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 RESPONSE 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 response to Complainants' Motion for Summary Determination ("Complainants' Motion") and respectfully prays that the Commission deny Complainants' request for summary determination as prayed in Complainants' Motion.

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).[1]

[1] As discussed in numerous Commission orders, including in the recent case styled *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), the *ITT* case applied Mo. R. Civ. P. 74.04, which as the Commission has noted "is sufficiently similar to the Commission's regulation to make cases interpreting the rule helpful in understanding the regulation." *Harris*, *supra*..

Complainants bear the burden of establishing their entitlement to summary determination. *Id. at 378.* Complainants have failed to establish either that there is no dispute about material facts or that they are entitled to judgment as a matter of law and, therefore, their request for summary determination must be denied. This is demonstrated by the fact that many of the facts claimed as material are indeed irrelevant to the *purely legal determinations* at issue in these complaint cases. Moreover, even if Complainants had stated a claim (they have not – see the Company's July 23, 2013 Motion to Dismiss), Complainants confuse questions of law for determination by this Commission (and if appealed, to be reviewed *de novo* by the courts) with questions of fact.

For example, in paragraph 11 of their Motion, Complainants suggest that the meaning of the statutory phrase "nameplate rating" in Section 393.1015(5)[2] could be considered a "factual" question. Complainants are wrong. It is well-settled law that the meaning of words or phrases in a statute is a question of law. *See, e.g., State v. Simmons*, 270 S.W.3d 523, 531 (Mo. App. W.D. 2008)("Statutory interpretation is a question of law, and questions of law are reviewed *de novo*."). Moreover, where a provision of a statute is unambiguous, words and phrases in a statute are taken in their ordinary and usual sense, *Smith v. Shaw*, 159 S.W.3d 830, 834 (Mo. banc 2005), and the plain and ordinary meaning of those words and phrases is derived from the dictionary, *Hemeyer v. KRCG-TV*, 6 S.W.3d 880, 881 (Mo. banc 1999). Where the phrase or term is unambiguous, as here, extrinsic evidence is not admissible and cannot be considered in making the *legal* determination respecting what the statutory phrase means. *Farmers' and Laborers' Co-op Ins. Ass'n v. Director of Revenue, State of Mo.*, 742 S.W.2d 141, 143 (Mo. 1987).

[2] All statutory references are to the Revised Statutes of Missouri, Cumulative Supplement 2011.

As outlined in the Company's Motion to Dismiss, which we incorporate herein by this reference, Complainants have not and cannot establish that they are entitled to judgment as a matter of law, and indeed have failed to state a claim upon which relief can be granted requiring dismissal of the Complaint. To summarize, the Complaint must be dismissed as a matter of law because even accepting all of Complainants' averments as true:

- The Complainant's interpretation of "nameplate rating" in the RES statute to suit their purposes is contrary to the plain and ordinary meaning of that term.
- The Complaint is also an unlawful collateral attack on the Commission's RES rules and thus fails to state a claim upon which relief can be granted – the Commission cannot ignore its own rule, which recognized the statutory definition of the term "nameplate rating" at the individual generator level, meaning that the Company is entitled to use generation from the Keokuk Energy Center to comply with the RES;
- The Complaint asks the Commission to perform the judicial function of declaring another agency's rule (MDNR) unlawful, which is a power the Commission does not possess – the Commission is bound by MDNR's rule, which also recognized the statutory definition of the term "nameplate rating" at the individual generator level;

- With respect to the "banking" of RECs, the Complainants cannot overcome the undisputed fact that there is not one word in the RES statute that supports Complainants' claim that there is some kind of "start date" for when a REC can be created, nor any language that limits the use of a REC created prior to 2011 to comply with the RES. Consequently, Complainants are asking this Commission to exercise a power it does not possess: to amend a statute. Given that the Commission lacks the power to grant such relief, the Complaint fails to state a claim upon which the Commission can grant relief; and
- With respect to the "geographic sourcing" issue, not only is there not one word in the RES statute that supports a geographic sourcing limitation, but the Commission has already affirmatively declined to promulgate a geographic sourcing requirement in its rules. Again, the Complaint fails to state a claim upon which relief can be granted on this issue because the Commission lacks the power to amend the statute to add a geographic sourcing limitation.[3]

