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-2013-0377**
	)	
UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI,	)	
	)	
RESPONDENT	)	
EARTH ISLAND INSTITUTE d/b/a/ RENEW MISSOURI, et. al.	)	
	)	
COMPLAINANTS	)	
	)	
v.	)	**Case No. EC-2013-0378**
	)	
THE EMPIRE DISTRICT ELECTRIC COMPANY,	)	
	)	
RESPONDENT	)	

COMPLAINANTS' REPLY TO RESPONSES TO
MOTION 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 ("Complainants"), and pursuant to the Commission's July 1, 2013 Order Modifying Procedural Schedule, hereby submit their Reply to the August 16th filings of Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri"), the Staff of the Missouri Public Service Commission ("Staff"), and The Empire District Electric Company ("Empire"). For their Reply, Complainants' state the following:

On August 16, 2013, the following filings were made in Case No. EC-20130377, et al: Ameren Missouri's Response in Opposition to Complainants' Motion for Summary Determination and Legal Memorandum in support thereof; The Empire District Electric Company's Response in Opposition to Complainants' Motion to Dismiss (and Memorandum in Support); and Staff's Response to Dispositive Motions. These filings allege shortcomings in Complainants' July 23, 2013 Motion for Summary Determination and Memorandum in Support, and ask that the Commission deny Complainants' Motion.

Complainants request that the Commission find: 1) that Complainants' Motion complies with the requirements of rule 4 CSR 240.2.117(1)(B), 2) that there are no genuine issues of material fact preventing a judgment in Complainants' favor, and 3) that Complainants are entitled to judgment as a matter of law.

I. PROCEDURAL ISSUES: STANDING AND EVIDENCE

Respondent do not deny that these Complainants have standing as aggrieved parties to bring these complaints. Respondents do attack Complainants' use of responses to data requests ("DRs") to establish standing,[1] but this is irrelevant if the issue of standing is not contested.

Respondent Empire District Electric Company ("Empire") asserts that the Missouri Rules of Civil Procedure apply and that no evidence can be received that would not be admissible in court.[2] Of course this is not true; the technical rules of evidence do not apply in the PSC and no formality will invalidate the Commission's orders. § 386.410, RSMo. Complainants rely on 4 CSR 240-2.117(B), which allows the use of "testimony, discovery or affidavits" to show the lack of material issues of fact. Ed Holt's Expert Testimony is clearly "testimony" within the rule, and

[1] Case No. EC-2013-0377, et al., "Ameren Missouri Response in Opposition to Complainants' Motion for Summary Determination," August 16, 2013, p. 5–8; "Memorandum in Support of The Empire District Electric Company's Response in Opposition to Complainants' Motion for Summary Determination," August 16, 2013, p. 3–5

[2] Empire's Memorandum in Support, August 16, 2013, p.3–4.

Complainants are at a loss to discern why DR responses are not "discovery" under rule 4 CSR 240-2.117(B).

Respondent Union Electric Company d/b/a Ameren Missouri ("Ameren Missouri") argues that, since the RES provides for penalties, it is a penal statute and must be strictly construed.[3] This does not quite have the effect desired by Ameren, as long-standing case law clarifies that the strict construction should include an effort to harmonize the statute within the obvious context and policy objectives of its enactment (Reeder v. Board of Police Commissioners, 800 S.W.2d 5, 6 (Mo.App. WD 1990), quoting Moore v. Western Union Telegraph Co., 164 Mo.App. 165, 148 S.W. 157, 159 (WD 1912):

> But by the expression 'strict construction' is meant that the scope of the statute shall not be extended by implication beyond the literal meaning of the terms employed, and not that the language of the terms shall be unreasonably interpreted. Courts should neither enlarge nor narrow the true meaning of penal statutes by construction, but should give effect to the plain meaning of words and where they are doubtful, *should adopt the sense in harmony with the context and the obvious policy and object of the enactment*.

Complainants didn't not originally think the words of the RES statute were doubtful. But now that doubt has been cast, harmonizing the words of the statute with the context and objective of the enactment is precisely what Complainants are urging the Commission to do. Complainants ask that the Commission clarify the meaning of their rule so as to achieve the obvious objective of the RES (i.e.: to increase Missouri utilities' generation of renewable energy).

[3] Case No. EC-2013-0377, et al., "Ameren Missouri's Legal Memorandum in Opposition to Complainants' Motion for Summary Determination," August 16, 2013, p. 7–8.

