2013, ¶8.

Section (5) makes no mention of the content and timing of annual RES compliance plans. Section (7), on the other hand, identifies the content required to be included in compliance plans, and specifies when such compliance plans must be filed. Subsection (7)(B)1.F lists a detailed description of the retail rate impact calculation as one of the minimum requirements for the annual RES compliance plans.

Moreover, Respondents perform calculations substantially similar to the one required by Section (5) in various proceedings unrelated to RES compliance. In Respondent Ameren Missouri's testimony in this case, the Company states that Ameren Missouri essentially performs the Section (5) calculation and includes it within its annual IRP filings.[9] Respondents Empire, KCP&L and GMO are under similar obligations, and thus have access to the necessary data for the detailed explanation required by. Accordingly, KCP&L and GMO's argument that "[i]f there is no retail rate impact calculation, then there is no explanation required" fails to hold water.

Respondents are both able and obligated by law to comply with Subsection (7)(B)1.F, regardless of whether they are exempt from performing the "comparison" laid out in Subsection (5)(B). There seems to be no reason for Respondents to withhold such information, other than an unwillingness to share information with stakeholders and the public. Complainants request that the Commission require Respondents to comply with Subsection (7)(B)1.F for compliance year 2012 and all subsequent compliance years.

b. <u>KCP&L and GMO propose to add "incremental renewable energy resource generation" through the payment of solar rebates and the purchase of SRECs.</u>

Even if the language of Subsection (5)(B) were to exempt utilities from the requirements of Subsection (7)(B)1.F, KCP&L and GMO fail to qualify for such an exemption. The alleged exemption language would only apply if a utility did not propose to add "incremental renewable

[9] EC-2013-0379, et al., "Rebuttal Testimony of Matt Michels," August 9, 2013, p. 4, lines 3-10.

energy resource generation directly attributable to RES compliance through the procurement or development of renewable energy resources."[10] KCP&L and GMO anticipate tens of millions of dollars in solar rebate costs over the 2012-2014 timeframe.[11] Moreover, both companies claim these costs as being attributable to RES Compliance.[12] GMO has even gone so far as to request suspension of their solar rebate tariff by claiming it has reached the 1% retail rate impact limit,[13] all without ever having met the requirements of Section (5) and Subsection (7)(B)1.F.

KCP&L and GMO are essentially asking for a pass on key rule provisions related to the calculation and disclosure of the 1% retail rate impact, while at the same time claiming they've reached that cap. The Commission should refrain from allowing this result, especially when KCP&L and GMO fail to establish why solar rebate expenditures do not defeat their claim for an exemption under section (5)(B).

There is sufficient evidence to indicate that solar rebate expenditures qualify as "incremental renewable energy resource generation directly attributable to RES compliance through the procurement or development of renewable energy resources." Both KCP&L and GMO consider solar rebate payments as directly attributable to RES compliance, as is evident from their compliance reports.[14] Moreover, payment of solar rebates directly results in the *development* of renewable energy resources. Nothing in the RES statute or the Commission's rule specifies whether "incremental renewable energy resource generation" must mean resources owned and operated by the utility.

[10] 4 CSR 240-20.100(5)(B).
[11] "2012 Annual Renewable Energy Standard Compliance Plan," filed by GMO in case no. EO-2012-0348 on April 15, 2012, p. 13.
[12] EO-2013-0504, "Kansas City Power & Light Co.: 2012 Renewable Energy Standard Compliance Report." May 28, 2013, pp. 7-8; EO-2013-0505, "KCP&L Greater Missouri Operations Co.: 2012 Renewable Energy Standard Compliance Report." May 28, 2013, pp. 7-8.
[13] ET-2014-0059, "Application for Authority to Suspend Payment of Solar Rebates." September 4, 2013.
[14] KCP&L and GMO's 2012 Compliance Reports, May 28, 2013, pp. 7-8.

Staff agrees that KCP&L and GMO have proposed to add renewable energy resource generation for the 2012-2014 RES compliance period. In her Rebuttal Testimony, Claire Eubanks states: "Ameren Missouri, KCPL, and GMO proposed to add renewable energy resource generation in their 2012-2014 RES Compliance Plans."[15] Additionally, the Staff Reports filed on May 31, 2012 make no reference to the Section (5)(B) exemption; instead the Staff Reports acknowledge that utilities did not achieve full compliance with Section (7)(B)1.F.[16]

According to a plain reading of section (5)(B), any RES-attributable expenditure that results in the development of renewable energy resources triggers a requirement that the utility perform the Subsection (5)(B) comparison (and thus a Subsection (7)(B)1.F. detailed explanation). Solar rebate payments are attributable to RES compliance (according to KCP&L and GMO), and such payments result in the development of renewable energy resources. Because KCP&L and GMO propose these expenditures in their 2012-2014 RES compliance plans, they are precluded from claiming an exemption from Subsection (7)(B)1.F for 2012.

III. Granting Respondents' Motions Would Be Against the Public Interest

The Commission's rule at 4 CSR 240-2.117(1)(E) states: "The Commission may grant the motion for summary determination if… the Commission determines that it is in the public interest." In its Memorandum of Law, Empire claims that granting its Motion for Summary Determination would be in the Public Interest.[17] Empire makes several attempts to further its public interest argument.

[15] EC-2013-0379, et al. "Rebuttal Testimony of Claire Eubanks," August 9, 2013, p. 6, lines 1-2.
[16] "Staff Report on Company's RES Compliance Plan," May 31, 2012, Case nos. EO-2012-0336 (p. 2, ¶6-8), EO-2012-0348 (p. 2, ¶7-9), EO-2012-0349 (p. 2, ¶7-9), EO-2012-0351 (p. 2, ¶7-9).
[17] Empire's Memorandum of Law, August 23, 2013, p. 5.

