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STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

TRANSCRIPT OF PROCEEDINGS

Oral Argument

September 12, 2013
Jefferson City, Missouri
Volume II

EARTH ISLAND INSTITUTE d/b/a)
RENEW MISSOURI, et al.,)
)
Petitioner,)
)Case No.
vs.)EC-2013-0377, et al.
)
UNION ELECTRIC COMPANY d/b/a)
AMEREN MISSOURI)
)
Respondent.)

MORRIS L. WOODRUFF, Presiding
CHIEF REGULATORY JUDGE
ROBERT S. KENNEY, CHAIRMAN
STEPHEN M. STOLL,
COMMISSIONERS

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1 P R O C E E D I N G S

2 JUDGE WOODRUFF: All right. I
3 believe we're ready to get started here. We're
4 here for an oral argument regarding the various
5 Motions to Dismiss and for Summary Determination
6 that have been filed in this case.

7 Before we get started, I want to make
8 sure -- we've a couple Commissioners in St. Louis
9 who will be participating remotely. Commissioner
10 Stoll and Chairman Kenny, can you hear me?

11 COMMISSIONER STOLL: Yes. Yes, we
12 can hear you.

13 JUDGE WOODRUFF: Okay. Very good.
14 Commissioner Bill Kenney was going to be calling in
15 later, but we're going to go ahead and start
16 without him, and he may join us later.

17 Let's go ahead and begin with entries
18 of appearance, beginning with Renew -- Renew
19 Missouri.

20 MR. ROBERTSON: Henry Robertson,
21 Great Rivers Environmental Law Center, 705 Olive
22 Street, Suite 614, St. Louis, Missouri, 63101,
23 representing Renew Missouri, et al.

24 JUDGE WOODRUFF: All right. And for
25 the Staff?

1 MS. HERNANDEZ: Good morning.
2 Jennifer Hernandez and Nathan Williams and Kevin
3 Thompson appearing on behalf of the Staff of the
4 Missouri Public Service Commission. Our address is
5 P.O. Box 360, Jefferson City, Missouri, 65102.
6 Thank you.

7 JUDGE WOODRUFF: And Public Counsel?

8 MR. MILLS: Let the record reflect
9 the appearance of Lewis Mills. My address is P.O.
10 Box 2230, Jefferson City, Missouri, 65102.

11 JUDGE WOODRUFF: For Ameren Missouri?

12 MR. BYRNE: Tom Byrne appearing on
13 behalf of Ameren Missouri. My address is 1901
14 Chouteau Avenue, St. Louis, Missouri, 63103.

15 JUDGE WOODRUFF: For Empire?

16 MR. MITTEN: Russ Mitten appearing on
17 behalf of the Empire District Electric Company. My
18 address is 312 East Capitol Avenue, Jefferson City,
19 Missouri, 65102.

20 JUDGE WOODRUFF: It looks like MIEC
21 is in the audience?

22 MR. DOWNEY: Yes, your Honor. Edward
23 F. Downey, Bryan Cave, LLP, representing MIEC. My
24 address is 221 Bolivar Street, Suite 101, Jefferson
25 City, Missouri, 65102.

1 JUDGE WOODRUFF: Okay. Anyone else
2 that I've missed? All right. Well, we're here for
3 oral argument. And how I envision this is
4 basically letting each party give their -- give
5 their statement. And Commissioners can ask
6 questions as they like.

7 I anticipate this being Court-type
8 argument where if the Commissioners have questions
9 during the proceeding, they -- they should feel
10 free to interrupt.

11 And then I'll give Commissioners a
12 chance to -- to ask further questions as -- as they
13 see fit after the presentation has ended.

14 And then I'll give you all a chance
15 to make a final summation at the end of the
16 proceedings.

17 There are three motions, I believe,
18 that are before the Commission right now.
19 One would be a Motion for Summary Determination by
20 Renew Missouri.

21 Then there's a Motion to Dismiss
22 filed by Empire and a Motion to Dismiss by -- filed
23 by Ameren.

24 You can argue about all three of them
25 as -- as you like. And as far as the order, we'll

1 start with Renew Missouri.

2 MR. MILLS: Judge before, we get too
3 deeply involved in the merits of the argument, I do
4 not intend to participate actively in this oral
5 argument today, and I would request to be excused.

6 JUDGE WOODRUFF: You may be excused.

7 MR. MILLS: Thank you.

8 ORAL ARGUMENT

9 BY MR. ROBERTSON:

10 MR. ROBERTSON: May it please the
11 Commission and Judge Woodruff. We are now in the
12 third year of the RES, Renewable Energy Standard.
13 And apart from the solar rebate, it's not working.

14 Ameren has done nothing to satisfy
15 the non-solar arrest obligations of the statute
16 while Empire insists that it is exempt from the
17 solar obligations.

18 Now, we have raised four issues in
19 these complaints, partly to correct
20 misinterpretations of the statute and partly to
21 exhaust administrative remedies.

22 The first issue is the definition of
23 hydro power name plate rating. Statute says hydro
24 power with a name plate rating of 10 megawatts or
25 less. That's singular.

1 Now, Ameren's Kiakuck plant, we now
2 know, has 15 generators, each of them a little
3 under 10 megawatts, so Ameren claims that the
4 entire facility is eligible as a renewable energy
5 resource. And Empire claims the same for the 16
6 megawatt Ozark Beach facility.

7 But the 10 megawatt limit in the
8 statute is rendered meaningless if this
9 interpretation is allowed. I mean, if Ameren
10 extended Kiakuck clear across the Mississippi and
11 had 200 generators, the 10 megawatt limit would be
12 meaningless.

13 If there were a dam with one 100
14 megawatt generator, it would not be eligible. But
15 the same dam, if it had 10 generators would be
16 eligible. That does not make any sense.

17 The purpose of the 10 megawatt limit
18 is to restrict the of ever hydro facilities. And
19 that is -- and that makes sense only if you
20 consider the total, the sum of the generator name
21 plate ratings of the facility.

22 JUDGE WOODRUFF: Mr. Robertson, I
23 hate to interrupt already, but I do have a question
24 that I've been wondering about for a long time on
25 this hydro power generators.

1 As I recall, several years ago, there was
2 talk about trying to create hydro power -- flow of
3 the river type hydro power where you would put --
4 for lack of a better expression, I guess, it would
5 be like windmills under the water that would churn
6 with the flow of the stream. Was that what was
7 intended by this?

8 MR. ROBERTSON: No. I'm not sure --
9 that was a free flow power -- I'm not sure when
10 that popped up. The idea was to scatter these
11 little generators all over the floor of the
12 Mississippi.

13 That could pose a difficult question
14 under the statute because I don't know how you
15 would determine the facility size. I don't know
16 that would you have to wire these up somehow. I
17 don't know how that would work. And it was not
18 contemplated, I don't think, by the statute.

19 JUDGE WOODRUFF: Okay. Thank you.

20 MR. ROBERTSON: Now, Ameren and
21 Empire can shout as loud as they like that their
22 definition of the name plate rating is the only
23 one, but we have shown conclusively that it is not.

24 So just to take a few examples. FERC
25 Form 1 says that the total installed capacity of a

1 hydro-powered facility is the generator name plate
2 rating in megawatts. And so Kiakuck is listed at
3 127 megawatts. Ozark Beach is listed at 16
4 megawatts. That's the aggregate plant capacity
5 that matters to FERC.

6 The North American Renewables
7 Registry, the Commission's tracking entity, has a
8 certificate and it says the name plate capacity
9 means the name plate capacity of the facility. And
10 so Kiakuck has reported at 134 megawatts and Ozark
11 Beach at 16. Again, it's the sum of the
12 generators that counts, the whole facility.

13 Now, Ameren and Empire attempt to
14 argue that -- well, to deny that name plate rating
15 and name plate capacity are the same thing. But we
16 have filed expert testimony that says they are
17 synonymous.

18 And furthermore, the physical
19 generator name plate gives the rating in kilowatts
20 or megawatts, and that's the measure of capacity.
21 So they are the same thing.

22 Ameren has a PPA with a wind farm in
23 Iowa called Pioneer Prairie. In their RES
24 compliance filings, they have submitted an
25 affidavit from Pioneer Prairie that says the name

1 plate capacity of the wind farm is 300 megawatts.
2 That is the sum total of the 62 or 65 wind turbine
3 generators, the aggregate again of the facilities.

4 And Ameren in its 2012 compliance
5 reports says that it has 102.3 megawatts of name
6 generation from Pioneer Prairie. Again, there is
7 no single wind turbine that's 102 megawatts.

8 Empire has a statute that it says
9 allows it to escape solar obligations. And under
10 that statute, it reports that it has --

11 COMMISSIONER KENNEY: Mr. Robertson?

12 MR. ROBERTSON: Yes, Chairman.

13 COMMISSIONER KENNEY: I want to move
14 on. I want to come back to this issue of the hydro
15 power name plate rating issue before we move on to
16 the solar issue.

17 How do you get around -- and how do
18 we get around the fact that we have a rule
19 promulgated by the Department of Natural Resources
20 that specifically allows for the counting of each
21 individual generator?

22 MR. ROBERTSON: Well, you don't. We
23 have to deal with DNR separately. Obviously, we
24 cannot attack their rule in this complaint
25 proceeding for the PSC. You have no jurisdiction

1 over DNR. So it requires two separate processes.

2 CHAIRMAN ROBERT KENNEY: So what rule
3 of ours are you -- are you attempting to attack?

4 MR. ROBERTSON: I'm not attempting to
5 attack the rule. I actually think that it can be
6 interpreted consistently with our position. It
7 says generator name plate ratings of 10 megawatts.
8 It doesn't say whether those are to be considered
9 individually or in aggregate. So it is susceptible
10 to --

11 COMMISSIONER KENNEY: So it's
12 susceptible to multiple interpretations. Is that
13 what you were about to say?

14 MR. ROBERTSON: It's -- well,
15 susceptible to two interpretations yes.

16 COMMISSIONER KENNEY: So let's --
17 let's assume you're saying the statute is
18 susceptible to two interpretations.

19 MR. ROBERTSON: No.

20 CHAIRMAN ROBERT KENNEY: That the
21 statute provides authority to the Commission and to
22 Department of Natural Resources to promulgate rules
23 to effectuate the statute. And if the statute is
24 clear -- I mean, if the rule is clear, how -- how
25 can we do what you want us to do?

