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	)	

LEGAL MEMORANDUM IN SUPPORT OF
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 4 CSR 240-2.117(1)(B), state why summary determination should be granted on their Motion as to all issues raised in the two complaints underlying these consolidated cases.

STANDARD FOR SUMMARY DETERMINATION

Complainants assume the burden of establishing that there is no genuine issue as to any material fact. Complainants must also establish in this memorandum that they are entitled to

relief as a matter of law. The Commission will not grant summary determination unless it determines that it is in the public interest. 4 CSR 240-2.117(1)(F).

With regard to the public interest, these complaints were brought to enforce Missouri's Renewable Energy Standard ("RES"), which was passed as a ballot initiative in November 2008 with 66% of the electorate voting in favor. The first year of required compliance under the RES was 2011. However, in Complainants' view, the RES has been ineffective due to non-compliance and misinterpretations of the law on the part of the state's investor-owned utilities. At the time of the RES rulemaking, Complainants did not anticipate that Ameren Missouri and Empire would raise the issues of individual generator hydropower capacity or retroactive REC banking. The issues have since been raised in the utilities' RES compliance reports and compliance plans, as well as in the comments filed in response (see: Comments of Renew Missouri on Ameren Missouri's 2011 RES Compliance Plan, EO-2011-0275; comments of these complainants and others on Ameren Missouri's 2011 compliance report and 2012–14 compliance plan, EO-2012-0351; Comments of Renew Missouri on Empire District's 2011 compliance plan, EO-2011-0276; and comments of these complainants and others on Empire's compliance report for 2011 and compliance plan for 2012–14 in EO-2012-0336).

The Commission has determined that these issues must be resolved through the complaint process. (see the Commission's Notices of August 15, 2012 in Case Nos. EO-2012-0336 and EO-2012-0351; 4 CSR 240-20.100(8)(A)).

It is in the interest of the public, which passed the RES, to have these issues concerning its meaning and effectiveness finally resolved. Summary determination will accomplish this most expeditiously.

COMPLAINANTS' INTERESTS IN THIS CASE

Complainants, as persons and corporations alleging violations of the law, have shown sufficient interest in the subject matter of these complaints. § 386.390, RSMo; 4 CSR 240-2.070(1) and (4). Their interests are detailed in discovery, in the answers to data requests served by Empire. EXHIBIT 17.

Renew Missouri and the Missouri Coalition for the Environment (MCE) have an institutional mission and interest in promoting renewable energy, and were active in the campaign to pass Proposition C. EXHIBIT 17, DRs 001,007, 008, 014, 015, 023–025.

Wind on the Wires and the Missouri Solar Energy Industry Association (MOSEIA) have an interest in the lawful and meaningful enforcement of the RES as part of their organizational missions and through their member companies' potential business opportunities. EXHIBIT 17, DRs 003, 009, 010, 016, 017.

The Alternative Energy Company, Missouri Solar Applications and StraightUp Solar are all installers of solar energy equipment and have suffered lost business opportunities due to Ameren Missouri's non-compliance as well as Empire's failure to pay the solar rebate and refusal to observe the 2% solar "carve-out." EXHIBIT 17, DRs 004–006, 011–013, 018–021.

All of these interests, even if not pecuniary, are sufficient to support these parties' interests in having the issues in the complaints resolved. State ex rel. Consumers Public Service Co. v. PSC, 180 S.W.2d 40, 46 (Mo. banc 1944).

DISCUSSION

I. Hydropower Nameplate Rating

Ameren Missouri claims that the vast majority of its RES obligations can be met with energy produced by its century-old Keokuk hydroelectric plant, which it rates as high as 140

MW. 2011 Ameren RES Compliance Report, pp. 8–9, Case No. EO-2012-0351. Empire claims that its entire RES obligation is met with energy produced by the equally ancient Ozark Beach facility (16 MW). 2011 Empire RES Compliance Report, pp. 4-5, Case No. EO-2012-0336.

a. Definition of "nameplate rating."

The RES limits qualifying hydro to "hydropower (not including pumped storage) that does not require a new diversion or impoundment of water and that has a nameplate rating of ten megawatts or less," § 393.1025(5), RSMo. The Commission's rule adds the word "generator" (i.e. "generator nameplate ratings," 4 CSR 240-20.100(1)(K)8), but does not explicitly specify whether those ratings are to be segregated or aggregated. Complainants believe the language of the Commission's rule is consistent with the latter and need only be interpreted correctly.

