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-2013-0378**
	)	**(Consolidated with Case No.**
THE EMPIRE DISTRICT ELECTRIC COMPANY,	)	**EC-2013-0377)**
Respondent.	)	

THE EMPIRE DISTRICT ELECTRIC COMPANY'S REPLY
TO COMPLAINANTS' ANSWER TO RESPONDENTS' MOTIONS TO DISMISS

The Empire District Electric Company ("Empire" or "the Company") hereby replies to the "Answer to Respondents' Motions to Dismiss" ("Answer"), which Complainants filed in consolidated Case Nos. EC-2013-0377 and EC-2013-0378.

I. STANDARD FOR DISMISSAL

In their respective motions to dismiss, Respondents Empire and Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri") each argue that the Complaints filed in the two consolidated cases should be dismissed because neither Complaint states any cause of action on which the Commission can grant relief. Further, both Respondents argue that the claims in Counts I and II of the Complaints are barred because (i) they constitute an unlawful collateral attack on one or more of the provisions of 4 CSR 240-20.100 or (ii) they challenge the validity of 10 CSR 140-8.010, a rule adopted by the Missouri Department of Natural Resources ("the Department"), claims which the Commission has no legal authority to hear or adjudicate. In addition, Empire argues that Count III of the Complaint filed in Case No. EC-2013-0378 should be dismissed because it asks the Commission to do something it is prohibited from doing by law – declaring invalid a statute passed by the General Assembly.

Although Complainants' Answer alleges that these arguments are false or unfounded, the analysis that follows clearly shows the contrary to be true. Moreover, nothing in Complainants' Answer rebuts the arguments made by Empire and Ameren Missouri in their previous filings in these consolidated cases that the Complaints fail to state any claim on which the Commission can grant relief.

II. COLLATERAL ATTACK

Complainants contend that none of the claims raised in the Complaints constitute an unlawful collateral attack on rules adopted by the Commission or the Department because "the complaints giving rise to this case include absolutely no challenges to any Commission rule or the rules of any other agency or department."[1] Instead, the Answer claims "the complaints only allege violations of the Missouri Renewable Energy Standard statute itself."[2] The Answer further states that "[t]he Commission's rules on hydropower, REC banking and geographic sourcing of unbundled RECs are not inconsistent with the statute, and any ambiguities can be removed by proper interpretation and clarification from the Commission."[3] But these arguments are unfounded for several reasons.

For one thing, Complainants' arguments ignore the fact that the allegations in Count I of the Complaints at the very least represents the essence of what constitutes an unlawful collateral attack. *Black's Law Dictionary* (6th Ed.) defines "collateral attack" as "an attempt to avoid, defeat, or evade [a judgment], or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it." In order to grant the relief sought by Complainants in each of the consolidated cases the effect of the Commission's action would be to avoid, defeat, evade, or deny rules adopted by both the Commission and the Department. And it would be doing so in a manner not provided by law. Consequently, even though the Complaints do not directly challenge either the Commission's or the Department's rules or specifically ask the Commission to invalidate those rules, Complainants' claims in Count I still constitute an unlawful collateral attack on one or both rules. A review of Count I of the

[1] Answer at p. 2.
[2] *Id.*
[3] *Id.* at pp. 2-3.

Complaints – more specifically, how Complainants' claims and the relief they request relate to the provisions of the RES and the rules at issue in that count – illustrates this point.

Section 393.1030.4, RSMo,[4] requires that only electricity generated from "renewable energy resources" can be used to satisfy the portfolio requirements of the RES. The statute further requires that such resources must be certified by the Department before they can be used to comply with the RES.