1 MR. ROBERTSON: Well, the statute
2 does not allow for two interpretations. What's
3 been presented are two different definitions of
4 name plate rating.

5 So what we're asking the Commission
6 to do is to choose the definition that fits the
7 statute, that accomplishes -- accomplishes the
8 purpose of the statute, simply interpret the
9 statute a name plate rating of 10 megawatts as
10 meaning the total -- sum total of the generators at
11 a facility.

12 So it's a two step process. You look
13 at two definitions. Obviously, name plate rating
14 can mean the name -- the physical name plate on a
15 generator. But it can also mean the aggregate
16 generator name plate ratings.

17 You choose the definition that fits
18 the statute, and then you say the statute says --
19 statute means the 10 megawatt limit means the
20 facility as a whole.

21 CHAIRMAN ROBERT KENNEY: I'm sorry.
22 So you say we choose the definition that fits the
23 statute?

24 MR. ROBERTSON: Yes.

25 CHAIRMAN ROBERT KENNEY: But you

1 acknowledge that the wording in the statute has two
2 definitions?

3 MR. ROBERTSON: The term "name plate
4 rating" has two definitions. But we say in the
5 larger context of the statute a name plate rating
6 of 10 megawatts is intended to mean the entire sum
7 of the generators of the facility.

8 Otherwise, the 10 megawatt limit is
9 meaningless. You do not interpret a statute in a
10 way that then renders one of its provisions
11 meaningless.

12 COMMISSIONER KENNEY: Well, then
13 let's assume for a moment that what was intended is
14 what you just indicated, the aggregate of the
15 entire wind farm or the generating station itself.

16 How do you then explain the
17 inconsistent rule that was promulgated? Because,
18 clearly, you'd have to acknowledge that the rule
19 that DNR promulgate is inconsistent, right?

20 MR. ROBERTSON: Yes, it is,
21 explicitly.

22 CHAIRMAN ROBERT KENNEY: How do you
23 explain an inconsistent rule and what are we bound
24 to do with that inconsistent rule?

25 MR. ROBERTSON: You can't do

1 anything. We will have to take that up with DNR.
2 We are strictly concerned with your rule here which
3 we think can be interpreted consistent with the
4 statute because it doesn't say each generator name
5 plate. It says name plate generator rating.

6 CHAIRMAN ROBERT KENNEY: Let me ask
7 this question, also, procedural question. Renew
8 Missouri and/or Earth Island Institute were
9 participants in the rule-making process both here
10 and at DNR, correct?

11 MR. ROBERTSON: Yes. To the extent
12 there was a process at DNR. It was nothing like
13 what the Commission did.

14 CHAIRMAN ROBERT KENNEY: Was there
15 opportunity to help craft the language of those
16 rules?

17 MR. ROBERTSON: Well, there was
18 opportunity to comment. But no, not to directly
19 craft the language of the rules, no.

20 CHAIRMAN ROBERT KENNEY: So,
21 according to -- I mean, there was a stakeholder
22 process, and I'm looking at Staff's pleading in
23 this where it's argued that the language regarding
24 the definition of hydro power, not including pump
25 storage, went through several revisions in which

1 stakeholders had an opportunity to comment and
2 strike language and -- and help craft the language.

3 Why would that not have been the
4 opportunity and time for a Complainant to influence
5 the language of the rules?

6 MR. ROBERTSON: Because we did not
7 know it would be an issue. I simply must
8 regretfully say that I didn't know -- we didn't
9 know about Kiakuck at that time.

10 The first I heard about that was in
11 one of the meetings in your geographic sourcing
12 document, which took place after the rule-making.

13 CHAIRMAN ROBERT KENNEY: So then
14 isn't the proper procedure, then, to just Petition
15 DNR and or the Commission to open up a new
16 rule-making?

17 MR. ROBERTSON: Well, that's one
18 thing we may have to do, depending on the outcome
19 of this complaint.

20 CHAIRMAN ROBERT KENNEY: I mean,
21 procedurally, is this complaint -- it's a
22 collateral attack on a rule-making that's already
23 concluded, right?

24 I mean, procedurally, is this even
25 the appropriate mechanism and forum to do what it

1 is that Earth Island Institute is trying to do?

2 MR. ROBERTSON: No, it's not a collateral
3 attack. And first of all, in the Commission's
4 notice in last year's compliance dockets, you said
5 we should file complaints. And we filed complaints
6 because we are alleging violations of the statute,
7 not of the rule. We make no allegation against the
8 rule.

9 And if you grant all the relief we
10 request, the rule will still stand. But it will,
11 as you say, be subject to a revised order of
12 rule-making if we get to that point.

13 CHAIRMAN ROBERT KENNEY: But aren't
14 we going to end up -- let's assume for a second we
15 did exactly what you wanted us to do and granted
16 you the relief that you wanted us to grant.

17 I don't know. It seems like you are
18 left with a situation in which we make a ruling in
19 this complaint case that's utterly inconsistent
20 with the rules that exist. And it seems like it
21 would lead to an absurd result.

22 MR. ROBERTSON: Well, if --

23 CHAIRMAN ROBERT KENNEY: I mean, if
24 we can interpret the statute in a way that's
25 consistent with the rules, shouldn't we do that?

1 MR. ROBERTSON: Exactly.

2 CHAIRMAN ROBERT KENNEY: The rules
3 were drafted in a way that we thought were
4 consistent with the statute.

5 MR. ROBERTSON: The rules should be
6 interpreted to the extent possible to be consistent
7 with the statute. And we think the hydro definite
8 can be consistent the statute to mean the aggregate
9 of the generator ratings.

10 CHAIRMAN ROBERT KENNEY: All right.
11 I'll stop asking questions. Thank you.

12 MR. ROBERTSON: Thank you. Second
13 issue is the use of outdated RECs. Ameren and
14 Empire have used RECs dating back to 2008 to 2010
15 to satisfy the RES.

16 The statute says that an unused REC
17 may exist for up to three years from the date of
18 its creation. The utilities fail to put this in
19 the context of the statute as a whole, and it leads
20 to an absurd result.

21 The absurdity is that under the guise
22 of complying with the RES, they are actually not
23 complying. They are doing nothing as of 2011
24 because they're bringing in these -- bringing
25 forward these old RECs. And you do not interpret a

1 statute to reach an absurd result.

2 Now, the statute says that a REC --
3 it defines a REC as a certificate of proof that 1
4 megawatt hour of electricity was generated from
5 renewable resources. So a REC cannot exist apart
6 from the energy that it represents.

7 The statute further provides that the
8 portfolio requirement is electricity for -- I'm
9 sorry. Was that a question?

10 CHAIRMAN ROBERT KENNEY: No. I think
11 it was just a glitch in the equipment. Sorry.

12 MR. ROBERTSON: Excuse me.
13 Electricity from renewable energy resources shall
14 constitute the following portions of each electric
15 utility's sales in the given compliance year.

16 So the REC -- any REC used under the
17 statute has to be -- has to represent the energy
18 that was generated to satisfy the statute within a
19 particular year.

20 The -- the REC banking provision, as
21 it's called, is merely a limited exception to that
22 that allows a utility that has more RECs than it
23 needs for one year to carry them forward in the
24 next year. That's all it was intended to do.

25 Now, what would the -- what would the

1 utilities say that the statute should say? That a
2 REC shall asks for three years from 2011? That
3 would make no sense because the date is constantly
4 changing. A 2011 REC is good through 2013, a 2012
5 REC through 2014, and so on.

6 Furthermore, if the statute intended 2008
7 RECs to be used to safe the standard, then it would
8 not have been necessary to delay the start of the
9 standard until 2011.

10 The evident purpose of pushing it back to
11 2011 is so the utilities could ramp up their
12 renewable generation to meet the standard when it
13 began.

14 So the effect of the utility's
15 interpretation which has been endorsed by Staff is
16 to roll back the starting date of the statute
17 beyond 2011 because, as of 2011, it just isn't
18 working.

19 CHAIRMAN ROBERT KENNEY:
20 Mr. Robertson, the -- the statute's effective date
21 was August of 2008, right?

22 MR. ROBERTSON: November 4th, 2008.

23 CHAIRMAN ROBERT KENNEY: November
24 4th. And so it's Earth Island Institute's
25 contention that RECs, for purposes of satisfying

1 the Renewable Energy Standards Act, could not have
2 existed before the first compliance period in 2011?

3 MR. ROBERTSON: That's right. There
4 has to be -- if you're going to use these RECs,
5 there has to be something for them to be complying
6 with. And the compliance date didn't begin until
7 2011.

8 CHAIRMAN ROBERT KENNEY: But the
9 predicate of that argument, then, is that the RECs
10 have to be associated with whatever energy is being
11 used to comply with the 2011 forward compliance
12 periods? So RECs can't have existed for purposes
13 of Prop C before 2011?

14 MR. ROBERTSON: Exactly. They
15 certainly existed. But Prop C does not know them
16 until 2011. And then it has been to be associated
17 with electricity generated in 2011, 2012, 2013.

18 CHAIRMAN ROBERT KENNEY: And -- and
19 where is -- how do we read the statute to come to
20 that conclusion?

21 MR. ROBERTSON: The utilities say
22 that there is no start date for this REC banking
23 provision. But there clearly is a start date, and
24 it's the start date of the Renewable Energy
25 standard itself. And that date is very clearly set

1 out as January 1st, 2010.

2 Before that, there is --

3 CHAIRMAN ROBERT KENNEY: Doesn't that
4 interpretation require that we accept the
5 proposition that the RECs have to be tied to energy
6 delivered to Missouri consumers? Doesn't that
7 presume that the wrecks are bundled?

8 Mr. ROBERTSON: No, it -- no, it
9 doesn't. I mean, one argument the utilities have
10 made is we are forbidding trade in unbundled RECs.
11 That's not true.

12 I mean, the energy has to be
13 delivered to Missouri in our interpretation. But
14 to enter -- it has to be sold to Missouri consumers
15 is what the statute says. It doesn't mean
16 customers of a particular utility. It could be
17 co-op customers, union customers, customers in
18 other IOU.

19 It does create a market for trading
20 unbundled RECs representing energy delivered to
21 Missouri. So Ameren can buy RECs from Empire
22 unbundled and so on.

