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 LEGAL MEMORANDUM IN OPPOSITION TO COMPLAINANTS' MOTION FOR SUMMARY DETERMINATION

COMES NOW Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri" or "Company") and, pursuant to 4 CSR 240-2.117(1)(C), hereby files this legal memorandum in opposition to Complainants' Motion for Summary Determination ("Complainants' Motion").

Introduction

Ameren Missouri will not repeat the applicable standards for summary determination nor the summary of its contentions regarding why the Complaint should be dismissed, which we already outlined in the Introduction in our Response to Complainants' Motion. The Company submits this Legal Memorandum primarily to address contentions and issues Complainants raise in their Legal Memorandum that they did not rely upon as a basis for summary determination in Complainants' Motion.

Unsupported Factual Contentions

Complainants make the factual assertion (unsupported by affidavit or other materials required when summary determination is sought) that the Renewable Energy Standard ("RES") has been "ineffective due to non-compliance and misinterpretations of the law on the part of the state's investor-owned utilities." Complainants' Legal Memorandum p. 2. The Company disputes that the RES has been "ineffective," or that it has not complied with the RES or has otherwise misinterpreted it. Complainants obviously make this unsupported and disputed charge because it suits what they claim to be the purpose of the RES. As we discuss below, Complainants fail to establish that the purpose that *they* claim is indeed a purpose reflected in the statute itself, or was the intention of the voters who adopted it.

Hydropower

Complainants' argument on this issue depends entirely on the Commission ignoring the unambiguous, plain and ordinary meaning of the phrase "nameplate rating." Because it is unambiguous and has a plain and ordinary meaning as found in the dictionary, basic rules of statutory construction dictate that the Commission give the phrase its plain and ordinary meaning as found in the dictionary. *Smith v. Shaw*, 159 S.W.3d 830, 834 (Mo. banc 2005); *Hemeyer v. KRCG-TV*, 6 S.W.3d 880, 881 (Mo. banc 1999). The plain meaning of the term "nameplate" is "a flat, usually rectangular piece of metal, wood, or plastic on which the name of a person, company, etc., is printed or engraved." *Webster's New Universal Unabridged Dictionary* (2003 ed.). Complainants do not claim – and indeed the Company has presented an affidavit that would dispute

such a claim even if it were made[1] – that the Keokuk Plant or any power plant for that matter has a nameplate reflecting the total or sum or aggregate of all of the ratings of all of the plant's generators. This fact alone is fatal to Complainants' Motion.[2]

Complainants ignore this plain meaning and attempt to rely upon inadmissible extrinsic evidence[3], but even that extrinsic evidence fails to prove Complainants' point; that the aggregate capacity of a *plant*, calculated by summing the nameplate ratings of its generators, exceeds 10 megawatts, or that "nameplate *capacity*" (a term that does not appear in the statute) is sometimes used to refer to the plant as a whole (usually, as Complainants sources indicated, by explicitly referring to the "aggregate" or "sum" of nameplate ratings of each generator), is irrelevant. The statute does not use the term "nameplate capacity" and even more importantly, it does not call for the aggregation or summing of individual generator nameplate ratings. Complainants cite not a single instance where a "nameplate rating" referred to the aggregate or total capacity of a plant.

The closest they come is the FERC Form 1, and in their attempt to make this point, they misleadingly fail to set out in its entirety the relevant language of the Form 1. Complainants' claim that the FERC uses "nameplate rating" and "nameplate capacity" synonymously. That is simply not true, as shown by the Form 1 itself. The FERC Form 1 provides as follows: "1. Large *plants* are hydro *plants* of 10,000 Kw or more of installed *capacity* (name plate ratings)" (emphasis added). And then the actual reporting requirement calls for "Net *Plant* Capability" (emphasis added). So, all that FERC Form 1 requires is for a company to *sum up* the "name plate ratings" of all of the generators *at a*

[1] See Affidavit of Warren A. Witt attached to the Company's Motion to Dismiss.
[2] Complainants' Motion fails before we even get to the summary determination stage because, for the reasons discussed in our Motion to Dismiss, the Complaint fails to state a claim upon which relief can be granted.
[3] *Farmers' and Laborers' Co-op Ins. Ass'n v. Director of Revenue, State of Mo.*, 742 S.W.2d 141, 143 (Mo. 1987).

