

**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-_____

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

RESPONDENT)

COMPLAINT

COME NOW COMPLAINANTS, by their attorneys, pursuant to Section 386.390, RSMo and 4 CSR 240-2.070 of the Commission’s Rules of Practice and Procedure, and for their Complaint against The Empire District Electric Company, respectfully state as follows:

PARTIES AND JURISDICTION

1. Complainant Earth Island Institute d/b/a Renew Missouri (“Renew Missouri”) has its principal place of business at 910 E. Broadway, Ste. 205, Columbia, MO 65201. Renew Missouri is a project of Earth Island Institute, a not-for-profit corporation organized under the laws of California with its principal place of business at 2150 Allston Way, Ste. 460, Berkeley, CA 94704. Renew Missouri is a registered fictitious name of Earth Island Institute under Section 417.200, RSMo. Earth Island Institute has a Certificate of Authority for a Foreign Nonprofit granted by the Missouri Secretary of State.

2. Renew Missouri was instrumental in the passage of Proposition C, or the Missouri Renewable Energy Standard (“RES”). Renew Missouri also participated in the RES rulemaking process. Renew Missouri has an interest in the full implementation of Missouri’s RES in that the organization’s mission includes the advancement of renewable energy in Missouri.

3. The following Complainants are not-for-profit corporations whose missions involve protection of the environment through the furtherance of renewable technologies and the renewable industry in Missouri:

a. Missouri Coalition for the Environment (“MCE”), 6267 Delmar Blvd., Ste. 2E, St. Louis, MO 63130;

b. Missouri Solar Energy Industries Association (“MOSEIA”), P.O. Box 434040, St. Louis, MO 63143;

c. Wind on the Wires, P.O. Box 4072, Wheaton, IL 60189.

4. The following Complainants are for-profit corporations engaged in the business of renewable energy development or installation that have a business interest in the implementation of Missouri’s RES:

a. The Alternative Energy Company, LLC, 4131 E. White Oak Dr., Springfield, MO 65809;

b. StraightUp Solar, 9100 Midland Blvd., St. Louis, MO 63114;

c. Missouri Solar Applications LLC, P.O. Box 1727, Jefferson City, MO 65102.

5. The signature, telephone number, facsimile number and email address of Complainants are those of their legal representatives and can be found in the signature block at the end of this complaint.

6. Respondent The Empire District Electric Company (“Empire”), 602 S. Joplin Avenue, Joplin, MO 64801, is an electrical corporation and public utility as defined in Section 386.020, RSMo engaged in the business of the manufacture, transmission, and distribution of

electricity subject to the regulatory authority of the Commission pursuant to Chapters 386 and 393, RSMo.

7. Complainants have sent a copy of this complaint to Empire. In addition, the issues and arguments in this complaint have been thoroughly aired with Empire in Case No. EO-2012-0336 reviewing Empire's 2011 RES Compliance Report, as well as in the previous year in Case No. EO-2011-0276 reviewing Empire's 2011-2013 RES Compliance Plan.

8. The Commission has subject matter jurisdiction over this complaint because it involves a utility's violation of a law – Section 393.1030, RSMo – that delegates regulatory authority to the Commission. Section 386.390.1, RSMo. The Commission also has primary jurisdiction, for purposes of judicial review, of the legal issues raised herein. *Evans v. Empire District Electric*, 346 S.W.3d 313, 318–9 (Mo. App. WD 2011).

9. Complainants Renew Missouri, MCE, MOSEIA, and Wind on the Wires aggrieved in that Empire's failure to comply with the law damages and threatens the Complainants' organizational missions as described in paragraphs 2-3 above.

10. The business Complainants listed in paragraph 4 have a professional interest in the full implementation and enforcement of the RES and are aggrieved by the loss of business opportunities in the state due to Empire's violation of the law.

BACKGROUND

11. In November 2008, Missouri voters approved Proposition C, otherwise known as Missouri's Renewable Energy Standard, now codified as Sections 393.1020-1035, RSMo. Proposition C requires "electrical corporations," as defined by Section 386.020(15), RSMo to achieve increasing percentages of their sales with electricity from renewable energy sources: two

percent of sales in the years 2011-2013; five percent from 2014-2017; ten percent from 2018-2020; and fifteen percent in each calendar year beginning in 2021.

