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.	)	

MOTION TO DISMISS COMPLAINT

The Empire District Electric Company ("Empire"), Respondent in this matter, moves the Missouri Public Service Commission ("Commission") to dismiss, pursuant to 4 CSR 240-2.116(4), the Complaint filed by Complainants Earth Island Institute d/b/a Renew Missouri, the Missouri Coalition for the Environment, the Missouri Solar Energy Industries Association, Wind on the Wires, The Alternative Energy Company, LLC, StraightUp Solar, and Missouri Solar Applications LLC, for the reasons set forth in this motion.

Grounds for Dismissal of Count I of the Complaint (Hydropower)

Complainants allege in Count I of the Complaint that Empire's Ozark Beach hydropower generating facility ("Ozark Beach") does not qualify as a renewable energy resource and, consequently, Empire is out of compliance with its non-solar obligations under the Renewable Energy Standard ("RES"), §§393.1025 and 393.1030, RSMo. Complainants contend that the Ozark Beach facility's "aggregate capacity" exceeds the 10 megawatt limitation in §393.1025(5), RSMo.

The Commission should dismiss Count I of the Complaint because the Commission lacks jurisdiction to grant the relief requested by Complainants. Additionally, the allegations in Count I constitute an unlawful collateral attack on the Commission's July 1, 2010, Revised Order of Rulemaking in Case No. EX-2010-0169.

The RES delegates to the Missouri Department of Natural Resources ("Department") the responsibility to certify electricity generated from renewable resources. Section 393.1030.4, RSMo, provides as follows:

> The department shall, in consultation with the commission, establish by rule a certification process for electricity generated from renewable resources and used to fulfill the requirements of subsection 1 of this section. Certification criteria for renewable energy generation shall be determined by factors that include fuel type, technology, and the environmental impacts of the generating facility. Renewable energy facilities shall not cause undue adverse air, water, or land use impacts, including impacts associated with the gathering of generation feed-stocks. If any amount of fossil fuel is used with renewable energy resources only the portion of electrical output attributable to renewable energy resources shall be used to fulfill the portfolio requirements.

The Department's rule – 10 CSR 140-8.010(2)(A)8 – defines "hydropower" in relevant part as follows: "[h]ydropower, not including pumped storage, that does not require a new diversion or impoundment of water and that *each generator has a nameplate rating of ten megawatts (10 MW) or less*" (emphasis added). As discussed *infra*, defining qualifying hydropower on an individual generator nameplate basis is fully consistent with §393.1025(5), RSMo. It also is fully consistent with the manner in which Empire has certified its compliance with the RES. In any event, the Commission has no statutory authority to determine the validity of a rule promulgated by the Department. Rather, §536.050(1), RSMo, vests the judicial branch with exclusive jurisdiction to issue a declaratory judgment to determine the validity of 10 CSR 140-8.010(2)(A)8. *See, Kansas Ass'n. of Private Investigators v. Mulvihill*, 35 S.W.3d 425, 431 (Mo. App. W.D. 2000).[1] Further, because the Commission is an administrative body whose authority is limited by statute, it "has no power to exercise or perform a judicial function." *State ex rel. Laundry v. Pub. Serv. Comm'n*, 34 S.W.2d 37, 46 (Mo. 1931).

Count I of the Complaint also presents a challenge to the definition of the term "hydropower" in Commission Rule 4 CSR 240-20.100(1)(K)8. This claim is barred because Complainants failed to address this aspect of the rule when the Commission originally proposed it and, further, failed to timely challenge the language of the rule after the Commission finally adopted it.

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[1] The Court of Appeals noted that the declaratory judgment remedy "was considered an exception to the requirement of exhaustion of administrative remedies." *Id.* at ftnt. 13.

The Commission included the term "hydropower generator" in its proposed rule in Case No. EX-2010-0169. No one, including those Complainants that actually filed written comments or testified in that case, said anything about this aspect of the proposed rule, so it was adopted by the Commission without modification. Only now have Complainants taken note of the language and registered their objections to the Commission's rule.