While it is the Company's position that its Motion to Dismiss continues to demonstrate that the Complaint does not state a claim upon which relief can be granted, we are filing concurrently with this Response a separate Legal Memorandum

[3] Given that the RES statute contains no geographic sourcing limitation a Commission rule that attempted to impose a geographic sourcing limitation would be unlawful. However, it doesn't matter – there is no such limitation and even if the Commission wanted to attempt to impose one it would have to initiate and complete a proper rulemaking under Section 536.021. *State ex rel. Missouri Energy Dev. Ass'n v. Pub. Serv. Comm'n*, 386 S.W.3d 165, 176 (Mo. App. W.D. 2012).

demonstrating why summary determination is inappropriate, and more particularly, in response to Complainants' Legal Memorandum in Support of Motion for Summary Determination.

Set forth below in numbered paragraphs are the Company's specific responses to each of the "factual" allegations contained in Complainants' Motion.

Response to Complainants' "Factual" Allegations[4]

1. "There are no genuine issues with Complainants' rights to bring these complaints, as shown through Complainants' responses to Empire's 1st Set of Data Requests. EXHIBIT 17."

Response: This is not a factual allegation and thus no response is required. To the contrary, it is an allegation that Complainants have legal standing as a matter of law. *See e.g., Universal Underwriters Ins. Co. v. Dean Johnson Ford,* 905 S.W.2d 529, 532–33 (Mo. App. W.D. 1995)(A non-movant for summary judgment is not required to controvert alleged undisputed facts when the allegations are not facts, but rather, are legal conclusions). Moreover, as set forth in the Company's Motion to Dismiss, even if Complainants have legal standing to *file* the Complaint, because it fails to state a claim upon which relief can be granted, Complainants have no right to *maintain* the Complaint. And even if this were a proper factual allegation, it is not properly supported and therefore does not establish an undisputed fact because a party cannot establish that a "fact" is "undisputed" by citing to its *own, self-serving and unsworn* responses to another party's discovery.

[4] We assume that Complainants' statement of alleged undisputed material facts starts at paragraph 1 on page 2 of their Motion and continues to paragraph 24 on page 7. There appears to be nothing in the Motion even alleging an entitled to judgment as a matter of law, which by itself is fatal to Complainants' request for summary determination. While not required by 4 CSR 240-2.117(1)(B), we will re-state each of Complainants' claimed statements of undisputed material facts and then provide our response, in **bold**, in response, as contemplated by Mo. R. Civ. P. 74.04(c)(2).

2. "Earth Island Institute, d/b/a Renew Missouri ("Renew Missouri") has an institutional mission and interest in promoting renewable energy, and was active in the campaign to pass Proposition C. EXHIBIT 17 DRs 001, 007, 014, 024."

Response: This allegation is not an undisputed material fact showing that Complainants are entitled to judgment as a matter of law because it is irrelevant to the legal questions before the Commission. Moreover, while as noted Complainants cannot rely upon their own unsworn discovery responses, the responses themselves show that the allegation is untrue – Earth Island Institute, Inc., the real party in interest, by its own admission indicates that it had no activities in Missouri until 2011 and thus it could not have been "active in the campaign to pass Proposition C."

3. **"**The Missouri Coalition for the Environment has an institutional mission and interest in promoting renewable energy, and was active in the campaign to pass Proposition C. EXHIBIT 17, DRs 008, 015, 025."

Response: This allegation is not an undisputed material fact showing that Complainants are entitled to judgment as a matter of law because it is irrelevant to the legal questions before the Commission.