Ameren maintains that "only generators have nameplate ratings." Response to Comments, p. 7, June 15, 2012, Case No. EO-2012-0351. Empire has adopted the same argument (see Response to Comments, pp. 3–5, July 3, 2012, EO-2012-0336), while conceding that "nameplate rating" can mean aggregate generator capacity in "informal usage." Id. at 7.

The utilities' position is untenable in light of the Direct Testimony of Ed Holt, which demonstrates that "nameplate rating" and the synonymous "nameplate capacity" are most commonly used to describe the total generating capacity of a facility. Direct Testimony of Ed Holt at 8. This usage is not merely informal but is the usage of the Federal Energy Regulatory Commission ("FERC")(see EXHIBITS 1–3.), the Energy Information Administration ("EIA") (see EXHIBIT 4), the Public Utility Regulatory Policies Act ("PURPA")(EXHIBIT 5), and the North American Renewables Registry ("NAR")(see EXHIBITS 9–11).

Mr. Holt further demonstrates that Ameren and Empire have acquiesced in this meaning and thereby admitted what their compliance filings deny. Direct Testimony of Ed Holt at 12–14.

Ameren Missouri has reported to FERC that Keokuk has "Total installed cap (Gen name plate Rating in MW)" of 127.20, while Empire has reported the capacity of Ozark Beach on the same form as 16 MW. EXHIBITS 2–3. NAR lists the "Nameplate Capacity" of Keokuk as 134 and of Ozark Beach as 16. EXHIBIT 11.

Other examples of "nameplate capacity" being applied as "aggregate nameplate capacity" can be found in § 393.1050 and in Empire's 2011 Annual Renewable Energy Standard Compliance Report. The statute that Empire claims exempts them from the solar requirements of the RES, Section 393.1050 applies to "any electrical corporation… which… achieves an amount of eligible renewable technology nameplate capacity equal to or greater than fifteen percent of such corporation's total owned fossil-fired generating capacity…" § 393.1050, RSMo. Here "nameplate capacity" clearly refers to "aggregate" or "total" nameplate capacity even though neither of those words is used to modify "nameplate capacity." In Attachment 2 to its 2011 compliance report, Empire 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 power purchase agreements ("PPAs"). 2011 Empire RES Compliance Report, pp. 14-15, Case No. EO-2012-0336.

Similarly, the Bureau of Reclamation refers to Hoover Dam with its 17 turbines: "The plant has a nameplate capacity of about 2080 MW." EXHIBIT 15.

Case law supports this interpretation. In Don't Waste Oregon Committee v. Energy Facility Siting Council, 320 Or. 132, 881 P.2d 119, 124 (1994), the "total generating capacity" of a plant is defined as the "nominal or nameplate capacity." Another opinion of the same court refers to the "nameplate capacity" of the combined generating facilities of two separate dams. Portland General Electric Co. v. State Tax Commission, 249 Or. 239, 437 P.2d 827, 829 (1968).

In Philadelphia Corp. v. Niagara Mohawk Power Corp., 723 N.Y.S.2d 549, 550–1 (A.D. 2001), the opinion refers to the "nameplate capacity" as the total capacity of a "run of the river" hydro plant that originally had three generators, later replaced by a single large turbine.

The hydropower assets of two utilities are described thus in State ex rel. Utilities Commission v. Edmisten, 40 N.C.App.109, 252 S.E.2d 516, 521 (1979): "Tapoco's two North Carolina facilities have a nameplate capacity of 155,000 KW; Nantahala's eight plants (subject to New Fontana Agreement) have nameplate capacity of approximately 98,000 KW."

In Madison Gas & Electric Co. v. USEPA, 25 F.3d 526, 529 (7th Cir. 1994), the terms "aggregate nameplate capacity" and "nameplate capacity" are used interchangeably.

The Missouri Department of Natural Resources' ("MDNR") rule for resource certification uses individual generator capacity. 10 CSR 140-8.010. However, MDNR is on record as urging the Commission to re-examine the issue, along with the issue of retroactive REC banking., Transcript of August 30, 2011, pp. 69–72, comments of Asst. Attorney General Mangelsdorf, Case No. EO-2011-0275; MDNR Comments in Case Nos. EO-2012-0351 and EO-2012-0336.

b. Aggregate nameplate rating is the intent of the statute.