To the extent Complainants were dissatisfied with the definition of hydropower adopted in the Commission's final order in Case No. EX-2010-0169, their exclusive remedy was to seek judicial review of the Commission's rulemaking order. *See, State ex rel. Atmos Energy Corp. v. Pub. Serv. Comm'n,* 103 S.W.3d 753, 758 (Mo. banc 2003); *Union Elec. Co. v. Clark*, 511 S.W.2d 822, 825 (Mo. 1974). But Complainants did not do so, and their failure to timely act was jurisdictional. *Id.* The Commission cannot now entertain a *de facto* challenge to its rulemaking order when the Complainants failed to bring their concerns and objections to the Commission's attention when the rule was under consideration, and further failed to timely avail themselves of the remedy of judicial review. *See,* §386.510 RSMo.

Count I also is unlawful because §386.550, RSMo, bars any collateral attack on an order of the Commission.[2] That statue states that "[i]n all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." The statutory bar "is declaratory of the law's solicitude for the repose of final judgments." *State ex rel. Harline v. Pub. Serv. Comm'n*, 343 S.W.2d 177, 184 (Mo. App. W.D. 1960).

Moreover, the Commission's Revised Order of Rulemaking in Case No. EX-2010-0169 (codified at 4 CSR 240-20.100) has been found to be lawful and reasonable by the Missouri Court of Appeals in *State ex rel. Missouri Energy Dev. Assn. v. Pub. Serv.Comm'n*, 386 S.W.3d 165 (Mo. App. W.D. 2012). That determination is conclusive for purposes of this case.

But even if it were possible to overcome the problems with Count I that deny the Commission jurisdiction to determine the validity of both 10 CSR 140-8.010(2)8 and 4 CSR 240-20.100(1)(K)8,

[2] *See, State ex rel. Office of Pub. Counsel v. Pub. Serv. Comm'n*, 301 S.W.3d 556, 566 (Mo. App. W.D. 2009); *State ex rel. MoGas Pipeline LLC v. Pub. Serv. Comm'n*, 395 S.W.3d 562, 566 (Mo. App. W.D. 2013).

Complainants' argument that the hydroelectric generators at Ozark Beach do not qualify as a "renewable energy resource" under §393.1025(5), RSMo, fails because the interpretation of that statute urged by Complainants does not conform to well established rules governing statutory interpretation.

Section 393.1025(5), RSMo, defines "renewable energy resources" to include "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." Complainants contend that the ten megawatt limitation included in that definition applies to the combined turbine rating of all hydroelectric generators at Ozark Beach.[3] But that contention ignores well established legal rules that require the Commission to interpret the word "nameplate" according to its plain and ordinary meaning.

Under Missouri law, the primary rule governing statutory interpretation is to ascertain the intent of the legislature from the language used, to give effect to that intent, and to consider the words used in the statute according to their ordinary meanings. *Gurley v. Missouri Bd. of Private Investigator Examiners*, 361 S.W.3d 406, 413 (Mo. banc 2012). And that rule applies equally to statutes enacted by the General Assembly and statutes, like the RES, that are approved by voters through the initiative process. *Missourians for Honest Elections*, *supra* at 775.

In determining legislative intent, words and phrases used in a statute are taken in their ordinary and usual sense, *Smith v. Shaw*, 159 S.W.3d 830, 834 (Mo. banc 2005), and the plain and ordinary meaning of those and phrases is derived from the dictionary, *Hemeyer v. KRCG-TV*, 6 S.W.3d 880, 881 (Mo. banc 1999). *Webster's New Universal Unabridged Dictionary* (2003 ed.) identifies the word "nameplate" as a noun and defines it as "a flat, usually rectangular piece of metal, wood, or plastic on which the name of a person, company, etc., is printed or engraved."

Based on the dictionary definition and the applicable rules of statutory interpretation discussed *supra*, the Commission must conclude that, as a matter of law, the phrase "nameplate rating" used in §393.1025.5, RSMo, was intended to mean *the rating of a generator as printed or engraved on the emblem or nameplate affixed to that generator*. Accordingly, the Commission's rule, like the

[3] Complaint at ¶¶ 26 and 28.

Department's rule, correctly interprets and applies the statutory language in accordance with its plain and ordinary meaning.

Further evidence that the dictionary definition accurately reflects the legislative intent is provided in the supporting affidavit of Tim N. Wilson, Empire's Director of Energy Supply Services, which includes a picture of the nameplate that is affixed to each of the four generators at Ozark Beach and a description of the information included on each of those nameplates. Mr. Wilson's affidavit further states that the Ozark Beach facility – i.e., the generating facility comprising the four hydroelectric generating units, each of which has an individual nameplate rating of 4 MW – has no engraved or embossed nameplate that shows an aggregate capacity of 16 MW for the entire facility. Indeed, Mr. Wilson's affidavit makes clear that no generating facility consisting of more than one generator has a facility nameplate rating. Nameplates, and the rating information included on nameplates, are only found on individual generators themselves.