4. **"**Wind on the Wires has an organizational mission to overcome barriers wind [sic] energy throughout the Midwest, including Missouri, and represents the interests of its members which have lost business opportunities in Missouri as a result of Ameren's and Empire's violations of the law." EXHIBIT 17, DRs 003, 010, 017."

Response: This allegation is not an undisputed material fact showing that Complainants are entitled to judgment as a matter of law because it is irrelevant to the legal questions before the Commission. Moreover, this allegation purports to

state two legal conclusions: that Complainants have legal standing as a matter of law and that the Company has violated the RES statute. Consequently, no response is required. *Universal Underwriters*, 905 S.W.2d at 532–33. In addition, as set forth in the Company's Motion to Dismiss, even if Complainants have legal standing to *file* the Complaint because it fails to state a claim upon which relief can be granted, Complainants have no right to *maintain* the Complaint. And even if this were a proper factual allegation, it is not properly supported and therefore does not establish an undisputed fact because a party cannot establish that a "fact" is "undisputed" by citing to its own, self-serving and unsworn responses to another party's discovery.

5. **"**The Missouri Solar Energy Industry Association ("MOSEIA") has a mission to expand the solar energy industry in Missouri; MOSEIA and its members' interest in business opportunities has been harmed by Empire's failure to observe the solar rebate and solar carve-out provisions of the RES. EXHIBIT 17, DRs 009, 016."

Response: This allegation is not directed to the Company and thus no response from the Company is required.

6. "The Alternative Energy Company is situated near Empire's service territory. It is aggrieved by the loss of solar energy business opportunities due to Empire's failure to observe the solar rebate and solar carve-out provisions of the RES. EXHIBIT 17, DRs 004, 011, 018."

Response: This allegation is not directed to the Company and thus no response from the Company is required.

7. "StraightUp Solar is a solar energy installation company based in St. Louis that has lost opportunities to expand into Empire's territory due to Empire's failure to observe the solar rebate and solar carve-out provision of the RES. EXHIBIT 17, DRs 006, 012, 019."

Response: This allegation is not directed to the Company and thus no response from the Company is required.

8. "Missouri Solar Applications, LLC, is a solar installation company based in Jefferson City that has lost business opportunities due to Empire's failure to observe the solar rebate and solar carve-out provisions of the RES. Two of its employees participated in the campaign to pass Proposition C. EXHIBIT 17, DRs 005, 013, 020."

Response: This allegation is not directed to the Company and thus no response from the Company is required.

9. **"**It is undisputed that Ameren Missouri is using its Keokuk hydroelectric generating station to comply with the RES, and that the facility is comprised of 15 generators each with individual nameplate ratings of between 7.2 and 8.8 megawatts. 2011 Ameren Missouri RES Compliance Report, p. 9, Case No. EO-2013-0351."

Response: Admitted.

10. "It is undisputed that Empire is using its Ozark Beach hydroelectric facility for compliance, and that Ozark Beach is comprised of four generators of four MW each for a total of 16 MW. 2011 Empire RES Compliance Report, p. 5, Case No. EO-2012-0336."

Response: No response is required as this allegation is not directed to the Company.

11. "The only other material issue that could be considered factual is whether the statutory phrase "nameplate rating" has any meaning other than the rating on a physical nameplate attached to an individual generator. The filed testimony of Ed Holt on behalf of Complainants establishes that the terms "nameplate rating" and "nameplate capacity" are synonymous (Direct Testimony of Ed Holt at 8) and are commonly used by utilities to refer to the combined generating capacity of all the generating units at a facility. Id. at 8, 10, 12 (see also EXHIBIT 6, Ameren Corporate fact sheet giving capacity of Keokuk as 140 MW and of Osage Beach as 240 MW). The two phrases are used in the same sense by government agencies such as the Federal Energy Regulatory Commission ("FERC")(EXHIBITS 1–3, FERC Form 1 using "Total installed cap" and "Gen nameplate rating" synonymously) and the Energy Information Administration ("EIA")(EXHIBIT 4, EIA Annual Electric Generator Report."