"Nameplate rating" indisputably has at least two technical meanings. The remaining questions are which interpretation is intended by the RES statute, and which interpretation will the Commission choose to assign to its own rule.

The limitations on hydro that are common in RES laws nationwide have the primary purpose of avoiding environmental damage, and often an additional purpose of excluding existing facilities that have long since been amortized, so as to encourage the development of renewable technologies not yet established. Direct Testimony of Ed Holt at 17–19. Dams flood

land and wildlife habitat. Id. At 17. Many states have similarly limited the size of qualifying hydro facilities, for similar purposes. Id. at 16–18. The Missouri RES has the same intent.

The purpose of environmental protection in the Missouri RES is shown by two passages in the law. First, hydropower must "not require a new diversion or impoundment of water…" § 393.1025(5), RSMo. Second, "Renewable energy facilities shall not cause undue adverse air, water, or land use impacts…" § 393.1030.4, RSMo. The environmental purpose is met primarily by the size limitation that the RES statute places upon qualifying hydro sources.

The purpose of encouraging new renewable technologies not yet established in Missouri is obvious from the nature and context of the RES itself. The intent of the RES could not be to allow all or almost all of the portfolio requirements to be met with hundred-year-old hydro facilities. It would have been unnecessary to pass an RES law in Missouri if that were the intent. Creating demand for new renewable energy development is one of the primary purposes of an RES law. An interpretation that would allow hydro plants larger than 10 MW to qualify for RES compliance would frustrate this basic purpose.

Furthermore, there exists the general legal principle in Missouri that a statute is not presumed to enact useless provisions. Wollard v. City of Kansas City, 831 S.W.2d 200, 203 (Mo. banc 1992). When a word has an uncertain meaning, courts look to the subject matter of the statute, the object it is meant to accomplish, and the consequences of any proposed interpretation. State ex rel. Slinkard v. Grebe, 249 S.W.2d 468, 470 (Mo.App. ED 1952). The RES allows only small hydro in order to prevent the environmental impacts of large dams and to encourage the development of renewable sources not yet established in and around Missouri. Accordingly, the 10 MW capacity limit must be interpreted to mean the aggregate capacity of all generating units at a hydro facility. Any other reading defeats the primary purpose of the RES.

II. Pre-Compliance Era RECs

Ameren Missouri relies on retroactive "REC banking" to order to claim they could meet the 2011 RES target with RECs they've collected since January 1, 2008, using banked RECs from Keokuk, and 2010-vintage S-RECs. 2011 Ameren Missouri RES Compliance Report, pp. 5, 8, 13, 15–28, 35, Case No. EO-2012-0351. Since Ozark Beach did not produce enough RECs in 2011 to meet the 2% target, Empire claimed that it may use RECs from 2008 and 2009 to meet the entire 2011 requirement with Ozark Beach alone. 2011 Empire RES Compliance Report, pp. 3, 4–5, 5–6; Revised Affidavit of Compliance, Case No. EO-2012-0336.

The RES statute states: "An unused credit [REC] may exist for up to three years from the date of its creation." § 393.1030.2, RSMo. The Commission's rule says: "An REC expires three (3) years from the date the electricity associated with that REC was generated." 4 CSR 240-20.100(1)(J).

However, the statute also provides: "Such portfolio requirement shall provide that electricity from renewable energy resources shall constitute the following portions of each electric utility's sales: (1) No less than two percent for calendar years 2011 through 2013…" § 393.1030.1, RSMo.

Therefore renewable energy must actually "constitute" the requisite portion of sales for a given calendar year. The REC banking provision allows leftover RECs to carry over to a subsequent year; it does not allow old RECs to carry forward from a time when the portfolio standard did not even exist. The standards began in 2011; therefore all RECs used for compliance must originate on or after January 1, 2011, not January 1, 2008. RECs created before 2011 could not represent energy that "constituted" a portion of sales beginning in 2011.

Complainants' witness Ed Holt reviewed RES practice nationally, and testified:

> 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 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. Direct Testimony of Ed Holt at 22.

Proposition C allowed more than two years after its enactment in 2008 before the utilities had to begin compliance with the portfolio standards in Section 393.1030.1, RSMo.