23 CHAIRMAN ROBERT KENNEY: Okay.

24 MR. ROBERTSON: I hope I've answered
25 that question. I'll move on to the third issue,

1 which is the Empire solar exemption, Second
2 393.1050.

3 We filed -- or several different
4 plants, actually, filed a declaratory judgment
5 action in the Courts to invalidate this statute.
6 But the Court said that the Commission has the
7 power to interpret the statute and see if you can
8 harmonize it with Proposition C.

9 The Western District said that we
10 could file a complaint, which is what we have done.
11 And the Western District said that if Empire is
12 found by the Commission not to be exempt from the
13 solar requirements, then Empire would be required
14 to file tariffs.

15 Now, Empire is trying to argue that
16 the Commission can't do what Empire itself
17 convinced the Courts that you have to do. And I
18 find that argument offensive and unacceptable.

19 Now, I -- I can't spend a lot of time
20 today detailing the three arguments we had made,
21 the substantive arguments. I do want to mention
22 them briefly.

23 First, the Legis -- there is a line of
24 cases that says the Legislature cannot amend an
25 initiative while it is in the process of enactment.

1 And 393.1050 was passed in May of 2008 at the end
2 of the Legislative session. And Proposition C was
3 passed in November.

4 So Proposition C repealed 1050
5 because 1050 is inconsistent with it. Proposition
6 C is said that RES applies to all electric
7 utilities. 1050 says except Empire for purposes of
8 the solar exemption.

9 CHAIRMAN ROBERT KENNEY:
10 Mr. Robertson, has this issue been argued in a
11 Court, in a Circuit Court?

12 MR. ROBERTSON: We were bounced out
13 of Circuit Court for failure to exhaust
14 administrative remedies. It has not been decided
15 by any Court.

16 CHAIRMAN ROBERT KENNEY: So this was
17 not an issue that was litigated to the Court of
18 Appeals?

19 MR. ROBERTSON: No. We didn't get
20 that far.

21 CHAIRMAN ROBERT KENNEY: And do we
22 have -- do we have the power to invalidate another
23 statute?

24 MR. ROBERTSON: No, you don't. But
25 nevertheless, the Courts say that you get first

1 crack, that you have primary jurisdiction at
2 interpreting the statutes under which you operate.

3 CHAIRMAN ROBERT KENNEY: So we can
4 interpret the statutes under which we operate. But
5 how do we go back and say that some action of the
6 General Assembly is violative of the law? I mean,
7 that seems like that's a different argument from
8 interpreting our own statute.

9 MR. ROBERTSON: Well, the -- the
10 Court of Appeals' opinion is one that has created
11 difficulties for me. But they clearly say that you
12 have primary jurisdiction to interpret the
13 statutes.

14 Now, one way to read that is possibly
15 they are creating a limited exception for only
16 non-Constitutional challenges of invalidity, in
17 which case the only issue before you is the repeal
18 by implication argument, which was strictly a
19 matter of statutory construction.

20 But I -- I am not confident entirely
21 that that is what the opinion says because there is
22 broader language in it. But, very clearly, the
23 Court of Appeals is requiring us to exhaust
24 administrative remedies. We have to get a decision
25 to you to go back to Court on.

1 Now, obviously, if you declare the
2 rule is invalid, that doesn't have -- I don't think
3 that has any force or effect until a Court ratifies
4 that finding. But, nevertheless, you are charged
5 with interpretation in the first instance.

6 CHAIRMAN ROBERT KENNEY: Okay. Thank
7 you.

8 MR. ROBERTSON: That's what the Western
9 District said. The reason the Legislature can't
10 amend a statute or initiative before it's passed is
11 it would change the question that's being put
12 before the voters, and the voters would be voting
13 then under false pretenses. They'd be voting for
14 something which has been changed. And so the
15 Courts do not allow that.

16 Our second argument is repeal by
17 implication, purely statutory construction.
18 Repeals by implications are not favored in the law.
19 But if there is an irreconcilable conflict between
20 two statutes, then the later one repeals the
21 earlier one to the extent of the inconsistency.

22 And -- and, again, we're saying that
23 Proposition C repealed 1050 because 1050 attempted
24 to make an exception to Proposition C, which
25 requires all electric utilities, regulated

1 utilities to be subject to the RES. There is an
2 irreconcilable conflict there.

3 And our final argument is that 1050
4 is a special law and that there is no reasonable
5 basis, no rational basis for giving an exemption to
6 Empire and not to the other utilities.

7 Now, this statute is actually quite
8 cleverly worded to say that a utility that has
9 15 percent renewable energy by January 20th, 2009,
10 whatever the significance of that date might be, is
11 exempt.

12 This is an attempt to make a closed
13 classification look like an open classification.
14 So a classification is open-ended if it's such that
15 other entities can come within it and then it's no
16 longer special law.

17 So there's a range of population for
18 a City or County. Another City or County might
19 grow or shrink within population until it fits in
20 that open-ended classification, and that's not a
21 special law.

22 But if it's a closed classification
23 and it's only one entity in it and nobody else can
24 come into it, then it's a special law and is
25 unconstitutional under the State Constitution. And

1 this is a transparent attempt to make a closed
2 classification appear to be an open-ended
3 classification.

4 And the final issue we're making is
5 geographic sourcing, a vexed subject. We are
6 attempting here again to exhaust remedies.

7 And as you may already know, we have
8 already filed a suit against JCAR. We named the
9 Commission as potentially a necessary party. So
10 this is already in the early stages of litigation.

11 CHAIRMAN ROBERT KENNEY: Now,
12 Mr. Robertson, how is this not a collateral attack?
13 This -- this issue was fully litigated to the Court
14 of Appeals, wasn't it?

15 MR. ROBERTSON: Well, the Court of
16 Appeals -- it was litigated on behalf of the
17 utilities, and the Court of Appeals decided that it
18 was moot.

19 But -- but the issues here that we're
20 raising actually were not litigated in the Court of
21 Appeals because they concerned the activity of
22 JCAR, which is not a subject of the rule-making
23 appeal.

24 CHAIRMAN ROBERT KENNEY: So your
25 argument here in this complaint case has to do with

1 the validity of JCAR's actions?

2 MR. ROBERTSON: Specifically with
3 whether the Commission should have submitted to the
4 authority of JCAR.

5 In other words, we're asking you to
6 find that Executive Order 97-97 where it says, All
7 agencies except the PSC and the Labor Commission
8 must submit their rules to JCAR, means that you
9 didn't have to. And --

10 CHAIRMAN ROBERT KENNEY: But don't
11 you argue elsewhere the that Executive Order is
12 unconstitutional, too?

13 MR. ROBERTSON: In the JCAR suit,
14 yes.

15 CHAIRMAN ROBERT KENNEY: But not
16 here?

17 MR. ROBERTSON: Not here.

18 CHAIRMAN ROBERT KENNEY: All right.
19 Sorry.

20 MR. ROBERTSON: We are asking an
21 interpretation of statutory interpretation that
22 says that JCAR's authority does not extend to acts
23 passed under the initiative.

24 And we are asking the Commission to
25 find that the Supreme Court decision in Missouri

1 Coalition for the Environment v. JCAR means that
2 JCAR did not have the authority to suspend or hold
3 in abeyance your rule.

4 And finally, we are submitting that
5 without the two disapproved paragraphs, the rule is
6 silent on the issue of geographic sourcing and can
7 be interpreted consistently with statute requires
8 delivery to Missouri consumers.

9 I realize that we all know why the
10 utilities went to JCAR to get those two paragraphs
11 removed. We are doing everything we can to
12 harmonize the rule with the statute.

13 This gets us back to this whole
14 collateral attack issue, which is the main basis of
15 the Motions to Dismiss. And we are only
16 challenging violations of the statute.

17 And the rule cannot be changed in a
18 complaint. We know that full well. And,
19 therefore, this is not a collateral attack.

20 But if you take Respondents argument
21 with logical conclusion, they say that once the
22 time has passed for writ of review, then the rule
23 is ever thereafter inviolate and cannot be changed,
24 even if a set of facts arises which shows a
25 conflict with the statute. So Respondents are

1 attempting to set the rule above the statute, which
2 cannot be the case.

3 A rule can always be changed. A
4 rule-making is different from -- usually collateral
5 attack applies to judgments, and judgments have to
6 become final at some point. But a rule is, in a
7 sense, never final because it's always subject to
8 revision.

9 And what the -- the review was of the
10 -- the rule-making review was the review of an
11 order of rule-making, not really the rule itself.
12 Sets of facts can arise giving grounds for a
13 complaint as here and which would entail or might
14 entail a -- a revised order of rule-making. That's
15 always a possibility, and is not a collateral
16 attack.

17 So rules differ from judgments in
18 that respect. And what you can do, according to
19 case law, is interpret your previous orders and
20 even limit their application. And we are asking
21 you to do that at the expense of being
22 inconsistent.

23 Ameren has cited to a transcript of
24 an argument last year on the RES compliance or 2011
25 on the RES compliance documents where Chairman

1 Kenney was asking me what would be needed to do to
2 fix the rule on the definition of hydro to make it
3 apply with the statute.

4 Yes, I was accepting the
5 interpretation as being pressed upon me at that
6 time for the sake of argument. I never conceded
7 that that interpretation was consistent with the
8 statute.

9 But if I had been inconsistent in my
10 interpretations, well, that's not a crime. We're
11 trying to show that if you can save the rule -- if
12 there is a problem with the rule and you can save
13 the rule by interpretation, then so much the
14 better.

15 But with outdated RECs issue, there
16 is no conflict. The rule says essentially the same
17 thing as the statute. There simply is no -- no
18 conflict between the two, no reason to question the
19 rule.

20 The hydro power generator name plate
21 ratings, we have pointed out why the statute must
22 mean it's in the aggregate. We think the
23 Commission's rule could be interpreted consistently
24 with that to -- to say that generator name plate
25 ratings of 10 megawatts or less mean the sum total

1 rather than the individual ratings qualify.

