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**
THE EMPIRE DISTRICT ELECTRIC COMPANY,	)	
Respondent.	)	

THE EMPIRE DISTRICT ELECTRIC COMPANY'S
RESPONSE IN OPPOSITION TO
COMPLAINANTS' APPLICATION FOR REHEARING

The Empire District Electric Company ("Empire" or "the Company") hereby responds in opposition to the Complainants' Application for Rehearing.

1. On December 18, 2013, the Complainants in the above-captioned case filed an application asking the Commission to rehear or reconsider its November 26, 2013, *Order Denying Motion for Summary Determination of Renew Missouri and Granting Motions to Dismiss of Ameren Missouri and Empire* ("Order"). The specific portions of the Complainants' application to which this response pertains are those that address Count III of the complaint against Empire. Generally, that count asked the Commission to find that §393.1050, RSMo,[1] is unlawful.

2. The Complainants' application cites three arguments in support of its request for reconsideration of the Commission's Order. First, the Complainants argue the Order should have found that §393.1050 is invalid because the statute is an unlawful legislative interference with the voters' adoption by initiative of the Renewable Energy Standard ("RES"), §§393.1025-1030. Second, the Complainants argue the Order improperly failed to find that §393.1050 is invalid because the statute is an

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

unconstitutional "special law." Finally, the Complainants argue that the Commission erred in finding that §393.1050 can be reconciled with the RES. The Complainants contend, instead, that the voters' adoption of the RES constituted a repeal by implication of §393.1050.

3. At page 6 of the Order the Commission discussed the decision of the Missouri Court of Appeals in *Evans v. Empire District Electric Co.*, 346 S.W.3d 313 (2011). In *Evans* the court held that although the Commission has no authority to declare a statute invalid "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." *Id.* at 319. Indeed, the court held the Commission has primary jurisdiction to make that determination. Consequently, as Empire argued in previously filed pleadings in this case, although *Evans* authorizes the Commission to grant certain relief with respect to Count III that relief is expressly limited to determining whether the provisions of the RES and §393.1050 are in irreconcilable conflict with one another or, instead, can be harmonized. The Commission cannot grant the Complainants the relief they primarily seek through their complaint: declaring §393.1050 invalid.

4. Despite the limitation imposed by *Evans*, which the Commission's Order specifically acknowledges, two of the Complainants' three arguments in support of the application for rehearing again ask the Commission to do something it lawfully cannot do – invalidate §393.1050. Because those arguments – i.e. the arguments that (i) §393.1050 is an unlawful legislative interference with the adoption of the RES by initiative and (ii) that §393.1050 is an unlawful "special statute" – go beyond the limitations on the scope of the Commission's authority expressly imposed by the Court of Appeals in *Evans*. Because of this fact, neither of those two arguments is a proper ground for granting rehearing or reconsideration of the Order.

5. Although the Complainants' remaining argument – that §393.1050 and the RES cannot be harmonized – is within the scope of the Commission's authority under *Evans*, the application for rehearing fails to establish any legal basis for granting the Complainants the relief they seek. Instead, the Complainants' application merely re-cycles arguments previously rejected by the Commission.

6. For example, the Complainants take issue with the Commission's reliance on the Missouri Supreme Court's holding in *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630 (2007), as a basis for the conclusion that §393.1050 and the RES can be harmonized. Specifically, the Commission's Order found that, as a matter of law, including the phrase "[n]otwithstanding any other provision of the law" within §393.1050 "does not create a conflict, but eliminates a conflict that otherwise would have occurred in the absence of the clause,"[2] The Complainants argue that the holding in *City of Jennings* only applies to prior legislative enactments, but the case the Complainants' cite as support for that proposition – *Covera Abatement Technologies v. Air Conservation Comm'n*, 973 S.W.2d 851 (Mo. banc 1998) – does not support that argument. Instead, in *Covera* the court reaches the same conclusion that was later affirmed in *City of Jennings*: that the phrase "notwithstanding any other provisions of the law to the contrary" *must* be read to mean that a statute containing that phrase was intended by the General Assembly to take precedence over any provisions of law that might otherwise appear to be in conflict.[3]

7. The Complainants appear to also argue that *Covera* further holds that a "later in time" rule applies to conflicting statutes that cannot be reconciled – i.e. where two statutes in

[2] *State ex rel. City of Jennings v. Riley* at 632.
[3] *Covera Abatement Technologies v. Air Conservation Comm'n* at 859.

conflict cannot be harmonized the later enacted statute will prevail.[4] But that holding is not applicable in this case for at least two reasons. First and foremost, the Complainants' argument begs the question of whether the statutes at issue in this case are incapable of being harmonized. The Commission's Order correctly concludes that §393.1050 and the RES are not in conflict and can be harmonized. Consequently, the condition precedent for applying the "later in time" rule endorsed in *Covera* does not exist. But even if that were not the case, Proposition C was not later in time than §393.1050 because the language of that initiative was known to the General Assembly prior to the date it enacted the statute exempting qualifying utilities from the solar energy provisions of the RES.[5] That chronology of events, as well as the language of §393.1050 itself, makes it clear that by including the phrase "notwithstanding any other provision of the law" in that statute the General Assembly intended to exempt certain utilities from the solar energy provisions of the RES should the initiative be approved by voters at the next general election.[6] Consequently, even assuming the "later in time" rule announced in *Covera* applied to the issues raised by the Complainants in Count III, §393.1050 represents the latter expression of legislative intent as to which utilities would be subject to the solar energy provisions of the RES and which utilities would be exempt from them.