It makes no sense to speak of 2008 RECs as "unused" when there was nothing on which to use them for the period from 2008 to 2010. In saying that "[a]n unused credit may exist for up to three years from the date of its creation," the statute refers to RECs that could have been used for RES compliance but were surplus to a utility's needs in the year of their creation. The only "use" within the scope of the statute is use for compliance with the statute: "A credit may be used only once to comply with sections 393.1020 to 393.1030…" and "An electric utility may not use a credit derived from a green pricing program." (§ 393.1030.2, RSMo.) "Unused" cannot refer to RECs sitting in a REC bank account (something whose existence in Missouri was not even contemplated on January 1, 2008).

The fact that the RES does not expressly prohibit existing renewable generating assets from being used to comply with the RES does not mean that any and all energy those resources generated in the past can be used for compliance. The purpose of a RES is to foster renewable energy going forward; in this case renewable energy generated after January 1, 2011 (see § 393.1030.1, RSMo). Retroactive REC banking would amount to a "time out" – based on three years of past generation, the utilities claim a right to take three years off. Those three years happen to be the first compliance period. The utilities' approach is "back to the future" – they go back to 2008–10 and make the initial compliance years 2011–2013 virtually disappear. Almost

no renewable energy development has happened in these more recent years, thanks to utilities' perverse reading of the statute. In order to prevent frustrating the intent of the RES, the Commission must clarify that the RES' three-year REC rollover provision (§ 393.1030.2, RSMo) is forward-looking only and does not allow the use of RECs created before compliance under the RES began.

III. Empire's Solar Exemption

Empire claims to be exempted from the RES' solar carve-out and solar rebate provisions by virtue of Section 393.1050 because it has "achieved" renewable resources in excess of 15% of its fossil-fired nameplate generating capacity. 2011 Empire RES Compliance Report, pp. 11–12, Case No. EO-2013-0336).

In Evans v. Empire District Electric, 346 S.W.3d 313 (Mo.App. WD 2011), the Court of Appeals held that the Commission has primary jurisdiction over this exact issue. It held that the Commission must decide the validity of the statute in the first instance and must require Empire to file a tariff if the Commission decides that it is not exempt. Id. at 318–9.

Section 393.1050 was passed in May 2008 and became effective August 28 of that year Missouri Senate Journal for 2008, p. 1729; House Journal, p. 1992. The RES was passed and became effective on Nov. 4, 2008 (see Missouri Constitution, Art. III, § 51).

Section 393.1050, RSMo reads:

> Notwithstanding any other provision of law, any electrical corporation as defined by subdivision 15 of section 386.020, RSMo, which, by January 20, 2009, achieves an amount of eligible renewable energy technology nameplate capacity equal to or greater than fifteen percent of such corporation's total owned fossil-fired generating capacity, shall be exempt thereafter from a requirement to pay any installation subsidy, fee, or rebate to its customers that install their own solar electric energy system and shall be exempt from meeting any mandated solar renewable energy standard requirements. Any disputes or denial of exemptions under this section may be reviewable by the circuit court of Cole County as prescribed by law.

Empire must be held to the terms of the RES because Section 393.1050 was unlawfully passed or, if initially valid, was repealed with the passage of the RES in November 2008. There are three independent reasons why this law is invalid.

a. Section 393.1050 was an unlawful attempt to amend an initiative before its enactment.

The legislature cannot repeal or modify an initiative or referendum until after it is passed, not while it is in the process of enactment. State ex rel. Drain v. Becker, 240 S.W. 229, 232 (Mo. Banc 1922); State ex rel. Barton v. Human, 514 S.W.2d 100, 101 (Mo.App. 1974). 82 C.J.S. Statutes, § 143, p. 188. The effect of such an amendment "is to ignore or attempt to hold for naught the action of the people" in the exercise of their constitutional right to enact or repeal laws independently of the legislature. Drain, loc. cit.; Mo. Constitution, Art. III, § 49.

Initiative petitions proceed on a strict timeline. The official ballot title for Proposition C was certified by the Secretary of State on Feb. 25, 2008. EXHIBIT 13. The petition cannot be circulated without that ballot title. § 116.180, RSMo. The signed petitions must be filed with the Secretary of State at least six months before the election. Mo. Const., Art. III, § 50.