Sections 393.1025(5) and 393.1030.4 vest the Department with exclusive authority to adopt rules governing the certification of renewable energy resources, and in accordance with its exclusive rulemaking authority the Department adopted 10 CSR 140-8.010. That rule defines the various types of "Eligible Renewable Energy Resources" that can be certified for RES compliance, and those definitions include characteristics and criteria of each resource that the Department will used for certification purposes. The Department's definition of "hydropower," which is found in subsection (2)(A)8 of the rule, is material to the resolution of Complainants' claims under Count I. That definition states as follows:

> Hydropower, not including pumped storage, that does not require a new diversion or impoundment of water ant that *each generator has a nameplate rating of ten megawatts (10 MW) or less*. If an improvement to an existing hydropower facility does not require a new diversion or impoundment of water and incrementally increases *the nameplate rating of each generator*, up to ten megawatts (10 MW) per generator, the improvement qualifies as an eligible renewable energy resource. (emphasis added)

The Commission's rulemaking authority under the RES, which is found in §393.1030(1), is limited to adopting rules governing the structure and process for complying with the portfolio standards that the RES imposes on Missouri electric utilities. But because the Commission has no independent authority to certify renewable energy resources, in order for a utility to comply with the Commission's portfolio standards it must first certify resources in accordance with the Department's certification rule.

The preceding discussion illustrates the close interrelationship between the Department's rule governing certification of renewable energy resources and the Commission's portfolio standards rule. In fact, as a matter of law the determination of what renewable energy resources qualify for compliance with

[4] All statutory references in this reply are to the Revised Statutes of Missouri unless otherwise indicated.

the portfolio standards is based *solely* on the Department's certification rule. Therefore, even if it were inclined to do so, the Commission cannot lawfully interpret its own rule in a manner that ignores or is inconsistent with the Department's rule. To do so would violate the provisions of the RES.

Even though the RES specifically requires the two agencies to consult with one another regarding their respective rules, the definitions of "hydropower" adopted by the Department and the Commission are not identical. For example, unlike the Commission's definition, the Department's definition specifically states that a hydropower resource qualifies for certification as a renewable energy resource if "each generator has a nameplate rating of then megawatts (10 MW) or less."[5] But those differences are not particularly significant because the purposes for which the two agencies adopted their respective definitions were very different. Further, differences in the two sets of definitions do not mean they are inconsistent. A side-by-side comparison of definitions common to both the Department's and the Commission's rules shows that in every instance the Department's rule is significantly more specific. Empire believes those differences are attributable to the fact that the Department's rule requires more detailed definitions because that rule defines the criteria that energy resources must satisfy in order to be certified as renewable under the RES. In contrast, because the Commission's rule only deals with the overall portfolio requirements and the processes and procedures that utilities must follow to satisfy those requirements, its definitions can be less specific. But whatever the reason for the differences, one thing is clear: the Department's definitions control for purposes of determining the characteristics and criteria of resources – including hydropower resources – that can be certified as renewable energy resources for purposes of complying with the portfolio standards.

No "interpretation" of the Commission's rule can change the fact that according to the Department's rule a hydroelectric generator with a nameplate rating of ten megawatts or less can be certified as a renewable energy resource. Indeed, if the Commission were to adopt Complainant's proposed interpretation of the term "hydropower" the effect would be to avoid, defeat, evade, or deny the

[5] 10 CSR 140-8.010(2)(A)8.

Department's clear and unambiguous definition of that term. Consequently, if the Commission were to adopt Complainants' argument, the essence of the claims in Count I of the Complaints would constitute an attack on the Department's rule. And as Empire pointed out and discussed in its Motion to Dismiss Complaint, the Commission lacks jurisdiction consider such an attack. Instead, §536.050(1) vests the judicial branch with exclusive jurisdiction to review and determine the validity of the Department's rule.

In addition, any proposed "interpretation" of the Commission's definition of "hydropower" that conflicts with the Department's definition of that term also constitutes an unlawful collateral attack on the Commission's final order of rulemaking in Case No. EX-2010-0169. That is true because it is inconceivable that the Commission would have intended that any of its definitions would be interpreted in a manner that is inconsistent with the Department's definitions. As Empire pointed out and discussed in its Motion to Dismiss Complaint, any challenge to that order had to be filed in accordance with §386.510, which requires an appeal to be filed within thirty days of the Commission's denial of a motion for reconsideration. But Complainants filed neither a motion for reconsideration nor a notice of appeal, and they cannot attempt to rectify those failures by indirectly challenging the Commission's order and rule in these Complaints.