Plant. Put another way, the FERC Form 1 recognizes that to determine the total capacity of a plant, one has to go look at the nameplate ratings *on each generator* because only a generator has a nameplate rating. But this does not turn the meaning of the phrase "nameplate rating" into "the aggregate of the name plate ratings of the generators" nor does it make "nameplate rating" synonymous with "nameplate capacity." Indeed, it shows they are not synonymous – the former is the rating on the generator; the latter is the *sum* of the ratings on multiple generators. Messrs. Robertson and Wilson may have wished that they had written those words when they drafted Proposition C, but they did not do so. The Commission has no power to re-write the statute for them now.

And the Commission, in its rule, has already recognized that "nameplate rating" in the statute refers to the individual nameplate rating of each generator.[4] This is in accord with its plain and ordinary meaning.[5] Complainants do not even attempt to argue that MDNR's rule is in accord with their argument respecting what the subject statutory phrase means.

Complainants seek to avoid the plain language of the statute, and the rules of the Commission and MDNR, by claiming a different intention underlies the RES statute as reflected in the purpose they claim the statute is directed toward accomplishing. Their claim is that the RES statute was intended to promote *new* renewable generation only.

[4] Complainants' meekly state, for the first time, that they "believe" the Commission's rule is consistent with their view that "generator nameplate ratings" "is consistent with" their argument that one must aggregate all generators at a plant. Complainant's counsel Mr. Robertson conceded this was not the case in a discussion with Chairman Kenney in Case No. ER-2011-0275, when he suggested that the Commission could change its rule and that would "solve half" of the problem – the problem being that the Commission's rule and MDNR's rule directly contradict Complainants' argument. Tr. Vol. 2, Aug. 30, 2011, p. 32. It is obvious that their newly-discovered belief is contradicted by the Commission's rule.

[5] As the Staff has previously pointed out, even if there were ambiguity the courts will first look to how the agency charged with administering the statute has resolved the ambiguity. *See, e.g., State ex rel. Jackson County v. Pub. Serv. Comm'n.*, 532 S.W.2d 20, 28 (Mo. 1975). Here, we not only have the Commission that understood what "nameplate rating" means – the rating on the nameplate on a generator – but we have a second agency reaching the same conclusion – the Missouri Department of Natural Resources ("MDNR").

Complainants' Legal Memorandum p. 7 ("The purpose of encouraging new renewable technologies not established in Missouri is obvious from the nature and context of the RES itself."). That may very well have been Messrs. Robertson's and Wilson's intention as the drafters of Proposition C, but it is not reflected in 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).

In the above-cited case, those that backed a piece of campaign finance disclosure and reporting legislation that was adopted by initiative petition, and certain "small candidates" who then were subject to it, challenged a rule of the Missouri Elections Commission that did not exempt these "small candidates" from the financial disclosure provisions of the statute. There were provisions in the statute that exempted those who did not receive or spend $500 or more from *reporting* contributions or expenditures, but by the plain words of the statute, all candidates had to make certain financial *disclosures* relating to things like their investments and gifts they had received. Plaintiffs argued that the purpose behind the statute was to curb "big money" in election campaigns and that construing the legislation as reflected in the Election Commission's rule, which required disclosure for all candidates, was "destructive of the legislative purpose." 536 S.W.2d at 776. Basically, the drafters claimed that they didn't intend to require the small candidates to make disclosures, even though the words of the statute plainly imposed that requirement. The Court rejected the drafters' purpose arguments, stating,

> It is, of course, impossible to determine the precise intention of the electorate on a proposition such as this one. * * * The provisions . . . draw no distinction between "major" and "minor" offices. * * * We . . . cannot attribute an intent to the voters not expressly contained in the proposition voted on.

In rejecting the contention that the Act was ambiguous, the Court also stated that "[w]hatever ambiguity exists is not in the Act, but in the difference between what the drafters thought they were doing and what was actually done." The Court noted that while the plaintiffs claimed that a small candidate should be exempt from the disclosure requirements because the proposition was not intended to reach conflicts of interest, "the ballot language does not make that apparent." *Id.* at 773.