12. Other relevant portions of the RES statute are summarized below:

a. The RES law includes within the definition of “renewable energy resources:” “hydropower 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.

b. The RES law requires that: “at least two percent of each portfolio requirement shall be derived from solar energy.” § 393.1030.1, RSMo.

c. The RES law provides: “An unused credit [REC] may exist for up to three years from the date of its creation.” § 393.1030.2, RSMo.

d. The RES law requires the rules to include a provision requiring “penalties of at least twice the average market value of renewable energy credits for the compliance period for failure to meet the targets...” § 393.1030.2(2), RSMo.

13. On December 2, 2009, the Commission opened a rulemaking case to adopt rules necessary to enforce the RES, as required by Section 393.1030.2, RSMo. After taking voluminous comments and holding a public hearing, the Commission transmitted an order of rulemaking to the Secretary of State and the Joint Committee on Administrative Rules (“JCAR”) on June 2, 2010.

14. The resulting rule, 4 CSR 240-20.100, became effective on September 30, 2010.

15. In April of 2011, Empire submitted its RES Compliance Plan for 2011-2013, as required by 4 CSR 240-20.100(7)(B). In Case No. EO-2011-0276, the Commission heard arguments on comments submitted by Renew Missouri, PSC Staff, and Empire on many of the issues involved in this Complaint.

16. In its October 5, 2011 “Notice Regarding Empire’s 2011 RES Compliance Plan,” the Commission declined to make a determination on Empire’s plan, indicating that it would make a final determination of whether Empire had met the requirements of the RES after the company filed its 2012 report. Notice Regarding Empire’s 2011 RES Compliance Plan at 2.

17. In April of 2012, Empire submitted its 2011 RES Compliance Report and 2012-2014 Compliance Plan, as required by 4 CSR 240-20.100(7)(A), in Case No. EO-2012-0336. 2011 was the first year in which utilities were required to achieve compliance with the RES.

18. Empire’s theory of compliance in its 2011 RES Compliance Report is summarized below:

a. Empire attempted to retire 68,786 RECs from the Ozark Beach Hydroelectric Project. Empire Report at 5. Were these Ozark Beach RECs to qualify for compliance, they would represent 85,982.5 MWh due to 4 CSR 240-20.100(3)(G), which gives each REC created in Missouri an additional credit of one-fourth (0.25) per REC. The Ozark Beach facility is in its 100th year of operation and has a total capacity of 16 MW, with each of its four separate turbines having an individual capacity of four MW. Id. at 4. The RECs produced at Ozark Beach and retired for 2011 compliance were from 2008 and 2009. Id. at 5.

b. Empire claims it is exempted from solar requirements and from paying solar rebates by virtue of Section 393.1050, RSMo. Empire Report at 14-15. Accordingly, Empire did not attempt to retire any solar RECs (“SRECs”) for purposes of RES compliance in 2011. Id.

19. In late May of 2012, various parties submitted comments to the Commission regarding Empire’s 2011 RES Compliance Report. Parties who submitted comments included

environmental and not-for-profit groups, for-profit solar installers, Wind on the Wires and the Wind Coalition, and the Missouri Department of Natural Resources (“MDNR”).

20. On May 31, 2012, the PSC Staff issued its Report on Empire’s 2011 RES Compliance Report and 2012-2014 Compliance Plan, as they are required to issue by 4 CSR 240-20.100(7)(D). PSC Staff identified no deficiencies in Empire’s 2011 RES Compliance Report. Staff Report on Company’s 2011 RES Compliance Report at 1.

21. On August 15, 2012, the Commission issued its “Notice Regarding The Empire District Electric Company’s 2011 RES Compliance Report and 2012-2014 Compliance Plan” in Case No. EO-2012-0336, indicating that the Commission plans to take no further action on Empire’s Compliance Report unless interested parties file formal complaints to address the issues.

COUNT I: HYDROPOWER

22. Complainants incorporate paragraphs 1-21 herein by reference.

23. Empire has failed to comply with Missouri’s RES in that it has attempted to retire 68,786 RECs produced from a hydroelectric facility that does not qualify as a “renewable energy resource” as defined by Section 393.1025(5), RSMo.

24. Empire argues that because Ozark Beach’s four separate turbines fall under the RES’ ten MW limitation, the aggregate capacity of the Ozark Beach facility should qualify for purposes of non-solar compliance.