The Commission also should note that, as a matter of law, Complainants failure to timely and properly challenge the Commission's rule is jurisdictional, which means that both the Commission and the courts are barred from now considering any challenge to that rule. And Complainants' contention that they only became aware of problems with the Commission's rule when Empire and Ameren Missouri "misinterpreted" the rule and claimed Ozark Beach and Keokuk as renewable energy resources is not a recognized legal basis to restore jurisdiction once it is lost.

III. THE COMMISSION'S JURISDICTION OVER THE DEPARTMENT'S RULE

The Commission's lack of jurisdiction over questions regarding the validity of 10 CSR 140-8.010, including but not limited to the definition of "hydropower" found in subsection (2)(A)8 of that rule, was discussed in both Empire's Motion to Dismiss Complaint and in the preceding section of this

Reply. Complainants' Answer concedes that the Commission lacks jurisdiction to make any determination as to the validity of the Department's rule. What appears to remain at issue, however, is what effect the Department's definition of "hydropower" has on the issues raised in Count I of the Complaints.

As described in the preceding section of this Reply, the RES grants the Department exclusive authority to certify resources that qualify as "renewable energy resources" under §393.1025(5). Consequently, Empire believes the Department's definition of qualifying "hydropower" to include each hydroelectric generator that has a nameplate rating of ten megawatts or less is dispositive of all issues in Count I of the Complaints. No alternate "interpretation" of the Commission's rule can be consistent with the RES. Moreover, it is inconceivable that the Commission would have intended its rule – whose scope is limited to the structure, operation, and procedures for utilizing certified renewable resources to comply with the portfolio standards of the RES – to conflict with the Department's rule. It seems clear that the Commission understood that it was the Department's exclusive right to certify renewable energy resources and the Commission's exclusive right to determine how energy derived from those resources would be credited toward satisfying the portfolio standards of the RES.

In their Answer, Complainants acknowledge that under §393.1030.2 "[t]he Commission has primary rulemaking and enforcement power 'except where the department is specified.'"[6] One area where the Department is specified, and where the Commission's rulemaking and enforcement power therefore is not primary, is with regard to the certification of renewable energy sources. Consequently, it would be impossible for the Commission to adopt Complainants' definition of "hydropower" without effectively rendering the Department's definition null and void. Moreover, such action would be contrary to the RES itself, which very specifically defines the scope and nature of the rulemaking authority vested in both the Commission and the Department.

[6] Answer at p. 6.

If, as the Answer contends, such a limitation on the Commission's authority leaves the Complainants without a remedy, that result is attributable to both the language of the RES itself and to Complainants' failure to timely pursue remedies available under §§386.510 and 536.050(1). But even if that were not the case, the Commission, as an agency whose power is limited by statute, has no authority to create a remedy for Complainants that is not specifically provided by law.

IV. SUBSTANTIVE ISSUES OF THE COMPLAINTS

A. Hydropower Nameplate Rating

As noted in the preceding sections of this Reply, the Department's definition of "hydropower" is dispositive of whether the generators at Empire's Ozark Beach hydroelectric facility and Ameren Missouri's Keokuk Energy Center qualify as renewable energy resources for purposes of complying with the RES's portfolio standards. But because Complainants' Answer questions the appropriate legal standard that should be used to interpret the definition of hydropower found in §393.1050(5) – more specifically, the terms "nameplate" and "nameplate capacity" included within that definition – Empire will briefly address Complainants' arguments.

Regardless of whether applicable rules of statutory interpretation require the plain and ordinary meanings of the word "nameplate" or the phrase "nameplate rating" to be determined based on dictionary definitions or on a more technical definition, either of those potential sources support the meanings of those terms proposed by Empire and Ameren Missouri. As Empire discussed in its Motion to Dismiss Complaint, the dictionary identifies the word "nameplate" as a noun and defines the word to mean "a flat, usually rectangular piece of metal, wood, or plastic on which information about a person or thing is imprinted or engraved. A technical definition of "nameplate rating" can be found in Staff's Response to Dispositive Motions, which cites two sources that define the phrase to mean the full-load continuous rating of a generator under specified conditions, as indicated on a nameplate attached mechanically to the generator itself.[7] And pictures showing the nameplates attached to generators at Ozark Beach and

[7] Staff's Response to Dispositive Motions at p. 4.