Complainants allege in Paragraph 26 of the Complaint that "it is common industry practice to use the word 'nameplate' to refer to the combined turbine rating of a hydroelectric facility." Even if that allegation is true, such usage is nothing more than a metaphorical reference that is employed solely for convenience, much like using the word "Washington" is sometimes used to refer to the entire federal government. But casual figures of speech are not dictionary definitions, so rules of statutory interpretation applicable in Missouri do not allow courts – or the Commission – to look to, or rely on, such generalizations to determine either the meaning of words used in statutes or the legislative intent embodied on those words.

Grounds for Dismissal of Count II of the Complaint (Banked RECs)

Count II of the Complaint alleges that Empire has failed to comply with the RES by carrying forward renewable energy credits that were surplus to its needs in the year they were created. This allegation fails to state a claim upon which relief can be granted and, as such, should be dismissed.

Section 393.1025(4), RSMo, defines a "renewable energy credit" or "REC" as "a tradable certificate of proof that one megawatt hour of electricity has been generated from renewable energy

resource." That definition is significant because §393.1030(1), RSMo, which establishes the portfolio requirement for all Missouri electric utilities to generate or purchase electricity generated by renewable resources, specifically states that "[a] utility may comply with the [renewable energy] standard in whole or in part by purchasing RECs." Subsection 2 of that same statute further states that: "[a]n unused [renewable energy] credit may exist up to three years."

Consistent with the statutory language cited in the preceding paragraph, Empire, like other Missouri investor-owned electric utilities, began accumulating and "banking" RECs soon after the January 1, 2008, effective date of the RES. Complainants claim that such an action was inappropriate because they interpret the RES as prohibiting the accumulation and banking of RECs until 2011, the first year the portfolio requirements contained in §393.1030(1), RSMo took effect. The fatal flaw in Complainants' allegation is that there is no language in the statute to support this claim.

As noted above, §393.1030(2), RSMo, simply states that an unused REC can exist up to three years from the date of its creation. There is no language anywhere in the statute that limits when a REC can be created, and there is most certainly no language that says a REC used to comply with the portfolio standard could not be created until 2011. Complainants' reliance on their apprehension of the voters' intent when approving the Renewable Energy Standard law is misplaced because the voter intent urged by Complainants is not in accord with the language used in the law.

An agency charged with promulgating regulations to implement the provisions of an initiative petition "cannot by rule change the substantive requirements of the law." *Missourians for Honest Elections, supra* at 772. That case considered a challenge to a rule adopted by the Missouri Elections Commission ("MEC"). The plaintiffs argued for the trial court to invalidate aspects of the MEC's rule relying on plaintiffs' representations as to the intent of the electorate in approving a ballot initiative. "It is, of course, impossible to determine the precise intention of the electorate", the appellate court observed, and it rejected the plaintiffs' appeal. The court further held that it had no authority "to ignore the express language of an initiative proposal and find a voter intent not expressed in the language of the proposition." *Id.* at 775. "We have no right to read into an act an intent contrary to the phraseology." *Id.*

In the current case, there is no language in either §§393.1025 or 393.1030, RSMo, that supports the arguments by Complainants that Empire was not permitted to begin accumulating RECs in 2008, when the RES went into effect, for use within the three-year period RECs remain viable. Complainants are asking the Commission to arbitrarily add language to §393.1030(2), RSMo, that would prohibit a utility from accumulating and banking RECs prior to 2011 based on Complainants' divination of the intent of the electorate. But as the court in *Missourians for Fair Elections* observed, that is inappropriate. There is nothing in the enabling legislation related to §393.1030(2), RSMo, or elsewhere in Missouri law that authorizes the Commission to add a material qualifier where none was contained in the initiative proposition passed by the voters of this state.

Grounds for Dismissal of Count III of the Complaint (Solar Exemption)

With Count III of their Complaint, the Complainants seek a declaration from this Commission that §393.1050, RSMo, is a "void law," and assert that the Missouri Court of Appeals held that the Commission may, in the first instance, "determine the validity" of a statute.[4] Count III of the Complaint fails to state a claim upon which relief may be granted by this Commission, and, therefore, must be dismissed.