25. The RES statute does not say “hydropower generator” rating, simply “hydropower... nameplate rating.” The RES Rules added the word “generator” to the definition of “hydropower,” despite it appearing nowhere in the RES statute. 4 CSR 240-20.100(1)(K)(8).

26. It is common industry practice to use the word “nameplate” to refer to the combined turbine rating of a hydroelectric facility. This is similar to references made to a coal plant’s generating capacity regardless of the number of individual boilers in the facility, or references made to the horsepower of an engine regardless of the number of pistons firing inside.

27. Empire itself represents to the Southwest Power Pool (“SPP”) that the Ozark Beach facility is larger than 10 MW.

28. The intent of limiting hydropower to ten MW is: to prevent large pre-existing sources from swallowing non-solar compliance targets, and to prevent the environmental impacts of large dams, as indicated by the statute’s prohibition against “a new diversion or impoundment of water...” § 393.1025(5), RSMo.

29. Because Ozark Beach does not qualify as a renewable energy resource, as defined by Section 393.1025(5), RSMo, Empire is out of compliance with its non-solar obligations in the amount of 81,201 MWh.

COUNT II: PRE-COMPLIANCE ERA RECs

30. Complainants reincorporate lines 1-21 herein by reference.

31. Empire has failed to comply with Missouri’s RES in that it has attempted to retire RECs associated with energy created at a time before RES compliance even began.

32. The RES’s three-year rollover provision, states: “An *unused* credit [REC] may exist for up to three years from the date of its creation.” § 393.1030.2, RSMo. (emphasis added). On this basis, Empire claims it can meet the 2% 2011 compliance target by retiring RECs it has collected since January 1, 2008. Specifically, Empire has retired 68,786 Ozark Beach RECs, which were created prior to 2011.

33. Section 393.1030.2, RSMo refers specifically to “unused” RECs. RECs created

from 2008 through 2010 cannot be considered “unused” because there was no requirement in effect during that time. Prior to 2011, there was no similar purpose for which RECs could be used or retired. The RES rules themselves were not even in place until September 2010. Thus, RECs created prior to 2011 cannot be considered “unused” for purposes of Section 393.1030.2, RSMo.

34. Section 393.1030.1, RSMo makes it clear that the renewable power used for compliance shall constitute 2% of the utility’s sales starting in 2011. RECs created before 2011 cannot “constitute” a portion of sales in 2011.

35. The rules require that utilities list in their compliance reports “the identification, by source and serial number, of any RECs that have been carried forward to a future calendar year.” 4 CSR 240-20.100(7)(A)G. Empire has not demonstrated it has done this for the years 2008 through 2010. Furthermore, the rules do not provide for a way to retroactively bring RECs forward from the past; the rules only provide a mechanism for carrying RECs forward in time from the present.

36. Section 393.1030.2, RSMo permits leftover RECs to carry over from one compliance year to the two subsequent compliance years. Essentially, this enables carrying forward RECs that could have been “used” for compliance but were surplus to a utility’s needs in the year they were created. The statute does not allow past RECs to be resurrected and carried forward from a time when the portfolio standards did not exist yet. 2008, 2009 and 2010 were not compliance years. The compliance period began in 2011, and therefore all RECs used for compliance must have originated on or after January 1, 2011.

37. The RECs Empire retired were from 2008-2009. Therefore, according to the Company’s 2011 RES Compliance Report, Empire is out of compliance in the amount of 81,201

MWh for its non-solar obligations.

COUNT III: SOLAR EXEMPTION

38. Complainants reincorporate lines 1-21 herein by reference.

39. Empire relies on Section 393.1050, RSMo in order to claim it is exempt from all solar requirements under the RES, including its obligation to pay solar rebates (Section 393.1030.3, RSMo) and its obligation to obtain 2% of its portfolio from solar energy (Section 393.1030.1, RSMo).

40. Section 393.1050, RSMo states: “any electrical corporation... 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...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.”

41. The Commission has primary jurisdiction to both determine whether Empire has met the renewable energy requirements of Section 393.1050, RSMo and to determine the validity of the statute in the first instance. *Evans v. Empire District Electric*, 346 S.W.3d 313 (Mo. App. WD 2011).