Response: This is not a factual allegation and thus no response is required. To the contrary, it is a conclusion of law (what the statutory phrase "nameplate rating" means) to which no response is required. ***Universal Underwriters Ins. Co.*** **905 S.W.2d at 532–33. To the extent there are factual allegations in this paragraph, they constitute extrinsic evidence that is not admissible to determine the meaning of the unambiguous term "nameplate rating."** ***Farmers' and Laborers' Co-op Ins. Ass'n v. Director of Revenue, State of Mo.,*** **742 S.W.2d 141, 143 (Mo. 1987). Moreover, the Company disputes Mr. Holt's general conclusions; indeed his expression of an opinion about what the legal interpretation of the subject phrase in the statute is. Mr. Holt possesses no qualifications that qualify him to opine about a matter that rests on a determination of law, as here. To the extent Mr. Holt is attempting to**

testify as to facts, we also dispute them, thereby precluding summary determination. See Affidavit of Warren A. Witt, attached.

12. "Both Ameren Missouri and Empire have publicly acknowledged that "nameplate rating" can mean the combined generating capacity of all generating units at a hydroelectric facility in their filings with FERC (Form 1) for the year 2012. Testimony of Ed Holt at 14-15. On line 5 at p. 406 of their 2012 FERC Form 1 filings, Ameren Missouri lists the total capacity of Keokuk as 127.2 MW, while Empire gives the 16 MW aggregate capacity of Ozark Beach when asked to provide the "total installed cap (Gen nameplate rating in MW)." EXHIBITS 2, 3."

Response: To the extent there are factual allegations in this paragraph, they constitute extrinsic evidence that is not admissible to determine the meaning of the unambiguous term "nameplate rating." The Company also denies all such allegations. None of the documents cited as support for this allegation state that a generating plant or facility has a "nameplate rating" that reflects the sum or aggregation of the nameplate ratings of each generator. To the contrary, the cited Exhibit 2 refers to "total installed capacity," reflecting the "total" or "sum" of all generator nameplate ratings. Nowhere does Exhibit 2 request or list the nameplate rating for each generator. See Affidavit of Warren A. Witt, *supra.*

13. "It is undisputed that Ameren Missouri refers to the aggregate "nameplate generation" of Pioneer Prairie wind farm on pg. 6 its 2011 RES Compliance Report (EO-2012- 0351)."

Response: To the extent there are factual allegations in this paragraph, they constitute extrinsic evidence that is not admissible to determine the meaning of the

unambiguous term "nameplate rating." The Company also denies that the out-of-context statement quoted above has anything to do with the "nameplate rating" of a generator. The entire discussion of Pioneer Prairie in the cited report is as follows:

> **In June, 2009 Ameren Missouri and Pioneer Prairie Wind Farm I LLC entered into a 15 year power purchase agreement. Ameren Missouri is purchasing 102.3 MWs of nameplate generation from the Pioneer Prairie Wind Farm consisting of 65 turbines, located in north east Iowa. The facility site covers approximately 10,000 acres of land located in Mitchell County, Iowa in Wayne and Stacyville Townships.**
>
> **The Pioneer Prairie Wind Farm was certified as a qualified renewable energy resource by the MoDNR on September 28, 2011. The total generational output from the Pioneer Prairie Wind Farm supplied to Ameren Missouri customers for the CY 2011 was 288,483 MWhs.**

Placed in context, it is clear that the Company is referring to the total capacity of all of the wind generators at the wind farm, which is determined by summing the individual nameplate ratings of each of those generators.

14. "It is undisputed that Empire refers to the "power plant ratings" of all its plants as the sum of all units in EXHIBIT 8, Empire Fast Facts. In EXHIBIT 7, the history page of its website, Empire states that Ozark Beach "supplies" 16 MW and that the Asbury plant's "capacity" is the sum of its two units' capacity. In EXHIBIT 12, Empire's 2009-2013 construction plans slide show, says that Ozark Beach "produces" 16 MW."