In Paragraph 41 of the Complaint, Complainants, citing *Evans v. Empire District Electric Co.*, 346 S.W.3d 313 (Mo. App. W.D. 2011), assert that the Commission has primary jurisdiction "to determine the validity of the statute in the first instance." The Western District Court of Appeals, however, made no such ruling. To the contrary, in *Evans* the court affirmed the general principle that the Commission "has no authority to declare a statute invalid." *Id.* at 318; *see also, Straube v. Bowling Green Gas Co.*, 227 S.W.2d 666 (Mo. 1950) (Commission has no authority to pronounce any principle of law or equity). In *Evans* the court determined that the Commission "has been given the statutory authority to *interpret* statutes" and that any such interpretation by the Commission will be given great weight by the courts. 346 S.W.3d at 318 (emphasis added).

[4] Complaint, ¶¶41-42.

> [W]hen the PSC is confronted with a new or amended statute, it must take that statute and interpret its meaning and application to the facts at hand. In other words, the PSC must construe the statute in light of the entire statutory scheme. . . . 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. Appellants are able to file a complaint with the PSC under 4 CSR 240-2.070 and section 386.390 and the PSC is able to grant relief.

Id. at 318-319.

The Complainants do not seek the type of relief contemplated by the court in *Evans*. Instead, Count III of the Complaint seeks a declaration from this Commission that §393.1050, RSMo, is a "void law." Because the Commission lacks the statutory authority to declare a statute invalid, Count III of the Complaint must be dismissed.

Even if the Commission had the authority necessary to consider Count III of the Complaint and declare whether §393.1050, RSMo, is valid, Complainants' arguments that the statute is unlawful also fail on the merits. Paragraph 42 of the Complaint sets out three independent reasons why Complainants believe §393.1050, RSMo, is unlawful. But, as the discussion which follows demonstrates, none of those reasons is supported by applicable law.

First, Complainants argue that the General Assembly may repeal or modify an initiative only after it is passed, not while it is in the process of enactment, and they cite *State ex rel. Drain v. Becker*, 240 S.W. 229 (Mo. banc 1922), as support for their argument. But the facts underlying *Drain* involved an attempt by the General Assembly to repeal or modify a statute while a citizen-initiated referendum on the statute was pending. Consequently, the holdings in *Drain* apply only to statutes that are subject to the referendum process. And although the rights to enact or repeal laws through initiative or referendum are both guaranteed by Article 3, §49 of the Missouri Constitution, those two rights differ materially.

The most significant difference is that initiative is the process through which citizens can enact laws independent of the General Assembly, while referendum is the process through which citizens can affirm or reject laws previously enacted by that same body. In *Drain*, the court confronted only the question of whether the General Assembly could act on legislation that is subject to a referendum during the period that precedes the referendum election. The court concluded that once the people invoke their

right to a referendum – which, in essence, is the right of citizens to pass judgment on legislation already adopted by both houses of the General Assembly – the legislature is powerless to modify or repeal that legislation until the people have had their say. The legal principle adopted by the court in *Drain* is analogous to the well-established rule that prohibits administrative agencies and lower courts from taking action on matters while those matters are on appeal.

In contrast, initiative does not involve citizens passing judgment on laws previously approved by the legislature. Instead, initiative gives citizens the same authority as the General Assembly to propose and pass laws. Moreover, there is nothing in the constitution that suggests or requires that the independent legislative powers of citizens and the General Assembly must be performed serially. In fact, the section of the Missouri Constitution that reserves to citizens the power of initiative specifically states that the peoples' initiative authority is "independent of the general assembly."[5] That same phrase, however, does not apply to the authority to approve or reject legislative acts through referenda.

Although language in *Drain* can be read to suggest that the court's holding prohibiting the General Assembly from exercising certain legislative powers during the pendency of a referendum also applies to initiative, that language is *dicta*. The court's holdings in *Drain* only apply to and limit the General Assembly's powers during the pendency of a referendum, and Empire has not been able to find a single case since *Drain* where a Missouri appellate court has been asked to decide whether, and to what extent, the General Assembly's legislative authority is limited by the initiative process. In the absence of case law addressing that question, it would be wrong for the Commission to infer any such limitation on the General Assembly's legislative powers.

Complainants' second reason for asserting §393.1050, RSMo, is unlawful is based on two assumed premises. First, Complainants assume that the solar exemption granted by that statute is inconsistent with, and therefore repugnant to, the RES. Second, they assume that because §393.1050, RSMo, was passed and took effect before the RES, the latter statute repeals the former to the extent they

[5] Missouri Const., Art. 3, §49.

are inconsistent. But neither premise is supported by applicable case law because, as a matter of law, §393.1050, RSMo, is not inconsistent with or repugnant to the RES.

