STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 26th day of November, 2013.

Earth Island Institute d/b/a Renew Missouri, et al.	)	
Complainants,	)	
v.	)	File No. EC-2013-0377, et al.
Union Electric Company d/b/a Ameren Missouri,	)	
Respondent.	)	

ORDER DENYING MOTION FOR SUMMARY DETERMINATION OF RENEW MISSOURI AND GRANTING MOTIONS TO DISMISS OF AMEREN MISSOURI AND EMPIRE

Issue Date: November 26, 2013 Effective Date: December 26, 2013

This order concerns the consolidated complaints brought by Earth Island Institute d/b/a Renew Missouri, and other complainants (Renew Missouri),[1] against Union Electric Company d/b/a Ameren Missouri and The Empire District Electric Company concerning the utilities' compliance with Missouri's Renewable Energy Standard (RES). That law was approved by Missouri's voters in November 2008 as Proposition C, and is now codified at Sections 393.1020-1035, RSMo (Supp. 2012).

Both complaints allege that Ameren Missouri and Empire have failed to comply with the RES requirements by 1) improperly relying on hydropower from hydroelectric facilities

[1] The other complainants are Missouri Coalition for the Environment, Missouri Solar Energy Industry Association, Wind on the Wires, The Alternative Energy Company, StraightUp Solar, and Missouri Solar Applications.

that Renew Missouri contends do not qualify as renewable energy resources under the RES statute; and 2) improperly relying on renewable energy credits (RECs) that were created before the renewable energy standards of Proposition C went into effect. Renew Missouri added a third count against Ameren Missouri, alleging that the company improperly relied on "unbundled" solar RECs that are not associated with power sold to Missouri consumers. Renew Missouri's complaint against Empire added a third count, arguing that the solar exemption the General Assembly gave to Empire in Section 393.1050, RSMo (Supp. 2012) is void.

Renew Missouri, Ameren Missouri, and Empire all agree there are no facts in dispute and each contends the Commission should dispose of the complaints without a hearing. Ameren Missouri and Empire filed separate motions to dismiss Renew Missouri's complaints on July 23, 2013. On the same date, Renew Missouri filed a motion for summary determination against both Ameren Missouri and Empire. The parties have filed responsive pleadings, and the Commission heard oral argument regarding the dispositive motions on September 12.

On November 13, the Commission approved a stipulation and agreement in File No. ET-2014-0085, in which Renew Missouri agreed to dismiss counts I and II of its complaints against Ameren Missouri and Empire in these cases. On November 15, Renew Missouri complied with the terms of the stipulation and agreement by dismissing Counts I and II of its complaints against Ameren Missouri and Empire. Both Ameren Missouri and Empire consented to the dismissal of the complaints so under Commission Rule 4 CSR 240.2.116(1), the counts may be dismissed without an order of the Commission. Count III of both complaints remain to be decided by the Commission.

Count III as to Ameren Missouri – Unbundled RECs

Findings of Fact

These material facts are alleged in Renew Missouri's Motion for Summary Determination and are not disputed by Ameren Missouri in its response to that motion.

1. For its compliance with the RES portfolio requirements in 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). Those RECs are "unbundled," meaning the energy associated with the production of the SRECs was never delivered to Missouri, or to any Ameren Missouri customer.

2. The Commission's RES rule as originally proposed included a geographic sourcing provision that would have required that RECs purchased for compliance with the RES portfolio requirements represent renewable energy that was actually delivered to Missouri customers. The Joint Committee on Administrative Rules suspended and the General Assembly rejected those provisions of the rule. Furthermore, the Commission withdrew the challenged provisions from the rule and they were never published as part of the rule by the Secretary of State.

Conclusions of Law

A. The applicable portion of section 393.1030.1, RSMo (Supp. 2012) states: "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." That sentence merely 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. In other words, it establishes the method of calculation to convert the portfolio percentage to

megawatt hours. (The total amount of power sold to Missouri customers multiplied by the applicable portfolio percentage).