The situation here is very similar. Despite the drafters claim today, of what they intended to say, the fact is that nowhere does the RES statute express an intention that only *new* renewable generation can qualify as a "renewable energy resource" for purpose of meeting the portfolio requirements in the RES. The drafters may have thought that is what they were doing, but it's not actually what they did. As the Court indicated, "[r]egardless of the pre-election intentions of the drafters . . . the Proposition and its express language became the law of this state.* * * By that law we are bound. * * * The function of the courts is to enforce the law according to its terms." *Id.* at 774-75.

And how could the voters of this state have intended that the RES statute be limited to only new generation? Not only does the RES statute itself contain no such limitation, but neither did the ballot. The ballot (included as Exhibit 13 with Complainants' Motion) simply asked whether utilities should be required to "generate or purchase electricity from renewable energy sources such as solar, wind, biomass *and hydropower* with renewable energy sources equaling at least . . ." (emphasis added)?

Complainants do not claim that the Keokuk Plant does not produce hydropower. While the drafters may have intended for the statute to read "the sum of the nameplate ratings of all generators at a given plant," that is not what they wrote. The Commission, Complainants and the utilities are all bound by the express language of the statute as written, not as Complainants may have wished it had been written.

There is indeed an even more plausible purpose reflected in the words used in the RES statute and in the ballot title the voters relied upon; that is, it is much more plausible that what the voters really intended was that by 2021 at least 15% of each utility's portfolio would come from "renewable energy sources such as solar, wind, biomass and hydropower." There is absolutely no proof, including in the sources cited by Complainants, that *Missouri* voters intended to limit the RES statute to only new sources of renewable energy, notwithstanding that Complainants' expert may have provided the irrelevant opinion about the purpose of *other* state renewable standards.

Not only does the plain language of the statute not support Complainants' argument, but other principles of statutory construction also support the Company's position. The RES statute contains substantial monetary penalties for non-compliance.[6] The Complaint seeks a determination of non-compliance, and asks that those penalties be imposed.

Because the RES statute contains penalties – indeed in effect double damages because the penalty for non-compliance is twice the average market value of a renewable energy credit – it is a penal statute. *Cf. Mikulich et al. v. Wright*, 85 S.W.3d 117, 119-20 (Mo. App. W.D. 2002)(Stating the rule in the context of another civil penalty statute, Section 407.410, that a statute providing for penalties is penal statute). Consequently, the

[6] Section 393.1030.2(2).

RES statute must be interpreted "strictly and literally,'" meaning it can be given '"no broader application than is warranted by its *plain and unambiguous terms*'" *Id., quoting City of Charleston ex rel. Brady v. McCutcheon,* 227 S.W.2d 736, 738 (Mo. banc 1950) (emphasis added). The issue in *Mikulich* was the meaning of the words "induce" and "cause" in the statute at issue, just as here the issue is the meaning of the words "nameplate rating." The court recognized that its job was to determine the statutory intent from the plain and ordinary meaning of those words, as found in the dictionary. *Id.* at 120. As previously demonstrated, the plain and ordinary meaning of "nameplate rating" simply does not support Complainants' argument.

Banked RECs[7]

The RES statute defines a REC as "a tradable certificate of proof that one megawatt-hour of electricity has been generated from renewable energy resources." Section 393.1025(4). The statute also expressly recognizes that an unused REC exists for three years after its creation. Section 393.1030.2.

Complainants argue that a provision of the RES statute ("Such portfolio requirement shall provide that electricity from renewable energy resources shall constitute the following portions of each electric utility's sales . . . [stating percentages]")[8] means that only RECs created starting January 1, 2011 can be used for compliance. Based on that provision, Complainants argue 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 claim that the reason for the delay was so utilities could "get new facilities built or line up sources of

[7] Complainants now refer to this issue as "Pre-Compliance Era RECs."
[8] Section 393.1030.1.

supply." Complainants' Legal Memorandum p. 9.