In the case of Proposition C, the Secretary of State received the signed petitions on May 4, 2008. EXHIBIT 14. From May 4 until the statewide election on November 4, Proposition C was in the process of passage, during which the petitioners could no longer amend the petition to take into account any changes made by the Legislature. Section 393.1050, RSMo passed as part of Senate Bill 1181 on May 16, 2008. Missouri Senate Journal for 2008, p. 1729; House Journal, p. 1992. Proposition C passed on November 4, 2008 and became effective that same day. Mo. Const. Art. III, § 51. The RES applies to all electric utilities as defined in Section 386.020. § 393.1025(3), RSMo. The Legislature's attempt to amend it to exempt one utility from certain

requirements of the RES was invalid because the RES was still in the process of passage when § 393.1050 was enacted.

If we assume that Section 393.1050 was in effect as of November 4, 2008, then Proposition C would have been inaccurate concerning Empire, and the voters would have cast their ballots under false pretenses. The law does not allow such a scenario.

b. Proposition C repealed Section 393.1050.

When two statutes are repugnant in any of their provisions, the later act, even if it lacks a specific repealing clause, repeals the earlier act to the extent of the inconsistency. State ex rel. Francis v. McElwain, 140 S.W.3d 36, 38 (Mo. Banc 2004). As noted in the previous section, Empire's purported solar exemption passed the Legislature before the RES was enacted and became effective on August 28, 2008. Consequently, Empire's solar exemption was repealed by the passage of Prop C on November 4. The RES, including the solar carve-out and solar rebate, applies to all electrical corporations, including Empire. Because of this inconsistency between the RES and Section 393.1050, the later passage of Proposition C repealed Section 393.1050.

The "[n]otwithstanding any other provision of law" clause in Section 393.1050, if meant to apply to any law that might be passed in the future, is of no avail. One session of the Legislature cannot bind future sessions. State ex rel. City of Springfield v. Smith, 125 S.W.2d 883, 885 (Mo. Banc 1939). By the same token it cannot bind the electorate when the voters pass a later law by initiative, which has the same effect as a statute passed by the Legislature. Labor's Educational and Political Club v. Danforth, 561 S.W.2d 339, 343 (Mo. banc 1977).

c. Section 393.1050 is an unconstitutional special law.

Empire is the only utility that claims to be free of solar obligations due to Section 393.1050. This is by design. The statute set a standard of renewable resources equal to 15% of

the utility's fossil-fuel capacity by the apparently arbitrary date of Jan. 20, 2009 (§ 393.1050, RSMo.), a classification that only Empire fit.

Section 393.1050 is a special law contrary to the Missouri Constitution, Article III, § 40 (28 and 30), because there is no substantial justification for the special treatment accorded to Empire but not to KCPL, GMO or Ameren Missouri. City of Springfield v. Sprint Spectrum, L.P., 203 S.W.3d 177, 185 (Mo. banc 2006). A general law relates to persons or things as a class; a special law relates to particular persons or things even when its criterion is naturally related to all members of the whole class. Id. at 184. If a statutory classification fits only one entity but is open-ended – allowing other entities to eventually fall within its terms – it is considered a general law; but if a statutory classification is fixed so that its membership is closed, the classification is special. Id.

The classification in the statute is disguised as open-ended, but it closed on January 20, 2009, about two and one-half months after Prop C passed. In Jefferson County Fire Protection Districts Association v. Blunt, 205 S.W.3d 866, 870 (Mo. Banc 2006), the Court struck down a law that applied to fire protection districts in first class counties with populations between 198,000 and 199,200; only one county fit that description. The Court held that where an ostensibly open-ended classification was so narrow that as a practical matter others could not fall into it, the presumption that an open-ended law is a general law fails, and it will be struck down as a special law to avoid contravening the intention of the Constitution. Id.

A classification can be narrow in time as well as in population, as in the Sprint Spectrum case, where the exemption for tax-enforcing municipalities ceased to apply on January 15, 2005. 203 S.W.3d at 184–5.

Empire knew that it already met the requirement if Attachment 2 is to be believed (see Empire 2011 RES Compliance Report, Attachment 2, pp. 14-15, Case No. EO-2012-0336). No other utility has attempted to claim exemption. The Jan. 20, 2009 deadline is a transparent ploy to avoid having the statute struck down as a special law, and it is within the Commission's competence and expertise to declare it as such.