B. The next sentence of the statute states: "A utility may comply with the standard in whole or in part by purchasing RECs." In other words, a utility can comply with the statute's portfolio requirements either by delivering renewable power to its Missouri customers or by purchasing RECs.

C. The statute defines a REC as a certificate of proof that electricity has been generated from a renewable energy source.[2] There is nothing in that definition or elsewhere in the statute that requires RECs to represent renewable energy delivered to Missouri customers.

D. The only way the Commission can publish a valid rule is to comply with the procedural requirements of Chapter 536, RSMo. Section 536.021, RSMo (Supp. 2012) requires that all proposed and final rules be published in the Missouri Register to be valid.

Decision

The RES statute does not require that a REC represent renewable energy delivered to Missouri customers. The Commission's rule, as published by the Secretary of State, also does not impose such a requirement. Renew Missouri's suggestion that JCAR acted beyond its authority in suspending the geographic sourcing provisions of the Commission's rule is irrelevant to this complaint against Ameren Missouri because those provisions of the rule have never been published by the Secretary of State as provided in Chapter 536 and thus are not enforceable against Ameren Missouri.

Renew Missouri has not shown, and cannot show that Ameren Missouri has violated any statute, regulation, or tariff by relying on RECs not associated with power sold to

[2] Section 393.1025(4), RSMo (Supp. 2012).

Missouri customers to comply with the two percent portfolio requirement for 2011. For that reason, Count III of Renew Missouri's complaint against Ameren Missouri must be dismissed.

Count III as to Empire – The Solar Exemption

Findings of Fact

These material facts are alleged in Renew Missouri's complaint against Empire and are admitted by the company in its answer to that complaint.

1. Empire relies on Section 393.1050, RSMo (Supp. 2012) to claim that it is exempt from all solar requirements under the RES statute, including its obligation to pay solar rebates and its obligation to obtain two percent of its renewable energy portfolio requirement from solar energy.

Conclusions of Law

A. Section 393.1050, RSMo (Supp. 2012) states:

> Notwithstanding any other provision of law, any electrical corporation as defined by subdivision 15 of section 386.020 which, by January 20, 2009, achieves an amount of eligible renewable energy technology nameplate capacity equal 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. ...

That statute was passed by the General Assembly and signed by the Governor to become effective in August 2008.

B. After Section 393.1050, RSMo (Supp. 2012) became effective, the voters of Missouri passed Proposition C, which became effective on November 4, 2008. The terms of Proposition C, the RES statute, do not exempt any electric utility from the solar energy requirements of that statute.

C. There are two provisions of the RES statute that are in dispute. First, a portion of Section 393.1030.1, RSMo (Supp. 2012) establishes portfolio percentages of renewable energy that each electric utility must meet. Those percentages increase from two percent in 2011-2013 to fifteen percent beginning in 2021. The statute also requires that "at least two percent of each portfolio requirement shall be derived from solar energy". That provision is sometimes referred to as the "solar carve out." Second, Section 393.1030.3 requires each electric utility to offer a solar rebate to its retail customers who install solar electric systems on their property. Empire has relied on Section 393.1050, RSMo (Supp. 2012) to claim exemption from both the solar carve out and the solar rebate provisions of the RES statute.

D. This complaint before the Commission is not Renew Missouri's first attempt to challenge the validity of Section 393.1050. It first attempted to challenge the statute in circuit court. However, in the *Evans v. Empire Dist. Elec. Co.*[3] decision issued in 2011, the Missouri Court of Appeals affirmed the circuit court's dismissal of that complaint for failure to exhaust administrative remedies. In doing so, *Evans* held that the Public Service Commission has primary jurisdiction and required the complainants to first seek a ruling from the Commission before they could proceed to challenge the statute in circuit court.