2 And that's all I have at the present.

3 I will yield to other parities unless there are
4 more questions.

5 JUDGE WOODRUFF: Mr. Chairman or
6 Commissioner Stoll, do you have any questions?

7 CHAIRMAN ROBERT KENNEY: I -- I
8 don't.

9 COMMISSIONER STOLL: I have no
10 questions, your Honor.

11 JUDGE WOODRUFF: All right. Thank
12 you. You may step down. And we'll move to Ameren
13 Missouri.

14 ORAL ARGUMENT

15 BY MR. BYRNE:

16 MR. BYRNE: Thank you, your Honor.
17 May it please the Commission. I'm Tom Byrne, and
18 I'm here representing Ameren Missouri in this case.

19 The purpose of this morning's
20 proceeding is to determine if the complaints filed
21 in these consolidated cases by Renew Missouri and
22 the other Complainants against Ameren Missouri and
23 Empire should be dismissed pursuant to the
24 utility's Motions to Dismiss or if they should be
25 resolved by Complainant's Motions for Summary

1 Determination or if they should be set for hearing.

2 With regard to the complaint filed
3 against Ameren Missouri, this is not a close
4 question. The complaint must be dismissed in its
5 entirety as a matter of law.

6 The complaint against Ameren Missouri
7 alleges that in 2011 the company failed to comply
8 with Missouri's Renewable Energy Standard in three
9 ways:

10 First, by using -- first, by using
11 renewable energy credits or RECs from its Kiakuck
12 hydro-electric facility as part of its compliance.

13 Second, by using renewable energy
14 credits derived from electricity generated during
15 the period from January 1, 2008, through December
16 31st, 2010, as part of its compliance.

17 And third, by using renewable energy
18 credits unrelated to electric energy delivered to
19 Missouri customers as part of its compliance.

20 Each count fails to state a claim
21 upon which relief can be granted, and each count,
22 therefore, must be dismissed.

23 With regard to the inclusion of
24 Kiakuck, the Complainants argue that the 10
25 megawatt limit on hydro electric resources

1 qualifying as renewables applies to the plant as a
2 whole rather than the individual generating units
3 within the plant.

4 Based on their interpretation,
5 Kiakuck would not qualify as a renewable resource
6 even though the individual generating units at
7 Kiakuck are all below the 10 megawatt threshold.

8 CHAIRMAN ROBERT KENNEY: Mr. Byrne?

9 MR. BYRNE: Yes, Mr. Chairman.

10 CHAIRMAN ROBERT KENNEY: Can I ask a
11 question about that?

12 MR. BYRNE: Sure.

13 CHAIRMAN ROBERT KENNEY: Is it --
14 does Ameren concede, irrespective of DNR's rule and
15 our rule, that what the drafters of the statute
16 intended was the aggregate of all the generating
17 units and not each generating unit individually?

18 MR. BYRNE: You know, Mr. Chairman, I
19 -- I know the drafters who are here today are
20 saying that's what they intended. I don't know.

21 CHAIRMAN ROBERT KENNEY: Sure.

22 MR. BYRNE: I can't get into their
23 mind. I do know that under Missouri law that what
24 they subjectively intend is not relevant to the
25 interpretation. It's what the words in an

1 initiative Petition say.

2 CHAIRMAN ROBERT KENNEY: Then would
3 you concede that the definition or the language in
4 the statute is amenable to two different
5 interpretations?

6 MR. BYRNE: I don't believe so, your
7 Honor. I believe name plate -- name plate rating
8 is on a name plate on a specific unit. I don't
9 believe it's susceptible to the interpretation that
10 it's aggregate plant capacity.

11 CHAIRMAN ROBERT KENNEY: So how do
12 you respond to their argument that when Ameren is
13 describing the Prairie wind farm capacity that it
14 aggregates all the wind turbines together to come
15 up with one number? How is that distinct from
16 doing that at the Kiakuck plant, aggregating the
17 generators together and coming up with the name
18 plate capacity of the entire generating facility?

19 MR. BYRNE: I guess -- you know, the
20 Complainants cited a number of examples. That was
21 one of them. My understanding is -- you know, all
22 of the examples taken in their context, they were
23 not just using the words name plate rating.

24 Sometimes they use name plate
25 capacity, aggregate name plate capacity. If you

1 read in context each of the -- each of the
2 references, it would be clear that it was referring
3 to the aggregate capacity of a plant rather than
4 the rating of a unit.

5 CHAIRMAN ROBERT KENNEY: So name
6 plate rating, Ameren argues, is only susceptible to
7 one interpretation and definition, and that means
8 the metal plate that is affixed to a generator?

9 MR. BYRNE: Yes, your Honor.

10 CHAIRMAN ROBERT KENNEY: Okay.

11 MR. BYRNE: And I'll get to some of
12 that in -- in my argument. The Renewable Energy
13 Standards Statute specifically delegates authority
14 to the Missouri Department of Natural Resources to
15 develop certification criteria for renewable energy
16 generation and to apply those criteria to certify
17 such generation.

18 In consultation with this Commission,
19 the DNR enacted final non-appealable rules that
20 definitively resolved the issue about Kiakuck.

21 The DNR's rules make it crystal clear
22 that the 10 megawatt limitation is to be applied to
23 each generating unit rather than the plant as a
24 whole. Specifically the DNR -- excuse me? Did you
25 have a question, Mr. Chairman, or was that a --

1 CHAIRMAN ROBERT KENNEY: I didn't say
2 anything. I didn't say anything.

3 MR. BYRNE: Okay. Must have been
4 another glitch in the technology. Specifically,
5 the DNR rules provide the eligible renewable energy
6 resources include, quote, hydro power, not
7 including pump storage that does not require a new
8 diversion or impoundment of water and that each
9 generator has a name plate rating of 10 megawatts
10 or less.

11 The rule goes on to say, quote, if an
12 improvement to an existing hydro power facility
13 does not require a new diversion or impoundment of
14 water and incrementally increases name plate rating
15 of each generator up to 10 megawatts per generator,
16 the improvement qualifies as an eligible renewable
17 energy resource, closed quotes.

18 This rule unequivocally states that
19 the 10 megawatt limit is to be applied on a per
20 generator basis.

21 Moreover on September 28th, 2011, the
22 DNR issued a letter which is attached as Exhibit 1
23 to our Motion to Dismiss that specifically
24 certifies Kiakuck as a renewable energy generation
25 facility under the RES standard.

1 These decisions by the Department of
2 Natural Resources cannot be ignored by this
3 Commission. As -- as was pointed out previously,
4 this Commission doesn't sit as a reviewing court
5 that can second-guess the determinations made by
6 the DNR under authority properly delegated to that
7 agency by statute.

8 The fact that the DNR has enacted
9 rules verifying that the 10 megawatt limitation
10 applies to individual generating units and the fact
11 that DNR has certified that Kiakuck qualifies as a
12 renewable energy resource means that Count 1 of the
13 complaint must be dismissed as a matter of law.

14 In addition, this Commission has
15 issued its own rule, as Mr. Robertson mentioned,
16 which is -- which we believe is consistent with the
17 DNR rules and, also, makes it clear that the 10
18 megawatt limitation applies to each hydro-electric
19 generator rather than the plant as a whole.

20 The Commission's rule says that,
21 Renewable energy resources includes electric energy
22 produced from, quote, hydro power, not including
23 pump storage, that does not require diversion or
24 impoundment of water and has a generator name plate
25 rating of 10 megawatts or less, closed quotes.

1 Even in the absence of DNR's rules,
2 this Commission would be bound by its own rules,
3 under which Kiakuck qualifies as a renewable
4 resource.

5 In short, Complainant's position is
6 contrary to both the Commission's and DNR's rules
7 whereas Ameren Missouri's position is in complete
8 compliance with those rules.

9 As the Staff has pointed out and as
10 was pointed out in Mr. Robertson's oral argument,
11 many of the Complainants participated directly in
12 the rule-making proceeding, which lead to the
13 Commission rule.

14 The exclusive means to challenge the
15 legality of the Commission's rule is to seek
16 rehearing before the Commission and then pursue a
17 review in court under the applicable review
18 procedures in 386.510 of the Missouri Revised
19 Statutes.

20 Having failed to pursue that avenue,
21 the Complainants cannot now challenge the rule in
22 this proceeding.

23 Count 1 constitutes a collateral
24 attack on this Commission's rule that is not
25 permissible, in addition to being an attack on

1 DNR's rule.

2 Finally. I would note that applying
3 the 10 megawatt limit to each hydro-electric
4 generator, the DNR and the Commission's rules are,
5 in our opinion, entirely consistent with the RES
6 statute.

7 The statute includes as a qualifying
8 renewable resource, quote, hydro power not
9 including pump storage that does not require a new
10 diversion or impoundment of water and has a name
11 plate rating of 10 megawatts or less.

12 And I have a visual I'm going to try
13 to put on the Elmo.

14 JUDGE WOODRUFF: Okay. I'll try and
15 bring it on over here. Okay.

16 MR. BYRNE: You know, this is an
17 example of a name plate that -- that appears on one
18 of the Kiakuck generators. And we attached it to
19 one of our pleadings.

20 But as you can see, it's physically
21 attached to the unit. You can see the screws where
22 it's screwed onto the generator. And -- and the
23 rating on the name plate consists of the
24 performance information based on engineering
25 specifications and physical characteristics of that

1 specific generating unit.

2 So in this example, the unit operates
3 at 9500 KVA, as you can see in the top line, which
4 is kilovolt amps, 62 revolutions per minutes, RPM,
5 13,800 volts, a power factor of .8. That says PF -
6 .8.

7 And based on all those parameters, it
8 has a rating of 7600 kilowatts or 7.6 megawatts.
9 The plant as a whole does not have a name plate and
10 it does not have a name plate rating.

11 Under the plain and ordinary meaning
12 of the term, a name plate rating refers to this
13 information on the name plate at each individual
14 generating unit, not a calculated aggregate
15 capacity of the entire plant.

16 If the statute had contemplated
17 inclusion of the entire capacity of a plant, it
18 could have so provided by simply saying the total
19 capacity of a qualifying hydro-electric plant has
20 to be 1- megawatts or less.

21 But by instead referring to the name
22 plate rating, which is only calculated for and only
23 appears on each individual generating unit, the
24 statute clearly applies the 10 megawatt limit to
25 each individual unit. And, again, the DNR rules

1 and the Commission rules are entirely consistent
2 with -- with this view of the statute.