Complainants might have had a point if the statute did not expressly and without qualification provide that "A utility may comply with the standard in whole or in part by purchasing RECs." Section 393.1030.1 (next to last sentence). But the inconvenient truth for Complainants is that it does so state. Given that statement, it is more logical that the 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.

In support of their theory, Complainants also claim that the "purpose of a RES is to foster renewable energy going forward." Complainants' Legal Memorandum p. 9. Ag**a**in, the RES statute does not contain the language Complainants seek to impose upon Missouri utilities and their customers. There is not one word (nor do Complainants cite one) that evinces such an intent. This Commission must apply the statute as written, not as Complainants claim it should have been written now five years later. *See Missourians for Honest Elections*, 536 S.W.2d at 774-75 ("[r]egardless of the pre-election intentions of the drafters . . . the Proposition and its express language became the law of this state.* * * By that law we are bound. * * * The function of the courts is to enforce the law according to its terms.")[9]

Complainants claim there was nothing to use RECs for prior to 2011. That claim

[9] On this argument, like the hydropower argument, Complainants are asking the Commission to read words or limitations into the RES statute broadly in a way that makes it more restrictive in terms of how utilities can comply with the RES and thereby create a greater likelihood of penalties under the RES statute. As noted earlier, penal statutes are to be construed narrowly, not broadly. *Mikulich*, 85 S.W.3d at 119-20.

is false. The statute did not create RECs.[10] RECs have been around for many years, and most certainly were around before January 1, 2008.[11] Indeed, the RES statute itself recognizes this when it specifically precludes a utility from using RECs from a green power program to comply with the standard. Section 393.1030.2. This is an obvious reference to the Company's Pure Power Program, which pre-dates the RES. As Staff Counsel Hernandez pointed out in prior argument before the Commission, the drafters of the RES knew how to put specificity in the RES statute. They specifically excluded green power RECS from use for compliance, and they specifically limited the viability of using RECs for compliance to three years after the REC was created. They could have put a "start date" that limited RECs that could be used for compliance to those created after that start date, but they did not do so.

Geographic Sourcing

We have already addressed Complainants' arguments on this point in our Motion to Dismiss. To summarize:

- Complainants admit that the Commission's RES rule does not contain a geographic sourcing requirement. They suggest that it is merely "silent" on the point, and argue that this means the Commission could interpret it to include one. The Western District has already made clear that is not true: "Should the PSC decide in the future to promulgate geographic sourcing rules, it will, of course, be required to do so pursuant to the

[10] As Mr. Mills pointed out in a prior argument on these issues before the Commission, there are all kinds of things reflected in statutes under the jurisdiction of the Commission that are defined by the statute, but which existed before the statute existed. One apt analogy: "[I]f a puppy mill statute had created a definition of a kennel, a kennel manufactured before the date of the statute that meets the definition is a kennel. I don't think – the statute doesn't create a kennel any more than it creates a REC." Tr., Vol. 2, p. 150-51, l. 24 – 3, Case No. ER-2011-0275.

[11] As the Commission itself acknowledged in 2007, in Case No. ER-2007-0002, Report and Order, Effective June 1, 2007, p. 113, "A REC is defined as the environmentally beneficial component of renewable energy and is equivalent to 1,000 kilowatt hours." Ameren Missouri requests the Commission take admin notice of this order.

rulemaking procedures of section 536.021."[12] Nor does it make any sense whatsoever to claim that the Commission's rule contains a geographic sourcing requirement when it is undisputed that the Commission first attempted to apply such a requirement, but specifically and expressly withdrew it. Since such a requirement was never published as part of the rule, it is not in effect as a matter of law. Section 536.021.8 (no rule is effective until after publication in the Code of State Regulations for 30 days – the geographic sourcing provision was never published).[13]

- Complainants' argument that the statute requires renewable energy to be delivered to Ameren Missouri customers and so RECs must be associated with energy delivery is completely without merit because it ignores the plain language of the RES statute. The sentence in the statute that Complainants rely upon for their argument reads, "The portfolio requirements shall apply to all power sold to Missouri customers whether such power is self-generated or purchased from another source in or outside of this state."[14] The portfolio requirements are the percentage of renewable power that must be provided by the utility. This sentence does not require renewable electricity to be delivered to Missouri. Instead, it is merely the method of calculation to convert the portfolio percentage to megawatt-hours. (The total amount of power sold to Missouri customers multiplied by the applicable portfolio percentage). The very next sentence