E. The Court of Appeals in the *Evans* decision confirmed that this Commission has no authority to declare a statute invalid. However, the court found that the Commission has authority to review the provisions of Section 393.1050 and its application to Empire. In particular, the Court found that the Commission has primary jurisdiction to determine "whether a challenge to a statute, which purports to exempt certain utility companies from

[3] 346 S.W.3d 313 (Mo. App. W.D. 2011)

providing a rebate to customers who install solar electric systems is in irreconcilable conflict with the provision of a statute adopted by an initiative petition (Proposition C) ..."[4]

F. In determining whether the two statutes are in "irreconcilable conflict", the Commission must apply relevant rules of statutory construction. The rules of statutory construction are not to be applied rigidly, but the Commission must bear in mind that the main purpose of such rules of construction is to "determine legislative intent and give meaning to the statutory language."[5]

G. An important rule of statutory construction is that "where two statutory provisions covering the same subject matter are unambiguous standing separately but are in conflict when examined together, a reviewing court must attempt to harmonize them and give them both effect."[6] Thus, if the statutes can be harmonized the Commission must read them together and apply both. However, "[i]f that harmonization is impossible, the general statute must yield to the statute that is more specific."[7] Moreover, "[w]here the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication."[8]

Decision

Renew Missouri contends Section 393.1050 is invalid for three reasons: first, it was an unlawful attempt by the General Assembly to amend an initiative before it was enacted;

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[4] *Evans* at 318.
[5] *South Metro. Fire Prot. Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. 2009).
[6] *South Metro Fire Prot. Dist.* at 666
[7] *City of Clinton v. Terra Found., Inc.*, 139 S.W.3d 186, 189 (Mo. App. W.D. 2004).
[8] *State ex rel. McKittrick v. Carolene Prod. Co.*, 346 Mo. 1049, 1059, 144 S.W.2d 153, 156 (Mo. 1940).

second, it was impliedly repealed by the subsequent passage of the RES statute by initiative; and third, it is an unconstitutional special law that could apply only to Empire.

Unlawful Attempt to Amend an Initiative

The first reason Renew Missouri offers for the invalidity of Section 393.1050 is an argument that the statute is an unlawful attempt by the legislature to modify an initiative provision while a vote of the people is pending. Renew Missouri cites *State ex rel. Drain v. Becker*[9] for the proposition that the legislature is forbidden to repeal or modify a statute that is the subject of a pending initiative or referendum effort. However, *Drain v. Becker* addresses only the legislature's treatment of a referendum and does not address the treatment of initiative provisions. There is reason to treat the two provisions differently.

A referendum is an attempt by the people to challenge and repeal a law passed by the legislature. In effect, a referendum can be seen as an appeal to the people of an act of the legislature. Just as an administrative body is precluded from acting regarding a matter that is under appeal to a court, a pending referendum-appeal should preclude the legislature from acting regarding the legislation that is being challenged. That is indeed the holding of *Drain v. Becker.*

In contrast, an initiative is an action by the people to step into the role of the legislature to pass new legislation. In that circumstance, 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. The question of whether the legislature interfered with the pending initiative when it passed Section 393.1050 leads into Renew Missouri's second argument about the invalidity of the statute.

[9] 240 S.W. 229 (Mo. 1922).

Implied Repeal

Renew Missouri argues that the later passed initiative impliedly repealed conflicting provisions of the earlier-passed Section 393.1050. However, Renew Missouri's argument relies on the proposition that Section 393.1050 is in "irreconcilable conflict" with the later-passed initiative. Indeed, that is precisely the question the *Evans* court indicated the Commission has primary jurisdiction to address. After examining the question, the Commission concludes the two statutes are not in conflict.

Section 393.1050 begins with the phrase "[n]otwithstanding any other provision of law." The Missouri Supreme Court has held that the inclusion of that phrase into a statute "does not create a conflict, but eliminates the conflict that would have occurred in the absence of the clause. A conflict would be present, then, only if both statutes included a prefatory 'Notwithstanding' clause or if neither statute included such a clause."[10] In other words, the 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. That conclusion is affirmed when the actual terms of the statutes are examined.