3 Count 2 of the complaint against
4 Ameren Missouri alleges that the company has
5 improperly counted renewable energy credits dating
6 back to 2008. It's the banking issue.

7 However, the RES statute provides
8 that an unused REC may exist for up to three years
9 from the date of its creation. And the RES statute
10 requires the Commission and the DNR to select a
11 program for tracking and verifying the trading of
12 RECs on or before November 4th, 2009.

13 The Commission rule is consistent
14 with the statute in that it provides that a REC
15 expires three years from the date that electricity
16 associated with that REC was generated.

17 There's absolutely nothing in the RES
18 statute or the Commission rules that indicates a
19 start date before which RECs that are less than
20 three years old are disqualified.

21 And the Commission simply lacks the
22 authority to read a limitation that does not exist
23 into the statute or the rule. If anything, the
24 language in the statute suggests that RECs before
25 2011 are specifically contemplated because it

1 required a program to track and verify them to be
2 in place by 2009. There would have been no reason
3 to have a program in place to track them by 2009 if
4 you didn't -- if they didn't count until 2011.

5 Complainants argue that RECs created
6 before 2011 can't be unused, which is a word in the
7 statute, because there was no possibility of using
8 them before the RES requirements took effect.

9 This is simply not true. RECs
10 existed long before the RES statute and were used
11 for many purposes. For example, Ameren Missouri's
12 Voluntary Green Program, which has in effect since
13 2007, utilizes the retirement of RECs to meet the
14 voluntary requests of customers. And RECs were
15 used for that purpose since 2007.

16 Other states in the Federal
17 Government also have permitted RECs to meet
18 voluntary or mandatory renewable standards, and
19 RECs could have been used for that purpose.

20 As Public Counsel Lewis Mills noted
21 in a previous oral argument on this topic, the
22 Missouri RES statute did not create RECs anymore
23 than the Missouri puppy mill statute created
24 kennels. RECs already existed. And if they were
25 unused and associated with energy generated within

1 three years, they clearly qualify for RES
2 compliance purposes.

3 Finally, Count 3 of the complaint
4 against Ameren Missouri argues that the company has
5 filed comply with the RES standard by counting RECs
6 associated with power that was not physically
7 delivered to Ameren Missouri customers.

8 This is perhaps the most farfetched
9 of the -- farfetched of the Complainants' argument.
10 This Commission originally voted to include
11 geographic sourcing restrictions in its RES rule.
12 But following disapproval by the Joint Committee on
13 Administrative Rules and the General Assembly as a
14 whole, the Commission issued a subsequent order
15 withdrawing the geographic sourcing provisions and
16 instructing the Secretary of State not to publish
17 the withdrawn sections.

18 And the Secretary of State did not
19 publish those sections of the rule. And Section
20 526.021.8 of the Missouri statutes says, No rule,
21 except an emergency rule, shall become effective
22 prior to the 30th day after the date of
23 publication. So since it --

24 CHAIRMAN ROBERT KENNEY: Can I ask a
25 quick question?

1 MR. BYRNE: Sure.

2 CHAIRMAN ROBERT KENNEY: Do -- do we
3 know -- do we know why the Secretary of State
4 didn't publish the rule? Was it because of the
5 letter that we sent over or some independent reason
6 from the letter from Senator Lou Ann Ridgeway to
7 the Secretary of State?

8 MR. BYRNE: I -- you know,
9 Mr. Chairman, I'm not sure. The Secretary of State
10 had -- had been three things that could have led to
11 it not to be published. There was the letter from
12 Lou Ann Ridgeway. There was a letter, I believe,
13 from Chairman Clayton at the time.

14 And then, of course, the Commission
15 had issued an order that -- that said, you know,
16 that they're withdrawing it and they're instructing
17 the Secretary of State not to publish.

18 So I -- don't know which of those
19 three things or maybe it was all of the three
20 things that led the Secretary of State not to
21 publish.

22 CHAIRMAN ROBERT KENNEY: And is there
23 anything about the timing of those three pieces of
24 correspondence and the publications that would shed
25 any light on the Secretary of State's

1 determination?

2 MR. BYRNE: Well, since -- I mean,
3 since it's never been published, I guess -- you
4 know, she got them all before -- before publishing
5 it because she never published it.

6 I -- I honestly don't remember what
7 the timing of all of them was. I suspect probably
8 the letter from Lou Ann Ridgeway came first and the
9 order from the Commission came second. But I'm not
10 a hundred percent sure as I stand here that that's
11 true.

12 CHAIRMAN ROBERT KENNEY: Okay. Thank
13 you.

14 MR. BYRNE: Anyway, since the
15 geographic sourcing regulations were never
16 published, they did not take effect as a matter of
17 law, as matter of Missouri statute.

18 As a consequence, Complainants'
19 theory of Count 3, the geographic sourcing
20 restriction, must be that there is an implicit
21 restriction in the statute or the rules not
22 withstanding the fact that provisions explicitly
23 imposing the geographic sourcing restriction were
24 withdrawn.

25 Again, there's simply no basis for

1 this claim. Complainants point to a sentence in
2 the RES statute which says, quote, The portfolio
3 requirements shall apply to all power sold to
4 Missouri consumers whether such power is
5 self-generated or purchased from another source in
6 or outside the State, closed quote.

7 However, the portfolio requirements
8 that are -- that are referred to in that sentence
9 are simply the percentages of renewable power the
10 electric utility has to have each year.

11 And Ameren Missouri agrees that these
12 percentages, for example, 2 percent in calendar
13 years 2011 to 2013, these -- these portfolio
14 requirements have to be multiplied by all the power
15 sold to Missouri customers in order to calculate
16 the kilowatt hours of renewable power that the
17 utility has to have each year.

18 That's exactly what Ameren Missouri
19 has done in its annual compliance reports. But
20 this sentence says nothing about the nature or
21 source of the renewable resources that can be used
22 to comply.

23 The next sentence in the statute
24 says, quote, A utility may comply with the standard
25 in a whole or in part by purchasing RECs, closed

1 quote.

2 There is no limitation on the
3 geographic source of the RECs that may be used to
4 comply, and the Commission does not have the power
5 to read an additional restriction into the statute.

6 In addition, as Staff has pointed
7 out, the Commission's own rules explicitly
8 contemplate that utilities may comply with the RES
9 standards using RECs that are completely unbundled
10 from any energy. Again, this is entirely
11 consistent with the language of the RES statute.

12 And, finally, as -- Mr. Chairman, as
13 you discussed with Mr. Robertson, there was a
14 recent appeal involving the Commission's RES rule,
15 and the Missouri Court of Appeal for the Western
16 District stated explicitly that the Commission
17 would have to initiate a rule-making proceeding if
18 it wanted to promulgate geographic sourcing rules.

19 And this was a substantive finding.
20 That was the reason the Court of Appeals was able
21 to find that that issue was moot. You know, they
22 found that there was no geographic sourcing
23 restriction. So the argument about it was moot.
24 So it was a substantive finding of the Court.

25 I don't want to leave the Commission

1 with the impression that Ameren Missouri and its
2 customers are reluctant to support renewable energy
3 or that we are somehow resisting compliance with
4 the RES statute and rules.

5 Our customers have financed literally
6 tens of millions of dollars of solar rebates to the
7 considerable financial benefit of the Complainants
8 who are in the solar installation business, and
9 that's reflected in our compliance reports that we
10 filed for 2011 and 2012.

11 We built a landfill gas plant that is
12 one of the largest in the country and some smaller
13 solar facilities. We've entered into a long-term
14 contract to purchase wind generated power, and
15 we've sponsored additional renewable power in
16 Missouri and across the country by purchasing RECs.

17 But the Complainants are attempting
18 to extract even more money from our customers, in
19 some cases for their private financial benefit by
20 advocating interpretations of the RES statute and
21 the Commission regulations that are inconsistent
22 with the plain language of the statute and the
23 rules were and by collaterally attacking properly
24 enacted rules of the DNR and this Commission.

25 As a consequence, the complaint

1 against Ameren Missouri must be dismissed. Thank
2 you.

3 JUDGE WOODRUFF: Commissioners have
4 any questions?

5 CHAIRMAN ROBERT KENNEY: I do not.

6 COMMISSIONER STOLL: I do not either.

7 CHAIRMAN ROBERT KENNEY: And we have
8 another commitment that's going to require us to
9 leave now. But thank you very much.

10 MR. BYRNE: Okay.

11 JUDGE WOODRUFF: Okay.

12 MR. BYRNE: Thank you.

13 JUDGE WOODRUFF: We'll move on, then,
14 to Empire.

15 ORAL ARGUMENT

16 BY MR. MITTEN:

17 MR. MITTEN: If it pleases the
18 Commission. It's Empire's -- my name is Russ
19 Mitten, and I'm appearing today on behalf of the
20 Empire District Electric Company in Case
21 No. EC-2013-0378.

22 Empire believes the Commission should
23 dismiss Complainants' Motion for Summary
24 Determination because it failed to state any --
25 satisfy any of the legal requirements for a Motion

1 for Summary Judgment or Summary Determination.

2 First of all, it fails to establish
3 that there is no genuine issue of material fact
4 necessary to establish Complainants' legal right to
5 a judgment.

6 Second, it fails to establish that
7 Empire's affirmative defenses are non-viable or
8 otherwise fails as a matter of law.

9 And, finally, it fails to establish
10 that, as a matter of law, the Complainants have an
11 undisputed legal right to a judgment on any of the
12 three counts stated in the complaint filed against
13 Empire.

14 Although a Motion for Summary
15 Disposition is not appropriate in this case, the
16 Commission should grant Empire's Motion to Dismiss
17 because, in its Motion, the company has shown that
18 there is no legal basis or any merit to any of the
19 claims made by Complainants in the three counts
20 that have been filed against Empire.

21 Let me briefly address, again, the
22 differences between summary disposition and
23 dismissal. A Motion for Summary Disposition exists
24 for a very specific purpose. It allows a Tribunal
25 to truncate a legal proceeding if, and only if, the

1 Tribunal determines that, one, there is no issue of
2 material fact still in dispute and, two, the
3 parties seeking summary determination is entitled
4 to judgment on its claims as a matter of law.

5 The law recognizes that a Motion for
6 Summary Determination is an extreme remedy and is
7 available only if the moving party can satisfy both
8 of the legal requirements that I just mentioned.