Keokuk, respectively, are attached to affidavits previously filed by Messrs. Timothy Wilson and Warren Witt.

In contrast, Complainants continue to argue that "nameplate rating" means the aggregate rating of all generators at a hydroelectric facility. They claim support for this interpretation from the Commission's use of the word "ratings" in the definition of "hydropower" found in 4 CSR 240-20.100(1)(K)8. But Complainants' primary support for their interpretation comes from the prepared direct testimony of Ed Holt as to what he speculates the drafters of Proposition C intended the phrase "nameplate rating" to mean.

But there is a fatal flaw in Complainants' argument because, as stated in the uncontroverted affidavits of Messrs. Wilson and Witt, hydroelectric *facilities* do not have nameplates. Only individual generators have nameplates, and it seems axiomatic that unless a facility has a nameplate it cannot have a *nameplate* rating. Therefore, when the aggregate capacities of individual generators within a hydroelectric facility are referred to as the "nameplate capacity" of the facility, that reference is nothing more than a metaphorical reference used for the sake of convenience.

Complainants contend that "nothing prevents the Commission from interpreting its rule . . . to restrict qualifying hydroelectric resources to 10 MW of facility-wide capacity."[8] But, as discussed earlier in this Reply, the Commission is not free to interpret "nameplate rating" in the manner proposed by Complainants because such an interpretation is inconsistent with the Department's rule defining hydroelectric renewable energy resources.

B. <u>"Banked" RECs</u>

Complainants' Answer asks the Commission to interpret both the RES and the Commission's own rule to include a limitation that would prevent utilities from acquiring and "banking" renewable energy credits ("REC") prior to January 1, 2011, the date the portfolio standards took effect. But neither the language of the RES nor the rule includes any such limitation. The only language in the RES

[8] Answer at p. 9.

regarding RECs is found in §393.1030.2, which states "[t]he commission, in consultation with the department and within one year of November 4, 2008, shall select a program for tracking and verifying the trading of renewable energy credits. An unused credit may exist for up to three years from the date of its creation." The Commission's program for tracking and verifying REC is found in 4 CSR 240-20.100(2) and (3). In addition, the Commission's rule defines "REC, Renewable Energy Credit or Renewable Energy Certificate" as "[an] REC expires three (3) years from the date the electricity associated with the REC was generated."[9] But neither the RES nor the rule prescribe a date when utilities can begin accumulating RECs to be used for complying with the portfolio standards. Therefore, to interpret the RES and the rule as Complainants propose the Commission would have to read into each limitations that do not exist. But the Commission has no legal authority to read either the RES or its own rule in such a creative manner.

As support for their respective positions on this question, both Empire and Ameren Missouri rely on the Missouri Court of Appeals' decision in *Missourians for Honest Elections v. Missouri Elections Commission*, 536 S.W.2d 766 (1976). Complainants contend that Respondents' reliance is misplaced, but a review of the facts and holdings of that case shows Complainants' argument is unfounded.

In late 1974, Missouri voters overwhelmingly approved a "campaign reform" initiative measure proposed and promoted by groups including the "Missourians for Honest Elections." Slightly less than a year after the initiative became law, the Missouri Elections Commission adopted rules implementing the new statute. Those rules included provisions that exempted "small candidates" from certain campaign expenditure disclosure requirements that the law imposed on other candidates. But the exemptions in the rules did not extend to the economic disclosure requirements of the statute. The Missourians for Honest Elections filed suit challenging the rules, claiming the initiative intended that small candidates would be exempt from the economic disclosure provisions as well.

[9] 4 CSR 240-20.100(1)(J).

The court began its analysis of the Elections Commission's rules by citing the principle that an administrative agency cannot by rule change the substantive requirements of a law it is responsible to enforce. *Id*. at 772. Applying that principle, the court examined the statute to see if its language could be interpreted to apply the small candidate exemptions to the economic disclosure provisions. The court concluded the language of the statute supported no such interpretation. *Id*. at 773.