When two statutory provisions covering the same subject matter are unambiguous standing separately but in apparent conflict when considered together, a reviewing court must attempt to harmonize them and give effect to both whenever possible. *South Metro. Fire Prot. Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. banc 2009). Where one statute deals with a subject in general and comprehensive terms while another statute deals with part of the same subject in a more minute and definite way, the two should be read together and harmonized whenever possible. But to the extent of any repugnancy between them, the more specific statute will prevail over the general. *Laughlin v. Forgrave*, 432 S.W.2d 308, 313 (Mo. banc 1968).

Missouri case law also requires that all consistent statutes relating to the same subject are *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). In addition, courts presume that any change in a statute is intended to have some effect, and will not charge the legislature with having done a meaningless act. *State v. Swoboda*, 658 S.W.2d 24, 26 (Mo. banc 1983).

The cases cited in the preceding paragraphs establish that courts are loathe to find two statutes, regardless of when they were passed, to be irreconcilably inconsistent with one another. Courts are reluctant to invalidate actions of the General Assembly and will do so only when circumstances leave them no alternative. And the 1991 Missouri Supreme Court's *en banc* decision in *Berdella v. Pender*, 821 S.W.2d 846, illustrates how far courts have gone to avoid finding that two statutes in apparent conflict are, as a matter of law, irreconcilably inconsistent.

In *Berdella* the court confronted a situation involving two bills passed during the General Assembly's 1990 legislative session. One bill repealed in its entirety Chapter 460 of the Revised Statutes of Missouri. The second bill "amended" two sections of that same chapter. The governor signed into law the bill that repealing Chapter 460 twenty-six days before he signed the second bill. The question presented to the court for decision was whether two statutes, one which repealed an entire statutory

chapter and another that purported to amend two sections of that repealed chapter, wereirreconcilably inconsistent. The court concluded they were not, and based its decision on the fact that neither bill specifically repealed the other. The court concluded that laws that are *in pari materia* should not be found to be inconsistent unless one act specifically repeals the other or the two are inherently in conflict with one another. Applying those principles, the court held that even the extreme facts in *Berdella* satisfied neither criterion. *Id.* at 849.

Berdella shows that Missouri's courts have established an extremely high threshold that must be satisfied to invalidate a statute based on grounds that it is irreconcilably in conflict with another statute. The apparent conflict between the RES and §393.1050, RSMo, which is alleged in Count III of the Complaint, does not come close to reaching that threshold. Section 393.1050, RSMo, merely exempts from the solar rebate obligations created by the RES any electric utility that, by January 20, 2009, equals or exceeds the renewable energy portfolio requirements prescribed in §393.1030.1(4), RSMo. The General Assembly's action did not change any of the overall renewable energy portfolio standards and requirements created by the RES. Instead, the legislature merely determined that any utility who achieved by 2009 renewable energy portfolio objectives not otherwise mandated until 2021 should be treated differently than utilities that had not achieved those objectives. Indeed, as discussed *infra*, failing to enact the exemption would have penalized utilities like Empire by forcing them to achieve compliance results greater than those prescribed by the RES. Consequently, in enacting §393.1050, RSMo, the General Assembly acted in a manner that is fully consistent with the overall objectives of the RES and also is fully within the scope of the legislature's own legislative powers and prerogatives.

But the reasonableness of the General Assembly's action aside, the biggest obstacle confronting Complainants' argument that the RES is inconsistent with §393.1050, RSMo, is the language used in that statute itself, because, as a matter of law, that language makes it impossible for the statute to be in conflict with the RES or any other Missouri statute.

Section 393.1050, RSMo, begins with the phrase "[n]otwithstanding any other provision of law," and as the Missouri Supreme Court observed in *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630

(banc 2007), the presence of a "notwithstanding clause" in a statute does not create conflict, but, instead, eliminates any conflict that would have existed in the absence of such a clause. *Id.* pp. 631-31. Consequently, it is impossible for §393.1050, RSMo, to be contrary to or in conflict with the RES. And because Empire is a utility who by January 20, 2009, achieved an amount of eligible renewable energy capacity equal to fifteen percent of its total owned fossil fuel-fired generating capacity, Empire "shall be exempt thereafter from meeting any mandated solar renewable energy standard requirements."