9 Although a Motion to Dismiss also is
10 designed to truncate a legal proceeding, a Motion
11 to Dismiss serves a very different purpose. It
12 allows a Tribunal to consider the legal issues that
13 underly an action and determine if, as a matter of
14 law, the complaining party has stated a recognized
15 cause of action against the Respondent.

16 This case is tailor made for a Motion
17 to Dismiss. But it is not the type of case that
18 can or should be decided on a Motion for Summary
19 Determination because this is not a case where the
20 issues the Commission must resolve are factual.

21 First of all, facts are immaterial to
22 the resolution of any of the issues in this case.
23 In fact, factual evidence is so unimportant that
24 Empire believes an evidentiary hearing in this case
25 would be a waste of time.

1 Second, the only issues to be
2 resolved in this case are legal issues. Do
3 Complainants have a cause of action against Empire
4 under any of the three counts raised in the
5 complaint? And those issues must be decided based
6 solely on the application of legal principles.

7 Finally, based upon applicable legal
8 principles, Complainants have not and cannot
9 establish that they have a cause of action against
10 Empire under any of the three counts raised in the
11 complaint.

12 But even if a Motion for Summary
13 Disposition was appropriate, Complainants' motion
14 fails to satisfy the legal requirements for such a
15 motion.

16 First, it fails to establish the
17 thing that's key to summary determination, and that
18 is that Complainants have an undisputed right to a
19 judgment as a matter of law.

20 Secondly, the responses filed by both
21 Empire and Ameren Missouri in this case show that
22 there are facts that still remain in dispute by the
23 parties.

24 Complainants' motion also fails to
25 establish that any of the affirmative defenses

1 raised by Empire are not viable.

2 The motion also doesn't satisfy the
3 legal requirement that evidence submitted in
4 support of the motion must be admissible at trial.

5 And, finally, the testimony that the
6 Complainants have submitted, the testimony of
7 Edward Holt, is not competent on any issue of the
8 appropriate legal interpretation of either the
9 definition of hydro power in Section 393.1025 or
10 what limitations, if any, the Renewable Energy
11 Standard imposes on REC creation and banking.

12 Let me first turn to -- to Count 1 of
13 the complaint against Empire. In its 2011 RES
14 compliance report, Empire stated that it achieved
15 compliance for the year 2011 by retiring
16 approximately 69,000 RECs that related to energy
17 produced by Ozark Beach hydro-electric facility.

18 In Count 1, Complainants allege that
19 hydro power from Ozark Beach does not qualify as a
20 renewable energy resource as defined by the RES.
21 Consequently, Complainants allege that because
22 Empire relied on energy from Ozark Beach, the
23 company did not comply with the Renewable Energy
24 Standards portfolio standard for 2011.

25 As a bit of background, Empire's

1 Ozark Beach hydro-electric facility consists of
2 four hydro-electric generators, each of which has a
3 name plate capacity rating of 4 megawatts.

4 The Complainants base their
5 allegations of non-compliance on an interpretation
6 of what constitutes qualifying hydro power under
7 the Renewable Energy Standard.

8 That interpretation would require the
9 Commission to aggregate the name plate capacities
10 of Empire's four hydro-electric generators and
11 conclude that because the aggregate capacity of
12 those four generators exceeds 10 megawatts, the
13 Ozark Beach facility does not qualify as a
14 renewable energy resource.

15 Let me first say that that definition
16 of what qualifies as hydro power under the statute
17 is not and cannot be correct.

18 As Empire pointed out in all of its
19 pleadings related to the dispositive motions filed
20 in this case, the key phrase of the statutory
21 definition of qualifying hydro power is a name
22 plate rating of 10 megawatts or less. And the
23 keyword in that phrase is name plate.

24 Only hydro-electric generators have
25 name plates. A hydro-electric facility like Ozark

1 Beach does not have a name plate. And it's
2 axiomatic that you can't have a name plate rating
3 unless you have a name plate.

4 Empire's filing details the
5 precedents that require statutes to be interpreted
6 based upon the plain and ordinary meaning of the
7 words used in the statutes. And I will be happy to
8 review those precedents if the Bench or the
9 Commission has any questions. Otherwise, I believe
10 Empire's pleadings on that point speak for
11 themselves.

12 But putting aside for a moment the
13 fact that the rules of statutory interpretation
14 don't support the interpretation the Complainants
15 have urged the Commission to adopt in this case,
16 the Commission has no authority to adopt
17 Complainants' interpretation even if the Commission
18 was disposed to do so.

19 That's because the Department of
20 Natural Resources already has adopted a rule that
21 specifies that any individual hydro-electric
22 generator with a name plate capacity of 10
23 megawatts or less qualifies as a renewable energy
24 resource under the Renewable Energy Standard.

25 And the Commission has no legal

1 authority to overturn the Department's rule or to
2 adopt an interpretation of the Commission's own
3 rule that is inconsistent with the Department's
4 rule.

5 Section 393.1030, subsection 3 gives
6 the Department the exclusive authority to establish
7 by rule a certification process for electricity
8 generated from renewable resources and used to
9 fulfill the requirements of the portfolio standards
10 of the RES.

11 Utilizing that authority, the
12 Department adopted the definition of what hydro
13 power qualifies as a renewable energy resource for
14 purposes of compliance. This is the definition
15 that the Department of Natural Resources adopted.

16 And as you can see in two places, the
17 Department's rule clearly states that an individual
18 hydro-electric generator that has a name plate
19 capacity of up to 19 megawatts qualifies as a
20 renewable energy resource.

21 That definition remains in effect
22 today. More importantly, that definition was in
23 effect throughout 2011, which is the period covered
24 by the compliance report that's at issue in this
25 complaint case.

1 In fact, using that definition, the
2 Department has certified the four electric
3 generators as -- at Ozark Beach as renewable energy
4 resources, and that certification remains in effect
5 today.

6 The Commission's rule-making under --
7 authority under the RES is limited to prescribing a
8 process for utilities to use to demonstrate
9 compliance with the portfolio standards of the RES.

10 Under the Renewable Energy Standard,
11 the Commission has no independent authority to
12 certify renewable energy resources. Therefore, the
13 Commission cannot adopt the interpretation of hydro
14 power being urged by the Complainants in that case
15 for at least two reasons.

16 First and foremost, such an
17 interpretation would have the effect of negating
18 the Department's definition of hydro power. The
19 definition of hydro power in the Department's rule
20 and the interpretation of the Commission's rule
21 urged by the Complainants in this case simply can't
22 co-exist because they're inconsistent with one
23 another.

24 As I mentioned earlier, the
25 Commission has no legal authority to review or

1 negate a rule adopted by the Department. Only the
2 Circuit Court can review a rule of the department,
3 and that has to be done through a Declaratory
4 Judgment Action filed under Chapter 536.

5 Second, the Commission can't adopt
6 Complainants' interpretation because that
7 interpretation is inconsistent with the obvious
8 intent of the Commission's rule when it was
9 adopted.

10 As I mentioned earlier, the RES vest
11 the Department with the exclusive authority to
12 adopt rules that govern the certification of
13 renewable energy resources.

14 I believe the Commission understood
15 that when it adopted its own RES compliance rule so
16 that it's inconceivable that the Commission would
17 have intentionally adopted a definition of hydro
18 power in its own rule that would conflict with the
19 definition of that term in the Department's rule.

20 Because the interpretation urged by
21 Complainants represents a challenge to the obvious
22 intent of the Commission when it adopted its own
23 rule, the complaint in this case constitutes at
24 least an indirect collateral attack on the
25 Commission's rule. And as we've noted in our

1 pleadings, such an attack is unlawful.

2 In its final pleading in response to
3 Empire's Motion to Dismiss, the Complainants
4 address the Department's rule by suggesting that
5 the Department has expressed an interest in
6 revisiting its definition of hydro power.

7 My response to that is, So what? If
8 the Department decides to change the rule in the
9 future, Empire and the Commission can deal with
10 that change at the appropriate time and in the
11 appropriate manner.

12 But unless and until that change is
13 made, the Department's current definition of hydro
14 power is the one that controls what hydro electric
15 generation qualifies as renewable energy.

16 More importantly, because the
17 Department's current definition was in effect in
18 2012 when Empire filed its 2011 compliance report
19 and in 2011, which is the covered period that was
20 covered by the report, then nothing the Department
21 does in the future will have any effect on the
22 complaint -- the allegations in the complaint
23 that's currently pending against Empire.

24 Moving to Count 2, which deals with
25 REC banking, Count 2 of the complaint alleges that

1 Empire violated the Renewable Energy Standard
2 because it began creating and banking RECs prior to
3 January 1st, 2011. The Complainants complain -- or
4 argue that January 1, 2011, is significant because
5 that is the day -- date on which the portfolio
6 compliance standards took effect.

7 But Complainants ignore the fact that
8 Section 393.1030, subsection 2 says only two things
9 about RECs used to comply with the Renewable Energy
10 Standard.

11 First, it says that a REC can be used
12 only once for compliance. And, second, it says
13 that an unused REC can exist and be used for
14 compliance up to three years from the date its
15 created.

16 Nowhere in that Section of the RES or
17 anywhere else in a Renewable Energy Standard does
18 it say or imply that a REC used for compliance
19 cannot be created prior to January 1st, 2011.

20 Complainants argue that allowing
21 utilities to create, accumulate and bank RECs prior
22 to 2011 would evade the purpose of the statute,
23 which they claim is to expand renewable energy in
24 Missouri.

25 And Complainants claim to know the

1 overriding purpose of the RES because Renew
2 Missouri and certain of the other Complainants
3 were, according to the Complaint, instrumental in
4 the passage of Proposition C.

5 But that argument ignores a couple
6 things. First of all, it ignores the facts that
7 RECs resisted -- or existed before the RES was
8 adopted.

9 Empire has received RECs from the two
10 Kansas wind farms. One started in 2005. The other
11 started in 2008. And so those RECs predated the
12 RES.

13 The only change that the adoption of
14 the RES caused was that Empire no longer sells all
15 of its RES -- RECs and credits the revenue derived
16 from those sales to the benefit of its customers.

17 Instead, it now banks some of those
18 RECs so that they can be used for compliance with
19 the Missouri Renewable Energy Standard.