[12] *State ex rel. Missouri Energy Dev. Ass'n v. Pub. Serv. Comm'n*, 386 S.W.3d 165, 176 (Mo. App. W.D. 2012).
[13] While we do not agree with the discussion, Complainants' discussion of JCAR is completely irrelevant. The geographic sourcing provision of the initial order of rulemaking never became an effective rule. The reason *why* it did not become effective is totally irrelevant to the question of whether Complainants are entitled to summary determination as a matter of law.
[14] Section 393.1030.2(1).

in the statute is key and is ignored in Complainants' argument. It reads, "A utility may comply with the standard in whole or in part by purchasing RECs."[15] A REC is defined in the statute as "…a tradable certificate of proof that one megawatt-hour of electricity has been generated from renewable energy sources."[16] By the very definition, RECs can be and are separate from energy, meaning that the Complainants' interpretation of the previous sentence cannot be correct. By the language of the statute, utilities are allowed to comply by providing renewable energy to its customers OR by purchasing RECs. Either option is acceptable. Complainants are asking the Commission to add restrictions not found in the statute, a power the Commission simply does not possess.

Conclusion

The Company is entitled to dismissal of Count I of the Complaint (hydropower) as a matter of law. For that reason alone, Complainants are not entitled to summary determination because they are not entitled to pursue Count I. Even if that were not the case, the statute is unambiguous regarding the meaning of "nameplate rating," as is the Commission's rule and MDNR's rule. Consequently, Complainants have completely failed to establish that they are entitled to summary determination as a matter of law, meaning Complainants' Motion as to Count I must be denied.

The Company is also entitled to dismissal of Counts II and III. Even if that were not the case, for the reasons discussed earlier, Complainants have failed to establish that they are entitled to summary determination as a matter of law, meaning Complainants

[15] Section 393.1030.2(1).
[16] Section 393.1025(4).

Motion as to Counts II and III must be denied.

Respectfully Submitted,

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ATTORNEYS FOR UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI

Dated: August 16, 2013

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Legal Memorandum 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 16th day of August, 2013.

/s/ Wendy K. Tatro
Wendy K. Tatro

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Respondent.	)	

STATE OF MISSOURI)
)
CITY OF ST. LOUIS)

AFFIDAVIT

The undersigned, being duly sworn upon his oath, states as follows:

1. My name is Warren A. Witt.

2. I am over the age of 18 years, and make this affidavit based upon my personal knowledge.

3. I have a mechanical engineering degree from University of Illinois and a Masters degree in Engineering Management from Missouri University of Science and Technology.

4. I am employed by Ameren Missouri as Director, Hydro Operations with responsibility for all of Ameren Missouri's hydro-electric generation, including the Keokuk Energy Center. I have had responsibility for Ameren Missouri's hydro-electric generators since November of 2005 and have been involved in the electric utility industry for approximately 30 years.

5. It is not standard industry practice to use the phrase "nameplate rating" synonymously with "nameplate capacity." The former refers only to the nameplates attached to a generator.

6. Ameren's FERC Form 1 (Complainants' Exhibit 2), consistent with its instructions, lists the "Net Plant Capability" of the Keokuk Energy Center as 142 megawatts, based on a calculation that takes into account the sum of the nameplate ratings of the 15 generators. Nowhere does the FERC Form 1 use the "nameplate rating" of a generator synonymously with the overall capacity ("Net Plant Capability") of the Plant itself.

Further affiant sayeth not.

Warren A. Witt
Director, Hydro Operations

On this 15th day of August, 2013, before me personally appeared Warren Witt, known to be the person who, upon his oath, signed the foregoing Affidavit in my presence in the county and state aforesaid.

Notary Public

Julie Donohue - Notary Public
Notary Seal, State of
Missouri - St. Louis County
Commission #13753418
My Commission Expires 1/15/2017