The final reason Complainants contend §393.1050, RSMo, is unlawful is because they allege the statute is a special law contrary to Article 3, §40 of the Missouri Constitution. But that argument also fails because it is not supported by applicable case law.

A special law relates to persons or things *of* a class, while a general law relates to things *as* a class. *Bd. of Ed. of St. Louis v. State Bd. of Ed.*, 271 S.W.3d 1, 9 (Mo. banc 2012). Special laws can be close-ended or open-ended. Close-ended laws are based on immutable characteristics, such as historical facts, geography, or constitutional status. Such laws are facially special and are presumed to be unconstitutional. *Id.* p. 10. In contrast, open-ended laws are based on factors that can change, are not facially special, and are presumed to be constitutional. *Jefferson County Fire Protection Districts Assn. v. Blunt*, 205 S.W.3d 866 (Mo. banc 2006). But even the presumption against a close-ended, facially special law can be overcome if there is a reasonable basis for the law's classifications, and for purposes of making that determination Missouri courts employ a test similar to the "rational basis test" used in equal protection cases. *Estate of Overbey v. Chad Franklin Nat. Auto Sales North*, 361 S.W.3d 364, 380 (Mo. banc 2012).

Based on the precedents cited in the preceding paragraph, §393.1050, RSMo, is not an open-ended law because the sub-class of utilities to which it applies – utilities who, by January 20, 2009, achieve an amount of eligible renewable energy technology capacity equal to or greater than fifteen percent of the utility's total owned fossil-fired generating capacity – could change between the date the statute became effective and the date (January 20, 2009) the members of the class would be determined. Such an open-ended law is not facially special and is presumed to be constitutional, and any party wishing

to contest the constitutionality of such a statute must show that the classification adopted by the General Assembly is arbitrary and without a rational relationship to the legislative purpose.

But even if §393.1050, RSMo, is determined to be a close-ended law, it is still constitutional because it passes the "rational basis test." Under that test, a court will uphold a statute if the court finds a reasonably conceivable set of facts that provide a rational basis for the classification created by the General Assembly. *Estate of Overbey*, p. 378. Furthermore, judicial review under the rational basis test is highly deferential to the legislative branch, and courts will not question the wisdom, social desirability, or economic policy underlying a statute. *Comm'n for Ed. Equality v. State*, 294 S.W.3d 477, 491 (Mo. banc 2009). Indeed, to uphold a statute subject to rational basis review a court need only find that there is a plausible basis for the statute's classifications. *Kansas City Premier Apartments, Inc., v. Missouri Real Estate Comm'n*, 344 S.W.3d 160, 170 (Mo. banc 2011).

While it is not possible to determine all the considerations that caused the General Assembly to enact §393.1050, RSMo, three obvious considerations show that there was a rational basis for the legislature's action. First, it was rational for the General Assembly to conclude that any utility who by January 20, 2009, was able to achieve all of the overall renewable energy portfolio objectives prescribed in the RES could – or should – be exempted from the specific requirements of §393.1030.1, RSMo, that relate to solar energy. Second, it was rational for the General Assembly to conclude that if it did not exempt such utilities from the solar energy provisions of the RES those utilities would, in effect, be forced to bear a more onerous compliance burden than utilities that had not already satisfied all the RES requirements. This is true because without the exemption utilities like Empire would have had to add an increment of compliance for solar energy to each of overall compliance benchmarks prescribed in §§393.1030(1) through (4), RSMo. Such a circumstance would impose on utilities who qualified for the exemption a greater RES compliance burden than that imposed on other utilities, and it was reasonable for the legislature to conclude such a disparity was unwarranted. Finally, the General Assembly's action was rational because although it exempted certain qualifying utilities from the solar requirement of the

RES, all electric utilities were still required to meet each of the portfolio benchmarks in §§393.1030(1) through (4), RSMo.

The General Assembly's action maintained the overall purpose of the initiative – i.e. ensuring that Missouri's electric utilities achieved all of the renewable energy compliance benchmarks is subsection 1 of the RES – while slightly modifying the manner of compliance for any utility who by January 20, 2009, already had satisfied all of those benchmarks. Whether or not the Complainants agree with that result is irrelevant. As long as there was a plausible basis for the General Assembly's action – as there most certainly was here – a reviewing court must defer to the legislature's decision and uphold the statute.