20 It also ignores the fact that
21 Missouri law is clear that for purposes of
22 interpreting a statute passed by initiative, the
23 subjective intent of the proponents of the
24 initiative is irrelevant.

25 The language of the statute and only

1 the language of the statute is what Courts rely on
2 to determine what a statute means.

3 Both the Complainants and the
4 Respondents in this case cite Missourians for
5 Honest Elections versus Missouri Elections
6 Commission as support for their respective
7 positions.

8 Therefore, I think it's important
9 that the Commission understand what that case holds
10 and what it doesn't. Like the current case,
11 Missourians for Honest Elections involved both a
12 statute passed by initiative and questions about
13 how language of that statute should be interpreted
14 for enforcement purposes.

15 The Appellants in the Honest
16 Elections case who were instrumental in drafting
17 and promoting the initiative challenged rules
18 adopted by the Missouri Elections Commission
19 because the Appellants claimed those rules did not
20 accurately reflect the intent of the initiative.

21 Specifically, the Appellate Court was
22 asked to decide whether certain reporting
23 exemptions for small candidates included only
24 campaign expenditures or whether those exemptions
25 also applied to financial disclosures.

1 The Appellants, again, the authors of
2 the initiative argued that it was the intent of the
3 initiative that the exemption would cover both
4 campaign expenditures and financial disclosures.

5 But the Court held that the language
6 of the statute did not support that interpretation.
7 Although the exemption for campaign expenditures
8 was clear from the language of the statute, the
9 statute provided no similar exemption, either
10 explicitly or implicitly, for financial
11 disclosures. And the Court reached that conclusion
12 based solely on the language of the statute as
13 passed.

14 In fact, the Court specifically held
15 the intent of the promoters of the initiative was
16 of no consequence unless that intent was expressed
17 in the language of a statute.

18 And here's the relevant language from
19 the Court's opinion in that case, and I think it's
20 significant. As you can see, the Court in that
21 case held that we can't attribute an intent to
22 voters not expressly contained in the proposition
23 voted on and that we have no right to read into
24 that an intent contrary to the phraseology.

25 There is no way to rationally interpret

1 the language in the Renewable Energy Statute to
2 impose a limitation on the date when utilities can
3 begin to accumulate RECs used to comply with the
4 Renewable Energy Standard.

5 To reach such a conclusion, the
6 Commission would have to read language into the
7 statute just as the Court said it couldn't do.
8 And that would be contrary to recognized principles
9 of law governing statutory interpretation.

10 The final count in the complaint
11 against Empire has to do with the solar exemption
12 that Empire claims. And the Complainants ask the
13 Commission to find that Empire's 2011 compliance
14 report violated the Renewable Energy Standard
15 because the company improperly claimed the solar
16 exemption provided by Section 393.1050, a statute
17 that Complainants claim is unconstitutional or
18 otherwise unlawful.

19 As Empire has pointed out in each of
20 its pleadings related to the Dispositive Motions
21 filed in this case, the Commission has no authority
22 to void a statute passed by the General assembly.

23 Complainants appear to agree, but,
24 nevertheless, maintain that the Commission can
25 grant them the relief they seek in Count 3 of the

1 complaint.

2 Simply stated, the Commission -- the
3 Complainants position on this issue is wrong as a
4 matter of law.

5 This is not the first time that
6 parties aligned with the Complainants in case have
7 sought to have Section 393.1050 declared invalid.

8 A few years ago, three of those
9 parties filed suit in Cole County Circuit Court
10 seeking a declaratory judgment that the statute was
11 invalid. That case was finally resolved in the
12 Missouri Court of Appeals in Evans versus Empire
13 District Electric Company, a case that Empire that
14 cited and discussed in its pleadings in this case.

15 Empire's position that that case was
16 simple. A declaratory judgment action was not
17 right because Missouri law required the Plaintiffs
18 for first exhaust available administrative
19 remedies, and the Court of Appeals agreed with
20 Empire.

21 In doing so, the Court was very
22 specific as to what a party seeking to overturn
23 Section 393.1050 must do. It must file a complaint
24 with the Commission.

25 But the Court was also very clear as

1 to what legal questions the Commission could
2 consider in that complaint case and what remedy the
3 Commission could provide.

4 Here's an excerpt from the Court of
5 Appeals decision in Evans that addresses both of
6 those questions. As you can see, the Evans Court
7 made very clear that the only question that is
8 presented for the Commission to decide in this case
9 is whether or not there is -- whether Section
10 393.1050 is irreconcilable with the remainder of
11 the Renewable Energy Standard or whether or not
12 those statutes can be harmonized.

13 That's the only question the
14 Commission has authority to decide in this case.

15 JUDGE WOODRUFF: And what is Empire's
16 view on that question?

17 MR. MITTEN: Empire's view is that
18 the Section 393.1050 can easily be reconciled with
19 the remainder of the RECs. And I will address that
20 in the balance of my argument.

21 JUDGE WOODRUFF: Okay.

22 MR. MITTEN: I must add one point.
23 The Complainants have not asked the Commission to
24 rule on that question. Instead, the Complainants
25 have asked you to invalidate 393.1050.

1 And because the Commission can't do
2 that, Count 3 of the complaint ought to be
3 dismissed for that reason alone. But assuming the
4 Commission decides its going to ignore the specific
5 relief requested by the Complainants and, instead,
6 deal with the question that the Court of Appeals
7 authorized, Empire's pleadings in this case show
8 that not only can the statute at issue be
9 harmonized, applicable law dictates that it must be
10 harmonized.

11 As the case law Empire cited in its
12 pleadings demonstrates, Courts are extremely
13 reluctant to find that statutes can't be harmonized
14 with one another.

15 Precedent says that a Court must
16 harmonize and give effect to both statutes whenever
17 possible. Precedent also says that where, as in
18 this case, one statute deals with a subject in a
19 comprehensive and general manner while another
20 deals with a part of the same subject in a more
21 minute and specific way, the more specific statute
22 will prevail over the more general.

23 Courts also view statutes relating to
24 same subject impair materia and require that such
25 statutes be interpreted together as if they were

1 part of the same Legislative act.

2 And, finally, Courts resume that any
3 act taken by the General Assembly was intended to
4 have some effect, so Courts will not interpret a
5 statute in such a way that would render the General
6 Assembly's action meaningless.

7 To illustrate how reluctant Courts
8 are to find two statute irreconcilably in conflict
9 with one another, Empire cited the Missouri Supreme
10 Court's decision in Bardella versus Pinder.

11 In that case, the Court was
12 confronted with two statutes passed during the
13 General Assembly's 1991 Legislative session. The
14 first Bill repealed in its entirety Chapter 460 of
15 the Missouri Statutes.

16 The second Bill passed later the same
17 session amended two sections of that has same
18 chapter that had already been repealed. The
19 Governor signed the Bill repealing Chapter 460 26
20 days before he signed the second Bill.

21 So the question confronting the Court
22 was whether a statute repealing a chapter of the
23 statutes is irreconcilable with statute that
24 amended two statutes that already had been
25 repealed.

1 The Court found the two Legislative
2 enactments were not irreconcilable and gave effect
3 to the second statute. In effect, the Court, in
4 Lazarus-like fashion raised from the dead those two
5 amended statutes.

6 Empire submits that if the two
7 statutes in Bardella were not irreconcilable, the
8 statutes at issue in this case don't even
9 constitute a closed case.

10 All Section 393.1050 does is exempt
11 from the solar energy requirements of the Renewable
12 Energy Standard any utility who, by January 20th,
13 2009, had been already satisfied with all of the
14 renewable energy objectives of the RES through
15 2021.

16 Section 393.1050 doesn't change the
17 over-arching renewable energy objectives of the RES
18 in any way. Instead, the statute merely provides
19 an exemption from one small part of the statute for
20 any utility who qualifies for that exemption.

21 Complainants make various arguments
22 regarding the validity of Section 393.1050 that are
23 beyond the scope of the single question the
24 Commission is authorized by Evans to decide in this
25 case.

1 But as Empire has shown in its
2 pleadings, those arguments are all invalid. And
3 since Mr. Robertson raised them in his argument,
4 I'm going to address them here as well.
5 Complainants allege that Section 393 is
6 unconscionable because it's a special statute and,
7 also, because it conflicts with the Constitutional
8 provision governing initiatives.

9 Regarding their allegation that it's a
10 special statute, they argue that its closed-ended.
11 And a closed-ended statute under Missouri law is
12 presumptively a special statute and, therefore,
13 unconstitutional.

14 Section 393.1050 is not a closed
15 ended-statute because at the time the statute was
16 enacted and, also, when it became effective, the
17 class of utilities who could qualify for the
18 exemption the statute provided was not closed.

19 Consequently, as a matter of law,
20 Section 393.1050 cannot be considered closed-ended.
21 Instead, it was an open-ended statute, and as such,
22 is presumptively Constitutional.

23 But even if Section 393.1050 had been
24 closed-ended, the Constitutional inquiry does not
25 end there because even a closed-ended statute could

1 be Constitutional if the Courts conclude the
2 General Assembly had a rational basis for passing
3 the statute in the first place.

4 As Empire has pointed out in its
5 pleadings, when called upon to determine whether
6 there was a rational basis for the General
7 Assembly's action, Courts are highly deferential to
8 the Legislative branch. As long as there is any
9 plausible basis for the General Assembly's action,
10 the Courts will not second-guess the Legislature's
11 decision.

12 In this case, there are at least
13 three possible -- plausible explanations for the
14 General Assembly's decisions to pass 393.1050.

15 First, it was rational for the
16 General Assembly to conclude that any utility who,
17 by January 20th, 2009, had already achieved the
18 renewable energy portfolio standard objectives in
19 the RES through 20121 could or even should be
20 exempted from one or more of the specific
21 objectives of that statute.

22 Second, it was rational for the
23 General Assembly to conclude that without the
24 exemption provided by Section 393.1050, utilities
25 like Empire would bear a greater burden than other

1 utilities if they were required to add solar energy
2 on top of the renewables they had already
3 accumulated to satisfy the portfolio requirements
4 through 200021.

5 Finally, it was rational for the
6 General Assembly to conclude that even if the solar
7 exemption provided by Section 393.1050, all
8 utilities, including those would qualified for the
9 exemption, would still have to satisfactory the
10 overall portfolio objectives of the Renewable
11 Energy Standard.

