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	)	

APPLICATION FOR REHEARING

COME NOW Earth Island Institute d/b/a Renew Missouri ("Renew Missouri"), Missouri Coalition for the Environment, Missouri Solar Energy Industries Association ("MOSEIA"), Wind on the Wires, The Alternative Energy Company, StraightUp Solar, and Missouri Solar Applications (collectively referred to as "Complainants"), pursuant to § 386.500, RSMo, and 4 CSR 240-2.160 and herein apply for rehearing from the Commission's "Order Denying Motion for Summary Determination of Renew Missouri and Granting Motions to Dismiss of Ameren

Missouri and Empire" (the "Order") issued in the above consolidated cases on November 26, 2013 with an effective date of December 26, 2013.

Complainants ask the Commission to rehear the case and modify its Order on the following grounds:

Count III as to Empire's Solar Exemption

1. In Conclusion of Law B (Order, p. 5) the Commission acknowledges that the Empire solar exemption, § 393.1050, RSMo, is inconsistent with the RES. In Conclusion C (Order, p. 6), the Commission finds that Empire is availing itself of the exemption. The Order nevertheless finds that § 393.1050 and § 393.1030 can be harmonized so as not to be in irreconcilable conflict.

Count III A: Legislative Interference with the Initiative

2. The controlling authority is *State ex rel. Drain v. Becker*, 240 S.W. 229, 232 (Mo. Banc 1922), holding that the legislature cannot repeal or modify an initiative or referendum until after it is passed, not while it is in the process of enactment. 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, 240 S.W. at 232. Thus Complainants have raised an issue of the infringement of a constitutional right by the passage of § 393.1050. Mo. Constitution, Art. III, § 49.

3. The reference to the initiative in *Drain* might be regarded as dicta in that that case, and every other Missouri case on the subject, involved a referendum. However, the Order (p. 8) goes farther and adopts an argument made by Empire without a shred of legal support—that the legislature can act on the subject matter of an initiative but not a referendum. This is erroneous for two reasons.

4. First, there is no hard and fast distinction between a referendum and an initiative. An initiative may repeal a law at the same time it enacts a new one. Indeed, Proposition C did exactly that—it repealed the pre-existing §§ 393.1020 – 393.1035, RSMo, enacted by the legislature in 2007 and enacted new sections with the same numbers. Thus the Order's reasoning leads to the opposite conclusion, that § 393.1050, RSMo, was illegally passed: "a pending referendum-appeal should preclude the legislature from acting regarding the legislation that is being challenged" (Order at 8).

5. Second, the same reasoning that prevents the legislature from interfering with a referendum applies to the initiative as well: the legislature cannot "change the question" pending in an initiative before the electorate gets to vote on it. In re Initiative Petition No. 347, State Question 639, 831 P.2d 1019, 1029 (Okla. 1991); Oklahoma Tax Commission v. Smith, 610 P.2d 794, 806–7 (Okla. 1980). Proposition C promised Empire's customers that they would be eligible for the solar rebate; § 393.1050 made this a lie, and there was nothing the sponsors of Proposition C could do about it at that stage of the process, when the ballot language was fixed and all the signatures had been delivered to the Secretary of State. Even assuming that the Order is correct in saying "there is no reason to preclude the legislature from acting on other, related aspects of an issue that are subject to a pending initiative so long as it does not interfere with the pending initiative," § 393.1050 was a direct interference with Proposition C, not mere action on a "related aspect."

Count III B: Repeal by Implication

6. The Commission concludes that § 393.1030 and § 393.1050 are not in irreconcilable conflict. While the law does not favor repeals by implication, if there is an irreconcilable conflict between two statutes, the later (in this case the RES) repeals the earlier.