8. The application for rehearing also argues that the Commission's interpretation of the legal effect of the phrase "notwithstanding any other provision of law" in §393.1050 is incorrect because, the Complainants' contend, that interpretation would unlawfully allow one

[4] *Id.*

[5] The Missouri Secretary of State took delivery of the signed petitions qualifying Proposition C for inclusion on the ballot on May 4, 2008. The General Assembly adopted SB 1181 (later codified as §393.1050) on May 16, 2008.

[6] Evidence confirming that the General Assembly intended to exempt certain utilities from the solar rebate provisions of the RES can be found in the language of HB 142, which was enacted into law earlier this year. In that bill the General Assembly included the phrase "except for those electrical corporations that qualify for an exemption under section 393.1050" as a preface to amendments to §393.1030.3 that capped solar rebate payments through June 30, 2020, thereby reaffirming the purpose for which §393.1050 was enacted in the first place. Moreover, the General Assembly's expression is later in time than the date on which the RES became effective.

session of the General Assembly to bind future sessions. But that argument has no legal merit whatsoever. Any future session of the General Assembly – or any future initiative adopted by the voters – can enact legislation that expressly repeals any previously enacted statute, and that authority is not diminished by the fact that the prior statute included the phrase "notwithstanding any other provision of law" or any similar language. Indeed, using one legislative enactment to specifically repeal another is a process the proponents of Proposition C – a group that allegedly included one or more of the Complainants in this case – understood well, as evidenced by the fact that language in Proposition C expressly repealed §393.1035.

9. The Commission's findings in support of its conclusion that §393.1050 and the RES can be harmonized and are not irreconcilably in conflict with one another are well supported by applicable case law. When two statutory provisions covering the same subject matter are unambiguous standing separately but appear to be in conflict when considered together, a reviewing court or administrative agency must attempt to harmonize them and give effect to both whenever possible. *South Metropolitan Fire Protection Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. banc 2009). Further, where one statute deals with a subject in general and comprehensive terms while another statute deals with the same subject in a more minute and definite way, the two should be read together and harmonized whenever possible. But where there is any repugnancy between them, the law requires that the special statute – e.g. §393.1050 – will prevail over the general. *Laughlin v. Forgrave*, 432 S.W.2d 308, 313 (Mo. banc 1968). In addition, all consistent statutes relating to the same subject are considered to be *in pari materia* and must be construed together as though constituting a single act, even if they are adopted at different times. *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. banc 1991). Finally, any change in a statute enacted by the General Assembly is intended to have

some effect; courts will not charge the legislature with having done a meaningless act. *State v. Swoboda*, 658 S.W.2d 24, 26 (Mo. banc 1983).

10. The Commission's Order recognizes that Missouri law establishes an extremely high threshold that must be satisfied for a court or administrative agency to conclude that one statute is irreconcilably in conflict with another, and rightly concludes that the conflict between §393.1050 and the RES, which is alleged in Count III of the Complaint, does not come close to meeting that threshold. The Order correctly observes that §393.1050 merely exempts from the RES's solar rebate obligations any electric utility that by January 20, 2009, equals or exceeds the renewable energy portfolio requirements prescribed in the RES. The Order further observes that §393.1050 did not change any of the renewable energy requirements created by the RES. Instead, §393.1050 merely exempted from a small portion of those requirements any utility who by 2009 had already achieved all the energy portfolio objectives mandated through 2021. In addition, the Order recognizes that failing to enact such an exemption would have penalized utilities like Empire by forcing them to achieve portfolio compliance results greater than those prescribed in §393.1030.1. Because the General Assembly's adoption of §393.1050 is fully consistent with the overall objectives of the RES, the statutes can easily be reconciled. And because they can be, the law requires that they must be reconciled.

WHEREFORE, for all of the reasons stated above, the Commission should deny those portions of Complainants' application for rehearing that pertain to Count III of the complaint filed against Empire. All questions decided by the Commission in its Order are questions of law, and Complainants' application provides no legal basis that should cause the Commission to rehear any arguments advanced by the Complainants or to reconsider any findings or conclusions included in the Order.

Respectfully submitted,

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ATTORNEYS FOR THE
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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of December, 2013, a copy of the foregoing was served, via e-mail, on counsel for each of the parties of record.

/s/ L. Russell Mitten