42. If the Commission is satisfied that Empire met the prerequisite of Section 393.1050, RSMo, Empire must still be held to the terms of the RES because the Section 393.1050 was unlawfully passed or, if initially valid, was repealed. There are three independent reasons, each sufficient in itself, why Section 393.1050, RSMo is a void law:

a. The Legislature may repeal or modify an initiative only 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).

b. 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). Section 393.1050, RSMo was passed as Senate Bill 1181 in May of 2008 and became effective on August 28. The RES was passed by the voters as Proposition C on November 4, 2008 and became effective the same day, thus repealing Section 393.1050, RSMo to the extent of inconsistency. The two statutes are inconsistent in that Section 393.1050 attempts to exempt one electrical corporation from obligations which the RES requires all electrical corporations to meet, including paying out solar rebates and complying with the 2% solar carve-out.

c. Section 393.1050, RSMo is a special law contrary to the Missouri Constitution, Article III, § 40 (28, 30), because there is no rational basis why the exemption should have been crafted to apply only to Empire but not to KCP&L or Ameren. Moreover, no other investor-owned utility realistically could have met the 15%-of-capacity criterion of Section 393.1050, RSMo in the short window between the law's passage and January 20, 2009.

43. Because Section 393.1050, RSMo failed to exempt Empire from its solar obligations under the RES, and because Empire has failed to demonstrate meeting these obligations, Empire is out of compliance in the amount of 1,657 MWh.

RELIEF REQUESTED

WHEREFORE, Complainants pray that the Commission:

1. Find the Empire District Electric Company in non-compliance with Missouri's RES for compliance year 2011 in the amount of 82,858 MWh.

2. Order Empire to pay the minimum financial penalties required by 4 CSR 240-20.100(8), and such other penalties as the Commission deems appropriate.

3. Find that the Ozark Beach Hydroelectric Project does not qualify as a renewable energy resource as defined by Section 393.1025(5), RSMo, and thus RECs from the facility may not be used for compliance with the RES.

4. Find that RECs created prior to the compliance period (prior to 2011) do not qualify as renewable energy resources as defined by Section 393.1025(5), RSMo, and thus cannot be used for compliance with the RES.

5. Find that Empire is not exempt from the solar requirements of the RES, and order Empire to comply with such requirements.

6. Order such other relief as the Commission shall deem just and appropriate.

Respectfully Submitted By:



Andrew Linhares, # 63973
Renew Missouri
910 E Broadway, Ste. 205
Columbia, MO 65201
Andrew@renewmo.org
(314) 471-9973, Fax: (314) 558-8450



Henry Robertson, #29502
Great Rivers Environmental Law Center
705 Olive Street, Suite 614
St. Louis, MO 63101-2208
hrobertson@greatriverslaw.org
(314) 231-4181, Fax: (314) 231-4184

ATTORNEYS FOR COMPLAINANTS

Representing,

Earth Island Institute d/b/a/ Renew Missouri
PJ Wilson
Director
910 E Broadway, Ste. 205
Columbia, MO 65201
pj@renewmo.org
(417) 459-7468, Fax: (314) 558-8450

The Alternative Energy Company, LLC
David E. Fairbank
President
4131 E. White Oak Dr.
Springfield, MO 65809
zfairbank@aenergyco.com
(417) 520-0624, Fax: (417) 823-7720

Missouri Coalition for the Environment
Kat Logan Smith
Executive Director
6267 Delmar Blvd., Ste. 2E
St. Louis, MO 63130
klogansmith@moenviron.org
(314) 727-0600

StraightUp Solar
Dane Glueck
President
9100 Midland Blvd.
St. Louis, MO 63114
dane@straightupsolar.com
(314) 541-3744

Missouri Solar Energy Industries Association
Joe Maxwell
Hagan & Maxwell, LLC
210 E Love Street
Mexico, MO 65265
jmaxwell@hagan-maxwell.com
(573) 721-0927

Missouri Solar Applications, LLC
Vaughn Prost
Chief Executive Officer
P.O. Box 1727
Jefferson City, MO 65102
vsp@mosolarapps.com
(573) 659-8657

Wind on the Wires
Sean Brady
Regional Policy Manager, East
P.O. Box 4072
Wheaton, IL 60189
sbrady@windonthewires.org
(312) 867-0609

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was delivered via electronic mail on the 30th day of January, 2013 to Respondent The Empire District Electric Company.



Andrew Linhares, #63973
Renew Missouri
910 E. Broadway, Ste. 205
Columbia, MO 65201
Andrew@renewmo.org
(314) 471-9973, Fax: (314) 558-8450

ATTORNEY FOR COMPLAINANTS