Sttaff agrees with Complainants that summary disposition is appropriate.[4] Empire agrees that the issues are purely legal,[5] but also inconsistently argues (without requesting a hearing) that there is an unresolved issue of fact regarding the meaning of the phrase "nameplate rating."[6]

II. HYDROPOWER NAMEPLATE RATING.

There is no genuine factual dispute that there are at least two existing uses or definitions of the phrase "nameplate rating."[7] Respondents protest that their disaggregation theory is the exclusive definition. However, Complainants have shown by overwhelming evidence – both in the testimony of Ed Holt and in the examples collected in their Memorandum in Support of Motion for Summary Determination (pp. 5–6) – that the phrase is commonly used to mean total facility rating regardless of the number of generators. The fact that such usage of "nameplate rating" occurs is beyond dispute. The legal issue now before the Commission is which definition most fits the statute. In coming to a decision, the Commission should observe the myriad of instances in which "nameplate rating" and "nameplate capacity" are both used in the aggregate sense. Ultimately, the Commission must reach an interpretation that does not render the 10 MW limit in the statute meaningless.

Mr. Holt's testimony for Complainants refers to various instances in which "nameplate ratings" and "nameplate capacity" are used synonymously, both by federal government agencies and by Respondents themselves. Ameren Missouri's affiant Warren Witt asserts that they are different but gives no facts to substantiate that position.[8]

[4] Case No. EC-2013-0377, et al., "Staff's Response to Dispositive Motions, August 16, 2013, p. 2.
[5] Case No. EC-2013-0377, et al., "The Empire District Electric Company's Response in Opposition to Complainants' Motion for Summary Determination," August 16, 2013, p. 2.
[6] Empire's Response, August 16, 2013, p. 6–7; Empire's Memorandum in Support, August 16, 2013, p. 2.
[7] Case No. EC-2013-0377, et al., "Complainants' Motion for Summary Determination," July 23, 2013, §11.
[8] Case No. EC-2013-0377, et al. Affidavit of Warren A. Witt attached to Ameren Missouri's Motion to Dismiss July 23, 2013, p.1–2.

Mr. Holt's testimony references filings and publications from the US Energy Information Administration ("EIA"), the Missouri Department of Natural Resources ("MDNR"), and the federal Public Utility Regulatory Policies Act of 1978 (PURPA).[9] Mr. Holt even lists instances in which Respondents themselves refer to the total capacity size of their hydroelectric facilities rather than the size of their individual generators.[10] Based on these sources and others, and based on his opinion as an expert, Mr. Holt draws several conclusions: that reference to *facilities* is typical;[11] that rarely do federal or state regulations make requirements with respect to the capacity size of a *generator*;[12] and that Respondents' interpretation would effectively abolish a size restriction on hydro in deviation from all other states that have size limits.[13]

Moreover, Complainants offered Exhibits 1–3 along with their Motion which establish, independent of Mr. Holt's testimony, that the Federal Energy Regulatory Commission ("FERC") uses "nameplate ratings" to mean the aggregate capacity of a hydro facility. Exhibits 2 and 3 show Ameren Missouri and Empire themselves treating Keokuk and Ozark Beach as hydroelectric generating plants with "name plate ratings" in excess of 10 MW.

As an expert, Mr. Holt may state his opinions based on facts within his personal knowledge or that are supported by competent evidence. He may also give an opinion on the ultimate fact in issue based on the knowledge within his expertise. Wailand v. Anheuser Busch, 861 S.W.2d 710, 715 (Mo.App. ED 1993). An expert may not state conclusions of law. City of St. Louis v. Kisling, 318 S.W.2d 221, 225 (Mo. 1958). Mr. Holt did survey the RES laws of other states and give his expert opinion on the policies behind them, but he made no attempt to

[9] Testimony of Ed Holt, May 28, 2013, pp. 9–10.
[10] Id. at pp. 12–15.
[11] Id. at p. 10, line 14.
[12] Id. at p. 10, line 15.
[13] Id. at p. 16–18.

dictate the law to the Commission. Wulfing v. Kansas City Southern Industries, 842 S.W.2d 133, 153–4 (Mo.App. WD 1992), overruled on other grounds, Executive Board of Missouri Baptist Convention v. Carnahan, 170 S.W.3d 437, 447, fn. 5 (Mo.App. WD 2005).

In order to show that Complainants are not entitled to judgment as a matter of law, Respondents would have to show that "nameplate rating" cannot possibly mean anything other than individual generator ratings. What Complainants have said so far in this case prevents such a showing, but even Respondents' attempts to discredit our evidence fail on their own terms.