IV. RECs Unassociated with Energy Sold To Missouri Customers

This is a familiar issue often referred to as "geographic sourcing." In 2010, the Commission promulgated a rule containing two paragraphs that required renewable energy to be delivered to Missouri, but withdrew those paragraphs at the behest of the Joint Committee on Administrative Rules (JCAR). Complainants feel compelled to revisit the issue because the Commission has been held to have primary jurisdiction over legal questions of this nature. Evans v. Empire District Electric, 346 S.W.3d 313, 318–9 (Mo. App. WD 2011). The Western District recognized that the Commission "has no authority to declare a statute invalid or interpret a statute in such a way that is contrary to the plain terms of the statute," but nevertheless held that the Commission can interpret statutes in accordance with rules of construction and harmonize them if possible. Id.

For 2011, Ameren Missouri retired 14,971 solar RECs ("SRECs") purchased from various third party brokers and taken from the Western Renewable Energy Generation Information System (WREGIS). These SRECs are "unbundled," meaning the energy associated with the production of the SRECs was never delivered to Missouri or to any Ameren Missouri customer. Of the 14,971 SRECs Ameren Missouri purchased from WREGIS, 12,606 of them were purchased in 2010 while the remaining were purchased in 2011. 2011 Ameren Missouri RES Compliance Report, pp. 8, 15–28, Case No. EO-2012-0351.

Ameren Missouri claims compliance in this manner because in July 2010 JCAR disapproved paragraphs (2)(A) and (2)(B)2 of the Commission's rule, 4 CSR 240-20.100. As described in subsections b and c below, JCAR has no authority to review Commission rules, for two independent reasons. But as a preliminary matter, it is necessary to review that the RES statute requires all RECs retired for compliance to be associated with energy "sold to Missouri customers." § 393.1030.1, RSMo.

a. Unbundled RECs are disallowed by the statute.

Despite JCAR's July 2010 action, the RES statute clearly requires delivery of energy to Missouri for compliance with the RES. Furthermore, despite the fact that paragraphs (2)(A) and (2)(B)2 remain unpublished, the Commission's rules are silent on the use of unbundled RECs. In order to realize the basic purpose of the RES and give effect to the overwhelming democratic aspiration that Missouri voters expressed in November 2008, the Commission should interpret its rule to disallow the use of unbundled RECs for RES compliance.

The relevant language of Section 393.1030.1 is: "The 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. A utility may comply with the standard in whole or in part by purchasing RECs." (emphasis added.)

The first sentence of Section 393.1030.1 makes it clear that the RES applies to *power*, and that such power is to be "sold to any Missouri customers." RECs are not included in that sentence because RECs are not power; they are tradeable certificates of proof that power has been generated. § 393.1025(4), RSMo. The requirement that the power must be sold to Missouri customers is already established in the first sentence; the second sentence concerning RECs must be read in the context of the first sentence. One part of a statute should not be read in isolation

from the others, and related clauses are to be considered when construing a particular portion of a statute. Martinez v. State, 24 S.W.2d 10, 18 (Mo.App. ED 2000). Where one provision of a statute contains general words while another contains specific words, the general language should give way to the specific. Brandsville Fire Protection District v. Phillips, 374 S.W.3d 373, 378 (Mo.App. SD 2012). And, of course, a statute should not be construed in a way that renders it meaningless. Wollard v. City of Kansas City, 831 S.W.2d 200, 203 (Mo. banc 1992).

Although the RES statute is clear in requiring delivery of actual power to Missouri customers, the Commissions rule (4 CSR 240-20.100) contains no provisions enabling the use of unbundled RECs for RES compliance. While JCAR's July 2010 action resulted in sections (2)(A) and (2)(B)2 never being published, this did not have the effect of authorizing the use of RECs unassociated with power delivered to Missouri; rather it simply renders the rule silent on the issue. There are several legal and policy reasons why 4 CSR 240-20.100 should be interpreted to disallow the use of RECs unassociated with power never delivered to Missouri. One practical reason is that the statute clearly requires that qualifying RECs be accompanied by energy "sold to Missouri customers" (§ 393.1030.1, RSMo.), and the Commission should avoid an interpretation that puts their rule in conflict with the enabling statute. However, another compelling reason has to do with the effect of allowing unbundled RECs to count for compliance under the RES.

The use of RECs unassociated with energy delivered to Missouri would give the utilities a cheap means of "compliance" that would accomplish nothing towards effectuating the goals of the RES. Ameren Missouri's attempted compliance with WREGIS RECs is of no real benefit to Ameren Missouri customers. RES and RPS laws commonly require delivery of energy into the state to accomplish the goals of local or regional renewable energy development and the

displacement of pollution-causing coal-fired generation. Direct Testimony of Ed Holt at 25–27. If the Commission allows RECs from California or Canada or China to count toward compliance, Missouri will experience none of the benefits that come from local job creation, coal plant retirements, and a cleaner environment, all of which the RES meant to accomplish.