The court next considered arguments made by Missourians for Honest Elections as to what the promoters intended the initiative to mean. The court, however, quickly dispatched those arguments. "It is, of course, impossible to determine the precise intent of the electorate on a proposition such as this one . . . We, therefore, cannot attribute an intent to the voters not expressly contained in the proposition voted on." *Id*. The court then described how the subjective intents of promoters, opponents, and news media affect the legal interpretation of statutes adopted by initiative:

> Regardless of the pre-election intentions of the drafters of the Act, or the views of individual supporters or opponents of the Proposition, of the explanations of the media, the Proposition and its express language became the law of this state when the overwhelming majority of the voters adopted the Proposition. By that law we are bound.
> . . .
> *[I]n ascertaining the meaning of a law, we must look to the express language of the Act irrespective of what was intended.* The rational meaning of the express language of the Act must be given effect. The primary rule of statutory construction is to seek and ascertain the intent of the lawmaker, but this intent is ascertained from the words used. We have no right to read into an act an intent contrary to the phraseology. (emphasis added)

Id. at 774-75.

Based on the court's opinion in *Missourians for Honest Elections*, the Commission has no authority to adopt the interpretation of either the RES or the Commission's own rule that Complainants urge in Count II of their Complaints. Because neither the statute nor the rule expressly prescribes a start date for the accumulation of RECs neither can be "interpreted" to include such a limitation. Consequently, Empire and Ameren Missouri were free to accumulate RECs prior to January 1, 2011, and to use those to comply with the portfolio requirements of the RES as long as none of the RECs exceeded the three-year period prescribed in §393.1030.2.

C. Empire's Solar Exemption

With regard to the exemption from the solar energy provisions of the RES that Empire claims under §393.1050, Complainants' Answer argues that the Court of Appeals' decision in *Evans v. Empire District Electric Co.*, 346 S.W.3d 313 (2011), holds that "[t]he Commission can grant relief, though on judicial review the legal question of statutory validity will be reviewed *de novo* and the Commission's conclusions of law are not binding on the courts."[10] To the extent Complainants argument suggests that the Commission can grant the relief sought in the Complaint pending against Empire – *i.e.* to declare §393.1050, RSMo, unconstitutional or otherwise invalid – that argument grossly distorts the nature and extent of the actions *Evans* authorized the Commission to take in this case.

The question before the court in *Evans* was whether the plaintiffs in that case – who were represented by one of the attorneys who now represents Complainants – were required to exhaust administrative remedies at the Commission prior to commencing a civil legal action challenging the validity of §393.1050. The court concluded that exhaustion of all administrative is a condition precedent to such a suit, and explained its rationale for that conclusion as follows:

> The Appellants' argument that they have no remedy to exhaust before the PSC because the PSC cannot declare a statute invalid has no merit, is belied by the claims in their petition. The PSC has been given the statutory authority to interpret statutes pursuant to the administration of their charge; the PSC's interpretation is afforded great weight by Missouri courts.
> . . .
> Construction of the statutory scheme by the PSC, in accordance with their judgment as to the intent of the Legislature, is the process that is envisioned for the administrative system in Missouri . . . The PSC has the power to determine if the provisions of Proposition C are in irreconcilable conflict or can in fact be harmonized with the provisions of section 393.1050. Appellants are able to file a complaint with the PSC under 4 C.S.R. §240-2070 [sic.] and section 386.390 and the PLC is able to grant relief.