Empire argues that Mr. Holt's testimony contradicts the testimony of Respondents' employee-affiants, Tim N. Wilson and Warren Witt, creating a genuine issue of material fact, thus defeating Complainants' Motion. Mr. Wilson attests to the obvious fact that only generators have physical nameplates attached to them.[14] This does not refute Mr. Holt's testimony. The issue is not the meaning of "nameplate" but of "nameplate rating" in the context of the statute.

Mr. Witt for Empire also states an irrelevance when he says, "Nowhere does FERC Form 1 use the 'nameplate rating' of *a* generator synonymously with the overall capacity" (emphasis added).[15] Mr. Witt makes no attempt to contradict the fact that Form 1 clearly uses "Gen name plate rating" in the aggregate sense: "Total installed cap (Gen name plate Rating in MW)."[16]

Ameren's argument about Pioneer Prairie wind farm is also self-defeating: "102.3 MWs of nameplate generation" from 65 wind turbines is clearly an aggregate figure, even though the word "nameplate is used.[17]

[14] Case No. EC-2013-0377, et al., Affidavit of Timothy N. Wilson, attached to Empire's Motion to Dismiss, July 23, 2013, p. 1.
[15] Affidavit of Warren A. Witt, July 23, 2013, p.2.
[16] Exhibit 2, accompanying Complainants' Motion for Summary Determination, July 23, 2013, line 5.
[17] Ameren Missouri's Response, August 16, 2013, pp. 10–11.

Respondents and Staff continue to harp on the rule of the Missouri Department of Natural Resources ("MDNR"). However, MDNR is on record as urging the Commission to re-examine the issue, along with the issue of retroactive REC banking.[18]

Ameren Missouri cites to the oral argument in RES compliance docket EO-2011-0275, where counsel Robertson was pressed on what it would be necessary to do to fix the Keokuk problem, including changing the rule.[19] This oral argument occurred after the issue concerning Respondents' disaggregation theory had surfaced. Any ambiguity in the statute was created by Respondents in an effort to neuter the RES. That effort has so far been successful. Complainants are asking the Commission to reverse this damaging course, not by a change in rule, but by clarifying their interpretation of their own rule. That is not a collateral attack, since it does not seek to invalidate the rule. The language of rule 4 CSR 240-20.100(1)(K)(8) is sufficient to support Complainants' desired interpretation, and would be in keeping with the common usage of "nameplate rating" to mean the aggregate capacity of a hydroelectric facility.

Staff's Response (p. 6) points out the lack of objection during rulemaking. At that point, Complainants had no notice that there would be a specific application of rule 4 CSR 240-20.100(1)(K)(8) that would bring this issue to light. As Complainants explained in their Answer to Respondents' Motion to Dismiss, it has taken a specific and absurd application of the rule to reveal this hydro controversy at hand. The Commission's published responses to the comments raised during the rulemaking shows that nobody, including the utilities, raised an issue as to the meaning of hydropower.[20] Respondents' disaggregation theory is such a radical divergence from

[18] EO-2011-0275, Transcript of August 30, 2011, pp. 69–72; Comments of Asst. Attorney General Mangelsdorf; MDNR Comments in EO-2012-0351 (Ameren Missouri) and EO-2012-0336 (Empire).
[19] Ameren Missouri's Memorandum in Support, August 16, 2013, p. 4, fn. 4; Ameren Missouri's Response, August 16, 2013, p. 2.
[20] 35 Mo.Reg. 1183, 1184.

the obvious meaning of the statute's hydro size limitation that the parties had no reason to suspect it until after rulemaking was completed.

Under the utilities' interpretation, a dam with a single 100-MW generator would not qualify, but the same dam with ten 10-MW generators would qualify. This renders the size limit meaningless, an interpretation to be avoided.

III. REC BANKING.

Respondents assert that there was no "start date" for the accumulation of RECs (Ameren Memo at 11; Empire Memo at 11). They refuse to put the 3-year REC life into the proper context – logically, it must start with the RES portfolio requirements themselves: on January1, 2011. Allowing utilities to use stored-up RECs as an excuse to do nothing once the RES actually went into effect is an absurd result.