First, Empire observes that the one percent retail rate impact provision in the RES[18] was included as a consumer protection measure. Complainants agree. However, the issue at hand deals not with the 1% retail rate impact provision, but with the provision of the Commission's rule requiring utilities to disclose their calculations to the public. Empire then goes on to state: "the retail rate impact calculation specified by the Commission is not a business planning tool put in place to advance the parochial commercial business interests of the renewable energy industry, as claimed by Complainants." Again, it is not the 1% retail rate impact provision, but the provision requiring disclosure of such calculation, that is at issue here. Empire's statement entirely misinterprets Complainants position. Moreover, rule 4 CSR 240-20.100(7)(B)1.F does in fact advance the commercial business interests of renewable energy industry,[19] along with the interests of a myriad of other stakeholders. The intent of the rule is irrelevant. It is not simply the utility's own interests at stake. A publicly-regulated utility must not be permitted to shrug off this Commission requirement simply because it sees no value for itself in meeting the requirement, especially when multiple parties' interests are at stake.

Next, Empire claims: "[t]he Commission's rule recognizes that there is no purpose to be served requiring an electric utility to undertake a detailed calculation of the retail rate impact of complying with the RES when the utility has no need to add renewable generation resources in order to meet the portfolio standard."[20] Such statement ignores the interests and purposes that Complainants have given voice to throughout this case. Many parties – including ratepayer advocates, environmental groups, business owners, the Complainants in this case, and the Commission and other governmental agencies – have an interest in seeing a detailed description

[18] § 393.1030.2(1), RSMo.
[19] See EC-2013-0379 et al., "Direct Testimony of Vaughn Prost," June 28, 2013; see also EC-2013-0379, et al., "Direct Testimony of PJ Wilson," June 28, 2013.
[20] Empire's Memorandum of Law, August 23, 2013, p. 5.

of what utilities are spending money on every year to comply with the RES. Parties also have an interest in seeing what utilities would otherwise be spending money on were it not for the RES. Since Empire has not once disclosed its Section (5) calculation with the Commission to date, parties have no knowledge of how Empire's renewable assets are affecting its customers' rates. It may be the case that Empire's renewable assets have actually resulted in lower rates. However, parties have no way of discovering this if Empire is allowed to avoid Subsection (7)(B)1.F because it believes the rule has no purpose.

Finally, Empire claims: "[r]equiring Empire to undertake such a calculation in these circumstances would only cause it to incur costs which will not advance the public interest and would, in fact, drive up costs to consumers."[21] As Complainants have already observed, utilities are already required to perform substantially the same calculation in the IRP process.[22] Requiring utilities to describe their Section (5) calculation in their annual compliance plans would cost the utility next to nothing. Such costs are dwarfed by the costs that Respondents have already spent defending these complaints alone.

Respondents' refusal to abide by the clear requirements of Subsection (7)(B)1.F has created massive confusion and is currently threatening the existence of an entire industry. Had GMO complied with Subsection (7)(B)1.F in prior years, the Commission and other stakeholders would have had the opportunity to achieve certainty and finality to the issue of what Section (5) requires. Instead, we find ourselves in the current situation, in which GMO threatens to discontinue payment of solar rebates[23] even though not a single utility has correctly performed the Section (5) calculation to date.

[21] Id.
[22] See Rebuttal Testimony of Matt Michels, August 9, 2013, p. 4, lines 3-10.
[23] See case no. ET-2014-0059.

Rule 4 CSR 240-20.100(7)(B)1.F exists precisely to avoid such confusion. Had utilities completely followed Sections (5) and (7)(B)1.F in 2012, it's likely that we would not find ourselves in this imminent crisis that threatens the existence of an entire industry. As such, Complainants ask that the Commission hold utilities responsible for failing to comply with rule 4 CSR 240-20.100(7)(B)1.F in 2012, and order utilities to comply every year in the future.

In contrast to Empire's argument, Complainants believe that the public interest will best be served by the Commission granting the relief requested in the complaints and requiring all utilities to abide by Subsection (7)(B)1.F every year. The relief requested in the complaints will serve the general public interest by ensuring a reliable framework for open disclosure of utilities' future renewable energy expenses. In addition, the relief requested would serve the interests of hundreds of Missourians working in the solar industry today. As the Direct Testimony of Vaughn Prost illustrates, solar companies and other renewable businesses need the ability to accurately plan for future market conditions in order to run their businesses.[24] This requires knowledge of exactly when utilities expect to reach their 1% limit; however, this alone is not enough. Renewable businesses also require a high level of assurance that utilities are correctly calculating this 1% limitation in accordance with the RES statute and the Commission's rule. To this end, the Commission's rule requires not only that the Section (5) calculation be performed, but that utilities include a "detailed explanation" of their calculation every year in their RES compliance plans.[25]

CONCLUSION

Respondents have failed to establish why they are entitled judgment as a matter of law, and why granting their motions will be in the public interest. Accordingly, Complainants

[24] Testimony of Vaughn Prost, June 28, 2013, at p. 3, lines 16-22.
[25] 4 CSR 240-20.100(7)(B)1.F.

respectfully request that the Commission deny the motions for summary determination of Respondents Empire District Electric Company, Kansas City Power & Light Company, and KCP&L Greater Missouri Operations Company.

Respectfully submitted,

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ATTORNEYS FOR COMPLAINANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing, together with all referenced Exhibits, have been electronically mailed to all parties of record on this 6th day of September, 2013.

/s/ Andrew J. Linhares
Andrew J. Linhares