Under *Evans*, therefore, although the Commission has authority to grant certain relief to Complainants with respect to Count III of their Complaint against Empire, *that relief is expressly limited to determining whether the provisions of the RES and §393.1050 are in irreconcilable conflict or, instead,*

[10] Answer at p. 12

can be harmonized with one another. In its Motion to Dismiss Complaint, Empire cites and discusses the case law that applies to the Commission's decision of those questions. That discussion will not be repeated here, but case law applicable to the questions raised by Complainants' challenge to §393.1050 conclusively establishes that (i) repeal by implication is not a result that courts are extremely reluctant to take, and (ii) not only can the solar exemption statute at issue in this case be harmonized with the RES governing principles of Missouri law compel that result.

i. <u>Amendment of Initiative Before Enactment</u>

Because the Court of Appeals' holding in *Evans* very specifically limits the questions the Commission can consider and the findings and conclusions it can make with respect to Count III of the Complaint against Empire, the Commission need not consider any arguments made by Complainants as to whether §393.1050 is unconstitutional or otherwise unlawful. But because Complainants' Answer addresses three specific arguments touching on that question, Empire will briefly respond.

The Answer cites two Oklahoma cases in an attempt to buttress an argument previously made by Complainants that the Missouri Supreme Court's 1922 decision in *State ex rel. Drain v. Becker*, 240 S.W. 229 stands for the proposition that the General Assembly is powerless to exercise its constitutional power to legislate during the period between when an initiative is certified and the date of the election when voters cast ballots for or against that initiative. But neither of those cases has any precedential value in Missouri. Moreover, upon analysis, neither case provides any support whatsoever for Complainants' arguments.

Like *Drain*, *In re Referendum Petition No. 1, Ordinance 6-B, City of Sand Springs*, 220 P.2d 454 (Ok. 1950), involves a *referendum* not an initiative. And although *Oklahoma Tax Commission v. Smith*, 610 P.2d 794 (Ok. 1980), does involve an initiative measure, the question at issue in that case was whether the Oklahoma legislature could change the language of the initiative measure that would appear on the ballot between the time it was authorized for submission to voters and the actual election. The adoption of the RES by initiative does not involve any similar legal question. In addition, the court's

discussion in *Oklahoma Tax Commission* specifically notes that there are significant differences between constitutional provisions in Oklahoma and Missouri governing initiative.[11] Consequently, even if the issue in that case had been similar to any issue raised in the Complaint against Empire, the holding of the Oklahoma court would be of no value because it was based on an interpretation of significantly different provisions of law.

In addition, Complainants' Answer alleges that the distinction between initiative and referendum that Empire drew in its Motion to Dismiss Complaint is "unfounded in law."[12] Complainants cite no authority as support for that proposition, and the likely explanation is because no such authority exists. The differences between initiative and referendum were thoroughly discussed in Empire's Motion to Dismiss Complaint. In addition to that discussion, the following definitions found in *Black's Law Dictionary* (6th Ed.) illustrate the obvious and significant differences between those two concepts. The definition of "referendum" is "[t]he process of *referring to the electorate for approval* a proposed new state constitution or amendment (constitutional referendum) or of a law passed by the legislature (statutory referendum)." (emphasis added) In contrast, "initiative" is defined as "[a]n electoral process whereby . . . the electorate may *initiate legislative or constitutional changes* through the filing of formal petitions to be acted on by the legislature or the total electorate." (emphasis added)

ii. <u>Proposition C Did Not Repeal §393.1050, RSMo</u>

The Answer also claims that Proposition C repealed §393.1050,[13] but Complainants provide little explanation, and cite no legal authority, to support that claim. Because there is no language in the RES specifically repealing §393.1050, it appears Complainants believe the statute was repealed by implication. But Missouri law is clear that repeal by implication is disfavored, and if two statutes can be reconciled with one another then both statutes should be given effect. *Crawford v. Division of Employment Security*,

[11] 610 P.2d at 807.
[12] Answer at p. 13.
[13] *Id.* at pp. 13-14.

376 S.W.3d 658, 665 (Mo. banc 2012). Section 393.1050 and the RES can easily be reconciled with one another.

Complainants also contest Empire's argument that the RES and §393.1050 are statutes relating to the same subject.[14] Under Missouri law statutes dealing with the same subject are to be considered *in pari materia* and must be construed together as though constituting a single act, even if they were adopted at different times. *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. banc 1991). Curiously, Complainants claim that §393.1050 "is not a law that deals with the same subject in a more minute and definite fashion."[15] But even a cursory comparison of that statute shows how closely it relates to the RES. Indeed, without the RES §393.1050 would be rendered a nullity because there would be no "solar renewable energy standard requirements" to which the exemption provided by the statute applies.