7. The Order (p. 9) relies on the "Notwithstanding any other provision of law" clause in § 393.1050, RSMo, in order to find no conflict between the statutes. "[T]he inclusion of the 'notwithstanding' phrase means section 393.1050 is a special act that carved out an exception to the general act of section 393.1030 rather than impliedly repealing the general act." (p. 9). A "notwithstanding" clause does this only by making express the intent to override prior—and only prior—legislative intent. *Corvera Abatement Technologies v. Air Conservation Commission,* 973 S.W.2d 851, 859-60 (Mo. banc 1998). Section 393.1050 was enacted prior to 393.1030, and thus the "notwithstanding" phrase could not possibly carve out an exception to 393.1030 or otherwise modify it in any way. Section 393.1030 did not exist at the time of the passage of 393.1050. To allow a "notwithstanding" clause to have prospective operation has the perverse result of allowing an earlier statute to repeal or modify a later one. This cannot be. One session of the legislature cannot bind future legislators, as the latter are always free to repeal the acts of their predecessors. *Dorsey v. U.S.*, —U.S.—, 132 S.Ct. 2321, 2331, 183 L.Ed.2d 250 (2012); *State ex rel. City of Springfield v. Smith*, 125 S.W.2d 883, 885 (Mo. Banc 1939).

8. The Order finds that § 393.1050, RSMo, is "a special act that carved out an exception to the general act," and that therefore there is no irreconcilable conflict (pp. 9–10). Complainants certainly agree that § 393.1050, RSMo, is a special act (see below), but the Commission's conclusion is erroneous for at least two reasons.

9. First, the exception is nonetheless in irreconcilable conflict with the later-enacted RES. The RES applies to all regulated electric utilities including Empire. There is no way this can be reconciled with the exemption of Empire.

10. Second, the Order creates a fanciful rationalization for the exemption, assuming without any support that the legislature intended to give Empire a break on solar because it had

already met the overall goal of the RES. But there is no reason to subordinate the "solar carve-out" to the overall renewable energy goals; 2% of the overall goal must be met with solar energy, and this is every bit as much a requirement of the law as the overall goal. Indeed, solar is the only form of renewable energy that has its own goal.

11. The Order states: "the solar rebate provisions would impose an extra compliance burden on a utility that had already, in the General Assembly's determination, gone the extra mile to offer renewable energy to its customers." (p. 10) First, as already noted, the General Assembly may not modify a statutory requirement before such requirement has even been enacted. Second, the solar carve-out and solar rebate requirements are not an undue "burden" on Empire; every utility is required to comply with an identical requirement. In fact, Empire had the least burden of all Missouri investor-owned utilities, as it was already able to meet the RES' overall 15% portfolio requirement. The Commission's Order would ensure that Empire never experiences any burden whatsoever as a result of the RES. But no matter what the legislature's motives in passing 393.1050 may have been, it is still in irreconcilable conflict with the later-enacted law.

Count III C: Special Law

12. 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). For the reasons stated in paragraph 10 above, there is no such justification.

13. The Order contends (p. 11) that § 393.1050, RSMo, is not a special law because the classification it makes (all utilities achieving 15% renewable energy by January 20, 2009) is

open-ended. On the contrary, the classification closed on a specific date just two and one-half months after the passage of Proposition C. The classification is therefore closed, and 393.1050 is facially a special law. 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 other counties could not fall into it, the presumption that an open-ended law is a general law failed. Such a spuriously open-ended classification 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.

Count III as to Ameren: Energy delivered to Missouri

14. The Commission decides that there is no requirement in the RES statute for renewable energy to be delivered to Missouri customers (Order, pp. 3–4). This effectively nullifies the sentence in § 393.1030.1, RSMo, which reads: "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" (emphasis added). This must be read to mean that the portfolio standards represent percentages of the power delivered to Missouri for use by Missouri customers. It applies, not to RECs, but to "power" consumed in Missouri. By adopting Ameren's argument that this sentence merely converts the percentage standards into megawatt-hours, the Commission converts the standards into a cloud of MWh that have no relation to our state and are not even subject to regulation by Missouri. The Commission should

revert to the position it took in its final Order of Rulemaking in EX-2010-0169, p. 8, Response to Comments #13:

> "Missouri voters passed a statute which specified that a renewable portfolio standard would apply to power sold to Missouri customers whether generated inside the state or outside. They did that because they wanted cleaner energy delivered to their homes and they wanted the economic advantages renewable energy generation will bring to the state. In order to achieve these goals, it is necessary to develop an in-state renewable energy industry."