For the above reasons, the Commission should interpret its rule (4 CSR 240-20.100) to not allow the retirement of RECs unassociated with energy sold to Missouri customers for purposes of RES compliance.

b. JCAR's authority does not extend to initiatives.

Section 536.024.1, RSMo, provides: "When the *general assembly* authorizes any state agency to adopt administrative rules or regulations, the granting of such rulemaking authority and the validity of such rules and regulations is contingent upon the agency complying with the provisions of this section in promulgating such rules after June 3, 1994" (emphasis added).

The delegation of rulemaking authority to the Commission in the RES was not done by the Legislature but through initiative petition. In Section 536.024.1, RSMo, the Legislature itself decided that its review of agency rulemakings did not extend to initiatives. Section 536.021, which details the procedure for rulemaking, says: "The secretary of state shall not publish any proposed rulemaking or final order of rulemaking that has not fully complied with the provisions of section 536.024 or an executive order, whichever appropriately applies." § 536.021, RSMo.

Section 536.073.4, RSMo states (emphasis added):

> No rule or portion of a rule promulgated under the authority of this chapter shall become effective until it has been approved by the joint committee on administrative rules in accordance with the procedures provided herein, and *the delegation of the legislative authority to enact law by the adoption of such rules* is dependent upon the power of the joint committee on administrative rules to review and suspend rules pending ratification by the senate and the house of representatives as provided herein.

These last two sections make clear that broader statements that "no rule" may be promulgated without going through JCAR are subject to § 536.024 with its specific limitation of JCAR's authority to rules made under legislative delegations of authority. Various sections of the Missouri Administrative Procedure Act relating to JCAR were amended or added in 1997 by HB 850 in response to Missouri Coalition for the Environment v. Joint Committee on Administrative Rules, 948 S.W.2d 125 (Mo. banc 1997), as stated in Executive Order 97-97. EXHIBIT 16. These amendments are to be construed *in pari materia*, and if they cannot be construed harmoniously, then the more specific limitation of 536.024.1 to rules passed pursuant to delegations of authority by the General Assembly takes precedence over more general language. Berdella v. Pender, 821 S.W.2d 846, 849 (Mo. banc 1991).

Consequently, JCAR lacked authority to disapprove portions of 4 CSR 240-20.100.

c. JCAR's authority does not extend to PSC rules.

As noted above, a compromise with the Executive branch in the form of Executive Order 97-97 accompanied revisions of the JCAR statutes in 1997.. The role of EO 97-97 is explicitly recognized by statute. § 536.019; § 536.021.1 (quoted above); § 536.028.13, RSMo.

EO 97-97 (EXHIBIT 16) says, in relevant part:

> NOW, THEREFORE, I, Mel Carnahan, Governor of the State of Missouri, by virtue of the authority vested in me by the Constitution and laws of the State of Missouri, do hereby order that each Executive Branch, department, agency, commission, and board, *except for the Public Service Commission* and the Labor and Industrial Relations Commission…" (emphasis added).

The rest of the Order directs other state agencies to submit to the authority of JCAR. Executive orders backed by statute are legally enforceable. Kinder v. Holden, 92 S.W.3d 793, 806 (Mo.App. WD 2002). Consequently, JCAR's review function did not extend to 4 CSR 240-20.100.

CONCLUSION

For the above reasons, in granting Complainants' Motion for Summary Determination, the Commission should declare that both the RES statute (§ 393.1025–1030, RSMo) and the Commission's rule (4 CSR 240-20.100) require the following: that qualifying hydroelectric sources be limited to facilities with a total or aggregate capacity of 10 MW for purposes of RES compliance; that RECs created before 2011 cannot be retired for compliance with the RES; that Section 393.1050 cannot be applied to exempt electric utilities from compliance with the RES' solar provisions; and that qualifying RECs must be associated with energy delivered to Missouri for purposes of RES compliance.

Respectfully submitted,

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ATTORNEYS FOR COMPLAINANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing, together with all referenced Exhibits, have been electronically mailed to all parties of record on this 23rd day of July, 2013.

/s/ Andrew J. Linhares
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