WHEREFORE, Respondent Empire requests that the Commission dismiss each Count of the Complaint for the reasons stated in this motion.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent via electronic mail on this 23rd day of July, 2013, to:

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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

State of Missouri)
) ss.
County of Jasper)

AFFIDAVIT

The undersigned Tim N. Wilson, being duly sworn, deposes and states as follows:

1. My name is Tim N. Wilson, and my business address is 602 South Joplin Avenue, Joplin Missouri. I am employed by The Empire District Electric Company ("Empire" or "the Company") as Director of Energy Supply Services.

2. I graduated from Pittsburg State University in 2000 with a Bachelor of Science degree in Education, Mathematics, and in 2010 I graduated from Missouri State University with a Master of Science degree in Project Management. Over the course of my employment I also have attended numerous electric industry training programs and seminars.

3. My career with Empire began in 1999 when I was hired as an Associate Planning Analyst in the Company's Strategic Planning Department. Since that time I have been promoted to various other positions, including Planning Analyst, Energy Trader, Energy Supply Planning and Operations Analyst, and Manager of Renewable and Strategic Initiatives. I assumed my current position in 2010.

4. Over the course of my career my job responsibilities have allowed me to gain hands-on knowledge regarding the individual electric generating units that Empire uses to satisfy the needs of its customers for electricity, as well as knowledge regarding the facilities where those generating units are housed. My job responsibilities also have required that I gain knowledge regarding terminology commonly used in the electric industry related to individual generators and generating facilities. I have been involved in gathering and collecting data associated with Empire's required capacity and heat rate tests for each of its generating facilities. In addition, I have been involved in multiple construction projects in various capacities including the Iatan 1 air quality control system (AQCS) upgrade, Iatan 2

construction, Plum Point construction, Empire's current Asbury AQCS project, and Empire's current Riverton 12 conversion to combined cycle project. I also lead Empire's efforts in negotiating and signing Empire's contract for the Meridian Way Wind Farm.

5. In the electric industry, the term "nameplate" means the metal plate affixed to each individual electric generating unit that includes information such as the identity of the unit's manufacturer and the generator's capacity rating (i.e. the amount of electricity the generator is capable of generating). A photograph showing one of the individual nameplates that are attached to each of the four generating units at Empire's Ozark Beach hydroelectric generating facility ("Ozark Beach") is attached to my affidavit to illustrate my point. This photograph shows the information included on the nameplates of each of the four hydroelectric generators housed at Ozark Beach, including the 4 MW capacity rating for each generator.

6. There is no such thing as a "nameplate" for an entire generating facility (i.e. an engraved or embossed plate showing the aggregate capacity of all generators located at the facility). Using Ozark Beach as an example, there is no nameplate anywhere in that facility that shows an aggregate capacity rating of 16 MW, which is the total capacity of all the generators located at Ozark Beach. The only nameplates that exist at Ozark Beach are the nameplates affixed to each of the four hydroelectric generators, and the information included on each of those nameplates is described in the preceding paragraph and shown on the photographs that are attached to my affidavit.

7. I am aware that the complainants in Case No. EC-2013-0378 allege that it is "common industry practice to use the word 'nameplate' to refer to the combined turbine rating of a hydroelectric facility." Although such references may be made from time to time, they are nothing more than figures of speech used for convenience. They are not intended to be taken literally because, as I stated previously, only individual generators have nameplates. I have searched Empire's records and I cannot find a single instance where the Company has referred to Ozark Beach, or to any of the Company's fossil-fuel facilities that comprise more than one generator, in the manner alleged by the complainants.

BY: _____

TIM N. WILSON

Subscribed and sworn to before me, the undersigned Notary Public in and for the county and state aforesaid, on the 23rd day of July, 2013.

NOTARY PUBLIC NOTARY SEAL STATE OF MISSOURI

JANET L. HUNLEY
My Commission Expires
September 20, 2015
Jasper County
Commission #11243846

_____

Notary Public


A.C. GENERATOR SERIAL NO.
K.W. 4000 P.F. 80 % VOLTS.
AMPS. CY. 60 PH. R.P.M.
TEMP. RISE PC. CONT. FULL LOAD
PC. % OVERLOAD HOURS
125 VOLTS.
EXCITATION AMPS. CONT. FULL LOAD
AMPS. AT % OVERLOAD
ALLIS-CHALMERS
MANUFACTURING CO.
MILWAUKEE, WIS., U. S. A.