Finally, Complainants' Answer mischaracterizes the Missouri Supreme Court's decision in *Bardella v. Pender*, 821 S.W.2d 846 (1991), which Empire cited in its Motion to Dismiss Complaint to illustrate the great lengths to which Missouri courts go to reconcile statutes that appear to be in conflict with one another. The holdings in that case most certainly are not limited to a rejection of the "later in time rule" for statutes passed during the same session of the General Assembly. A more accurate characterization of the holdings in *Bardella* is that they support the principle that laws that are *in pari materia* should not be found to be inconsistent unless one act specifically repeals the other or the two acts are inherently in conflict with one another. *Id*. at 849.

iii. §393.1050, RSMo, Is Not A Special Law

Complainants' final argument regarding §393.1050 is that the statute is invalid because it is a "special law" under Article 3, §40 of the Missouri Constitution.[16] They base their claim on the fact that although the class of potential beneficiaries from the solar exemption was open at the time the statute took

[14] *Id*.
[15] *Id.* at p. 13.
[16] *Id.* at p. 14

effect it was only open for a brief period.[17] Yet again, however, applicable case law does not support Complainants' argument.

Under Missouri law, a statute based on characteristics that are open-ended at the time the law becomes effective is not facially a "special law." Such laws are, therefore, presumed to be constitutional. *See Alderson v. State*, 273 S.W.3d 533, 538 (Mo. banc 2009). Complainants admit that at the time §393.1050 was enacted and took effect the class of utilities who potentially could take advantage of, and benefit from, the solar exemption was open. The fact the class closed approximately four months later is irrelevant and of no legal significance because under Missouri law whether a statute is open-ended, and therefore constitutional, is determined at the time it takes effect.

But, as discussed in Empire's Motion to Dismiss Complaint, even if §393.1050 was close-ended on the day it took effect, it would still be constitutional because it passes the "rational basis test." Complainants Answer argues that there was no reason for the General Assembly "to subordinate the solar standard" to the other renewable energy resources endorsed by the RES.[18] That argument suggests that whether or not the General Assembly had a rational basis for its action will be determined based on whether Complainants agree with the legislature's rationale. But neither the Complainants nor courts who review contested legislation under the rational basis standard are allowed to second-guess the General Assembly's rationale or substitute their judgment for that of the legislature. Courts must uphold a legislative enactment under the rational basis standard if they are able to find any reasonably conceivable set of facts that provide a rational basis for the classification created by the General Assembly. *Estate of Overby v. Chad Franklin National Auto Sales North*, 361 S.W.3d 364, 378 (Mo. banc 2012). Moreover, the law requires courts to be very deferential to the legislative branch, and courts are not allowed to question the wisdom, social desirability, or economic policy underlying a statute subject to rational basis review. *Committee for Educational Equality v. State*, 294 S.W.3d 477, 491 (Mo. banc 2009).

[17] *Id.*
[18] *Id.*

Finally, Complainants' Answer characterizes as "ludicrous" Empire's observation that without the exemption provided by §393.1050 utilities, like the Company, who qualify for the exemption would end up having to utilize more renewable resources to satisfy the RES's portfolio requirements than utilities who do not qualify.[19] But Empire's point is based on simple arithmetic. Adding an increment of solar energy to the portfolio standards that Empire had already achieved by January 20, 2009, would boost the Company's overall renewable energy resource burden to a level that exceeds the burdens borne by utilities who did not qualify for the solar exemption.

CONCLUSION

For all of the reasons stated in this Reply, as well as for the reasons stated in the Company's Motion to Dismiss Complaint and its Response in Opposition to Complainants' Motion for Summary Disposition, the Commission should dismiss each of the counts and claims made by Complainants against Empire in the Complaint filed in Case No. EC-2013-0378.

Respectfully submitted,

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[19] *Id.*

Certificate of Service

I hereby certify that this 30th day of August, 2013, a true and correct copy of the foregoing document was sent via electronic mail to counsel of record for all parties.

/s/L. Russell Mitten
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