Proposition C, specifically Section 393.1030, establishes renewable portfolio standards that all electric utilities must meet. Ultimately, those standards require the electric utilities to purchase or generate no less than fifteen percent of the electricity they sell from renewable resources by no later than 2021. Section 393.1050 does not change those portfolio standards; all electric utilities must still comply. However, in passing Section 393.1050, the General Assembly recognized that an electric utility that was already meeting

[10] *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 632 (Mo. 2007).

the fifteen percent renewable portfolio standard in 2008 was in a different position than other electric utilities that had not met that standard.

For an electric utility already meeting the fifteen percent renewable standard, the solar carve out and 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. Thus, the provisions of Section 393.1050 do not irreconcilably conflict with the renewable portfolio standards enacted by initiative in Section 393.1030. Rather Section 393.1050 is merely a rational modification of those standards to ease the burden the solar carve out and solar rebate provisions would otherwise impose on an electric utility that had already met the initiative's overall portfolio standards. Since the two statutes are not in irreconcilable conflict, the passage of Section 393.1030 by initiative did not impliedly repeal Section 393.1050.

Unconstitutional Special Law

Renew Missouri's third argument against the validity of Section 393.1050 is that it is an unconstitutional special law that could apply only to Empire. Article III, Section 40 of the Missouri Constitution denies the legislature authority to pass local and special laws. A general law relates to persons or things as a class, while a special law relates to a particular person or thing of a class.[11] Under that standard, a consideration of the classification imposed by the statute is key. Classifications based on factors that can change or are open-ended are presumed constitutional. Laws that use such classifications are not special and are constitutional if the classification is made on a reasonable basis.[12] In contrast, a statute that uses a closed-ended classification is facially special and is

[11] *Bd. of Educ. of St. Louis v. State Bd. of Educ.*, 271 S.W.3d 1, 9, (Mo. 2008).
[12] *Bd. of Educ.*, at 9.

presumed unconstitutional unless a substantial justification for the classification can be demonstrated.[13]

Section 393.1050 allows an electrical corporation to take advantage of the solar exemption if it achieves a fifteen percent renewable energy standard by January 20, 2009. That is an opened-ended classification available to any electrical corporation making the effort to comply. Thus, the statute is presumed constitutional and is valid if there is a reasonable basis for the classification. As previously discussed, the legislative classification in Section 393.1050 is a reasonable effort to ease the burden the solar carve out and solar rebate provisions would otherwise impose on an electric utility that had already met the initiative's overall portfolio standards. Thus, Section 393.1050 does not violate the Missouri Constitution.

Renew Missouri has not shown, and cannot show that Empire has violated any statute, regulation, or tariff by relying on the solar exemption found in Section 393.1050, nor has it shown, nor can it show, that Section 393.1050 is invalid or unconstitutional. For that reason, Count III of Renew Missouri's complaint against Empire must be dismissed.

THE COMMISSION ORDERS THAT:

1. The Motion for Summary Determination of 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 is denied.

2. Union Electric Company d/b/a Ameren Missouri's Motion to Dismiss is granted, and the complaint against Ameren Missouri is dismissed.

[13] *Bd. of Educ.*, at 10.

3. The Empire District Electric Company's Motion to Dismiss Complaint is granted, and the complaint against Empire is dismissed.

4. This order shall become effective on December 26, 2013.

BY THE COMMISSION

Morris L. Woodruff
Secretary

R. Kenney, Chm., Stoll, W. Kenney
and Hall, CC., concur;

Woodruff, Chief Regulatory Law Judge

STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 26th day of November 2013.

Morris L. Woodruff
Secretary

MOPSC

Digitally signed by MOPSC
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MISSOURI PUBLIC SERVICE COMMISSION

November 26, 2013

File/Case No. EC-2013-0377

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Enclosed find a certified copy of an Order or Notice issued in the above-referenced matter(s).

Sincerely,

Morris L Woodruff

Morris L. Woodruff
Secretary

Recipients listed above with a valid e-mail address will receive electronic service. Recipients without a valid e-mail address will receive paper service.