15. The Order (p. 3–4) states that the first sentence of § 393.1030.1, RSMo, "establishes that the percentage of portfolio requirements established by the RES statute apply to all power sold by the electric utility to its Missouri customers." After citing the second sentence of § 393.1030.1, RSMo, the Order later concludes (p. 4): "There is nothing… in the statute that requires RECs to represent renewable energy delivered to Missouri customers." These two statements cannot logically coexist with one another unless a distinction is made between energy "sold to" and energy "delivered to" Missouri customers. No justification is given for such a distinction. The Commission should resolve the above contradictions or otherwise give justification for how they can be reconciled. If the Commission cannot do so, it must determine that § 393.1030.1 requires utilities to comply only using RECs representing power actually delivered to Missouri customers.

16. The Order (p. 3) finds that the "geographic sourcing" provisions of the rule were rejected by the Joint Committee on Administrative Rules, were not published by the Secretary of State, and are not enforceable. In reaching this conclusion the Commission has not ruled on

certain issues raised in the complaint that are or may be within the Commission's primary jurisdiction, and which therefore need to be resolved in this complaint case:

a. The Missouri Supreme Court has held that JCAR may not unilaterally suspend or veto a regulatory action of the Executive Branch, as per the Separation of Powers clause of the Missouri Constitution, Article II, § 1. *Missouri Coalition for the Environment v. Joint Committee on Administrative Rules*, 948 S.W.2d 125 (Mo banc 1997). JCAR's act of holding two paragraphs of the rule in abeyance was unlawful.

b. The authority of JCAR to review administrative rules does not apply to rules promulgated under a statute passed by ballot initiative, but only to rules promulgated under statutes passed by the General Assembly. §§ 536.024.1, 536.073.4, RSMo. Therefore JCAR had no jurisdiction over rules passed pursuant to Proposition C.

c. Executive Order 97-97 expressly exempts the Commission from submitting its rules to JCAR. The Commission therefore had no duty to submit its rule to JCAR and acted unlawfully in doing so.

17. The Commission should find that the final order of rulemaking transmitted to the Secretary of State included the two geographic sourcing paragraphs, and therefore those paragraphs should have been published. The letter to the Secretary of State by the Commission's Secretary Reed (which transmitted the Commission's request that the paragraphs not be published) was not part of the order of rulemaking. The Commission's vote at an agenda meeting to send this letter was not an order of the Commission. *State ex rel. OPC v. PSC*, 326 S.W.3d 868 (Mo.App. WD 2010). The final order of rulemaking therefore left the Commission and went to the Secretary of State intact with the two paragraphs that had been disapproved by JCAR.

18. The Order notes the Commission's withdrawal of the rule. Such withdrawal took place in January of 2011, long after expiration of the time to complete the rulemaking as set forth in § 536.021, RSMo. At that time, the only way the Commission could have amended the rule was through another rulemaking under § 536.021, RSMo. Furthermore, the rulemaking was on judicial review by January 2011, and therefore the Commission had no jurisdiction over it.

Conclusion

WHEREFORE Complainants pray the Commission to rehear the case and to amend or modify its order in accordance with this Application.

Respectfully submitted,

/s/ Andrew J. Linhares
Andrew J. Linhares, # 63973
910 E Broadway, Ste. 205
Columbia, MO 65201
(314) 471-9973 (T)
(314) 558-8450 (F)
andrew@renewmo.org

/s/ Henry Robertson
Henry Robertson, # 29502
705 Olive Street, Ste. 614
St. Louis, MO 63101-2208
(314) 231-4181 (T)
(314) 231-4184 (F)
hrobertson@greatriverslaw.org

ATTORNEYS FOR COMPLAINANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by electronic mail to all parties of record on this 18th day of December, 2013.

/s/ Henry B. Robertson
Henry B. Robertson