Ameren makes the fanciful argument that the 2-year delay between passage and implementation of Prop C was solely for the purpose of letting the utilities amass RECs that they could use to *avoid* compliance beginning in 2011.[21] Staff abets this with the suggestion that the tracking program was selected early for the purpose of legitimizing those RECs.[22] These selective readings of the statute are a gross oversight. The obvious purpose of the delay in implementation was to give the utilities time to ramp up to the 2% standard. This is supported by the testimony of Ed Holt (p. 22):

> Unless there is an express provision for creating eligible RECs prior to the initial year of compliance, state RES practice is to start with the first year of compliance. This is why state RES statutes often allow a few years between enactment and implementation of the policy, so the obligated utilities have time to get new

[21] Ameren Missouri's Memorandum in Support, August 16, 2013, p. 8–9.
[22] Staff's Response to Dispositive Motions, August 16, 2013, p. 10–11.

facilities built or line up sources of supply. If the utilities could rely on pre-existing RECs that may have been created, there would presumably be no need to delay the first year of implementation.

Ameren Missouri's argument from the green pricing prohibition of the RES[23] is beside the point. Pure Power RECs, whether pre- or post-2011, may never be used for RES compliance. Ameren Missouri's argument says nothing about the starting date for RES compliance.

Staff's Response (p. 9) cites early drafts of the rule that would have allowed 2008-vintage RECs. Since these dates were removed, the rule leaves Respondents in the same position they accuse Complainants of being in: they have no start date to support their argument. However, Complainants do have a starting date located within the statute: January. 1, 2011.

IV. EMPIRE'S SOLAR EXEMPTION

Empire raises evidentiary objections to Complainants' proof of the passage of Section 393.1050, RSMo and Proposition C.[24] Administrative agencies take official notice of the same things the courts take judicial notice of. § 536.070(6), RSMo. The Courts take judicial notice of the laws of the state, including the proceedings by which they were enacted. Sperry v. State Tax Commission, 695 S.W.2d 464, 469 (Mo. banc 1985). They take notice of legislative journals, § 490.160, RSMo., and of the certified records of the Secretary of State, §490.180, RSMo. They take notice of election results. State ex inf. McKittrick v. Graves, 346 Mo. 990, 144 S.W.2d 91, 94 (Mo. banc 1940). They also take notice of executive orders having the effect of law. In re DeGheests' Estate, 360 Mo. 1002, 232 S.W.2d 378, 381 (1950).

Unless Empire really intends to contest these facts, it should relax its insistence on the technical rules of evidence.

[23] Ameren Missouri's Memorandum in Support, August 16, 2013, p.10.
[24] Empire's Response, August 16, 2013, p. 9–10.

V. GEOGRAPHIC SOURCING

There is nothing new to respond to here. Staff continues to confuse this issue with the issue of "unbundled RECs."[25] Complainants have tried to make clear that trade in unbundled RECs is allowed, provided that the energy underlying those RECs is still delivered to Missouri.[26] This is because the statute clearly provides that "[t]he portfolio requirements shall apply to all *power sold to Missouri consumers* whether such power is self-generated or purchased from another source in or outside of this state."[27] (emphasis added). The sentence concerning RECs that follows must be read together with the above sentence. An interpretation that allows RECs without a demonstration that the associated energy was delivered to Missouri consumers would invalidate this first sentence, and as such is an interpretation that should be avoided.

VI. ENTITLEMENT TO JUDGMENT.

Respondents and Complainants filed a "Joint Motion to Modify Procedural Schedule" allowing for summary disposition, which the Commission granted.

We do not believe that Empire intends to renege on that agreement, since they do not request a hearing, but otherwise the parties and Staff are agreed that the hydropower issue is a legal one of which of two definitions of "nameplate rating" fits the context of the statute. Putting witnesses on the stand to argue further over which definition is correct by itself would serve no purpose.

Therefore the pleadings, evidence, and legal memoranda establish that the issues are ripe for summary determination on the merits.

[25] Staff's Response to Dispositive Motions, August 16, 2013, p. 12–13.
[26] Complainants' Answer to Respondents' Motions to Dismiss, July 23, 2013, pp. 10–11, 16.
[27] § 393.1030.1, RSMo.

The grounds underlying the Respondents' motions to dismiss are those Empire refers to as its "affirmative defenses,"[28] e.g., collateral attack, lack of jurisdiction. Complainants have addressed these in their Answer to Respondents' Motions to Dismiss and see no need to repeat their arguments here.

CONCLUSION

WHEREFORE Complainants pray the Commission to deny Respondents' Motions to Dismiss, proceed to summary determination and grant the relief sought in the Complaints as a matter of law.

Respectfully submitted,

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ATTORNEYS FOR COMPLAINANTS

[28] Empire's Memorandum is Support, August 16, 2013, p. 6–7.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing, together with the accompanying Memorandum and all referenced Exhibits, have been electronically mailed to all parties of record on this 30th day of August, 2013.

/s/ Andrew J. Linhares
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