Response: No response is required as this allegation is not directed to the Company.

15. "There is no genuine issue with regard to the fact that Empire, in its compliance filings, repeatedly uses "nameplate capacity" to refer to aggregate capacity, as in, "Empire's renewable energy nameplate capacity as of January 20, 2009 is 255 MW," referring to the two Kansas wind farms with which it has PPAs (see, e.g., 2011

Empire RES Compliance Report, pp. 14-15, Case No. EO-2012-0336)."

Response: No response is required as this allegation is not directed to the Company.

16. "It is undisputed that Ameren Missouri attempted to retire RECs that were created prior to 2011 for compliance with the RES for 2011. 2011 Ameren Missouri RES Compliance Report, p. 13, Case No. EO-2012-0351)."

Response: The Company admits that it properly used RECs created prior to 2011 but within three years of their creation to comply with the RES.

17. "It is undisputed that Empire attempted to retire RECs that were created prior to 2011 for compliance with the RES for 2011. 2011 Empire RES Compliance Report, p. 5, Case No. EO-2012-0336."

Response: No response is required as this allegation is not directed to the Company.

18. "It is undisputed that Ameren Missouri relied on solar RECs ("SRECs") purchased from the Western Renewable Energy Generation Information System ("WREGIS") associated with power that was never sold to Missouri customers in claiming to meet the 2% "solar carve- out" of the RES. 2011 Ameren Missouri RES Compliance Report, p. 8, Case No. EO-2012-0351."

Response: The Company admits that it properly used WREGIS SRECs to comply with the 2% solar carve-out.

19. "It is undisputed that Empire failed to offer or pay solar rebates in 2011 and did not attempt to retire any solar RECs for compliance with the solar provisions of the RES for 2011, and that their claimed reasons for such non-compliance are the

provisions of Section 393.1050, RSMo. 2011 Empire RES Compliance Report, pp. 14–15, Case No. EO-2012-0336."

Response: No response is required as this allegation is not directed to the Company.

20. "There is no genuine issue that Section 393.1050, RSMo, as part of Senate Bill 1181 (2008), was enacted on May 16, 2008 with an effective date of August 28, 2008. Missouri Senate Journal for 2008, p. 1729; House Journal, p. 1992."

Response: Irrelevant, but admitted.

21. "There is no genuine issue that the Secretary of State certified the ballot title for Proposition C on February 25, 2008. EXHIBIT 13."

Response: Irrelevant, but admitted.

22. "There is no genuine issue with the fact that the signed petitions for Proposition C were received by the Secretary of State on May 4, 2008. EXHIBIT 14."

Response: Irrelevant, but admitted.

23. "There is no dispute that the RES, or Proposition C, passed on November 4, 2008 and became effective on that date, which appears in the Revised Statutes of Missouri for §§ 393.1020–393.1035, RSMo."

Response: The Company admits that Proposition C was passed on November 4, 2008, became effective on that date, and is codified at Sections 393.1020 – 393.1035, but denies the remaining allegations of this paragraph.

24. "It is undisputed that no Missouri investor-owned utility besides Empire has ever claimed to be exempt from the solar requirements of the RES or to have had by Jan. 20, 2009, an amount of eligible renewable energy technology nameplate capacity

equal to 15% of their total owned fossil-fired generating capacity. 2011 Ameren Missouri RES Compliance Report, pp. 10– 11, Case No. EO-2012-0351; 2011 KCPL RES Compliance Report, pp. 4, 5–6, 7, Case No. EO-2012-0348; 2011 GMO RES Compliance Report, pp. 4–5, 6, 7, 8, Case No. EO-2012-0349."

Response: No response is required as this allegation is not directed to the Company.

WHEREFORE, Respondent Ameren Missouri requests that the Commission deny Complainants' request for summary determination, and that the Commission dismiss each Count of the Complaint against Ameren Missouri, as prayed in Ameren Missouri's Motion to Dismiss.

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 Response 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