12 Therefore, Section 393.1050 clearly
13 passes the rational basis test, even if it were to
14 be legitimately classified as a closed-ended
15 special statute.

16 In conclusion, for all the reasons
17 that have been covered in Empire's pleading and in
18 my argument today, the Commission should deny the
19 Complainants' Motion for Summary Disposition.

20 They should dismiss Counts 1 and 2 at
21 a minimum because Plaintiff -- or the Complainants
22 have failed to show that they have a legal basis
23 for a decision in their favor.

24 And they should either dismiss Count
25 3 because Complainants have asked for more relief

1 than the Commission can give, or, in the
2 alternative, issue an order finding that Section
3 393.1050 is not to irreconcilably in conflict with
4 the other provisions of the RES.

5 That concludes my argument. I'd be
6 happy to answer any question from the Bench if you
7 have any.

8 JUDGE WOODRUFF: I do have a question
9 just on your last statement there. You said we
10 could either dismiss the solar exemption count or
11 -- or issue a finding that it's not in conflict.

12 Procedurally, how would we issue a
13 finding not in conflict? Would it have to be a
14 summary determination or --

15 MR. MITTEN: I think just as a matter
16 of interpretation of the statute, you simply say
17 that we interpret the statute -- the solar
18 exemption statute not to be irreconcilably in
19 conflict with the remainder of the RES.

20 JUDGE WOODRUFF: And could we do that
21 in the context of an order granting your Motion to
22 Dismiss?

23 MR. MITTEN: Yes. I think you can.
24 Because, again, it's a statutory interpretation
25 question, and it doesn't depend upon any evidence

1 that would be produced in an evidentiary hearing in
2 this case.

3 JUDGE WOODRUFF: Okay.

4 MR. MITTEN: Thank you.

5 JUDGE WOODRUFF: MIEC?

6 ORAL ARGUMENT

7 BY MR. DOWNEY:

8 MR. DOWNEY: May it please the
9 Commission. Judge, I'll be very brief. The MIEC
10 intervened in these complaint cases and has
11 monitored all the filings by all of the parties.

12 Why did we do that? We wanted to
13 make sure that the interests of consumers,
14 certainly, the industrial consumers, were
15 adequately represented here.

16 And we concluded that they have been.
17 And you know won't hear me say this often, but we
18 believe they have been by the utilities.

19 I don't think there's any question
20 but that if these complaint cases are successful
21 that electric rates are going to increase by more
22 than they otherwise would increase.

23 And so I guess, in summary, we
24 support the position of Empire, support the
25 position of Ameren and oppose the position of Renew

1 Missouri.

2 JUDGE WOODRUFF: Thank you. Public
3 Counsel was excused. So Staff?

4 ORAL ARGUMENT

5 BY MS. HERNANDEZ:

6 MS. HERNANDEZ: Thank you. It's
7 still morning, so good morning, and may it please
8 the Commission.

9 I will try to limit some of my
10 comments because a lot of the things that I would
11 say are -- say on behalf of Staff has already been
12 said by the utilities represented here. So I'll
13 try to make my comments more brief than what I had
14 originally prepared.

15 It's been brought to you -- to the
16 Commission's attention that they have four issues
17 now before them that need to be decided.

18 And because the Commission has been
19 giving the -- given the statutory authority to
20 interpret statutes of its charge, the Commission
21 has the authority to make such determinations, and
22 your interpretations and determinations will be
23 afforded great weight by a reviewing court.

24 Staff and the utilities take the same
25 interpretation of the words in the statute and what

1 the statute means. Staff recommends that you
2 exercise your authority to interpret the statute
3 and -- and file -- or issue some order which finds
4 the interpretations by Staff and the utility and
5 not as Renew Missouri argues they should be.

6 You also have Motions to Dismiss as
7 Ameren and Empire have thoroughly discussed. And
8 to the extent that Renew Missouri is asking for the
9 Commission to overturn a decision by the Missouri
10 Department of Natural Resources in Count 1 of the
11 Complaint, then again in Count 3, where they're
12 talking about finding the solar exemptions,
13 393.1050 to be void, the Commission does not have
14 the jurisdiction to issue that type of opinion.
15 And those counts or those parts of Counts should be
16 dismissed.

17 Going quickly to the four issues that
18 are before the Commission for a decision. Starting
19 with the name you -- name plating, Staff agrees
20 with the analysis that has been given by Ameren
21 Missouri as well as Empire.

22 The statute could have included the
23 words aggregate or total generating capacity, but
24 it did not. 393.1025, paragraph 5, I won't read
25 it, but that is the part of the statute that

1 defines renewable energy resources, and that also
2 includes the definition for hydro power.

3 Now, it's Staff's position that the
4 RES is not ambiguous and the parties should
5 interpret it using the plain and ordinary sense of
6 the words therein with technical terms in the
7 statute being understood according to their
8 technical import.

9 This comes from Section 1.090 of the
10 Missouri Statutes that provides that words and
11 phrase shall be taken in their plain and ordinary
12 and usual sense, but technical words and phrase
13 having a peculiar and appropriate meaning in law
14 shall be understood according to their technical
15 import.

16 Now, name plate rating is an
17 engineering term of art, and it must be read in the
18 statute using its technical meaning. Case law says
19 that words that have subtle technical meaning
20 before the statute was enacted should infer that
21 the Legislature meant to give those words the same
22 technical meaning in their use.

23 While Proposition C was a voter
24 initiative, you can use the same theory to apply to
25 -- to -- to -- to the RES standard.

1 Staff has included in its brief
2 several sources that define what name plate rating
3 is. Those -- some of those being the U.S. Energy
4 Information Administration, EIA, the U.S.
5 Department of Energy and the U.S. Nuclear
6 Regulatory Commission.

7 Now, some questions early on that
8 were asked by the Chairman, he was correct that
9 there was a stakeholder process when developing the
10 RES rules. And there were 14 times -- or 14 -- 14
11 times to comment on the hydro power definition in
12 the RES rules.

13 So there was an opportunity there if
14 there was some misunderstanding or some invalid
15 interpretation that was being placed in the rules,
16 that could have been corrected in the rule-making.

17 Renew Missouri has also said here
18 today that it didn't know about Kiakuck being a
19 resource that was going to be planned to qualify
20 under the RES.

21 Didn't know and could have known are
22 two different things. All of the parties to the
23 rule-making were placed on notice by comments filed
24 by the Department of Natural Resources, those
25 comments being filed on March 23rd, 2009, regarding

1 what DNR found the meaning of hydro power name
2 plate rating to be.

3 And those eastbound comments did
4 include the ability for Ameren Missouri to use
5 Kiakuck as a facility that would qualify under the
6 Renewable Energy Standard.

7 Going to the issue of REC or what --
8 what year of REC you can use to qualify with the
9 Renewable Energy Standard, Renew Missouri is
10 arguing that the utilities have not met the
11 portfolio requirements because they were using RECs
12 that were produced prior to 2011 to meet the
13 standard.

14 There's nothing in the statute that
15 -- that puts a time limit on the RECs. The -- the
16 statute is very clear in other parts on the timing
17 of certain things. Dates are given in the statute.
18 Years are given in the statute.

19 That same specificity could have been
20 put in with the portion that defines RECs and how
21 long you can use them for and when you can use
22 them. But it was not included in -- in that.

23 And going back to the discussion
24 about how do you interpret statutes using the plain
25 -- plain meaning of the words were, you -- you

1 can't find that a certain era REC has to be comply
2 with the RES statute.

3 Something important for the
4 Commission to know is that this issue is really
5 going to go away by the end of this year because
6 the last date you could have produced a REC would
7 -- prior to 2011 would be December 31st, 2010.

8 That REC produced on December 31st,
9 2010, will expire at the end of this year. So this
10 is not going to be an issue going forward. It's
11 going to end by the end of this year.

12 In terms of the geographic sourcing,
13 I believe the utilities have commented on what the
14 meaning of 393.1030.1 means. The language there,
15 The portfolio requirement shall apply to all power
16 sold to Missouri customers whether such power is
17 self-generated or purchased from other source in or
18 outside of the state. And the utility might comply
19 with the standard in whole or in part by purchasing
20 RECs.

21 Now, Renew Missouri uses the section
22 to argue that the RES requires utilities to use
23 RECs bundled with renewable energy or
24 geographically sourced in Missouri to meet the
25 portfolio standard.

1 What this section really means is
2 that you use the power sold in Missouri by each
3 utility to determine the megawatts that have to be
4 provided by renewable energy resources to meet that
5 portfolio percentage requirement.

6 And in regard to the solar exemption,
7 Empire discussed the Evans case. And for the
8 Commission having that cite handy, I have a West
9 Law cite, and I'll read that into the record so you
10 can have it at your disposal.

11 2011, WL2118937, the portion that's
12 I'll talk about are on page 4. But the 393.1050
13 reads, Notwithstanding any other provision of law,
14 any electrical corporation which, by January 20th,
15 2009, achieved an amount of eligible renewable
16 energy technology name plate capacity equal to or
17 greater than 15 percent of such corporation's total
18 owned fossil fire generating capacity shall be
19 exempt thereafter from a requirement to pay any
20 installation subsidy fee or rebate to its customers
21 that install their own solar electric energy system
22 and shall be exempt from any mandated solar energy
23 standard requirements.

24 As Mr. Mitten mentioned, Staff does
25 agree with his interpretation that this is an

1 open-ended statute, that it's not only Empire that
2 is meant to -- for this to apply to, but it uses
3 the word any, which means that any electrical
4 corporation which would meet these provisions could
5 be qualified for a solar exemption.

6 Now, the Evans Court said that the --
7 the present dispute is whether a challenge to a
8 statute which purports to exempt certain utility
9 companies from providing a rebate to customers who
10 install solar electric systems is in irreconcilable
11 conflict with a provision of a statute adopted by
12 an Initiative Petition is a matter which must first
13 be considered by the PSC.

14 So the Commission has the ability to
15 determine whether these two statutes can be
16 reconciled with each other. It does not have the
17 jurisdiction to find 393.1050 void.

18 And Staff suggests that these two
19 sections can be harmonized. And looking to the
20 opinion that supported the Commission's Renewable
21 Energy Standard rules, that opinion being Meta and
22 other parties versus the Public Service Commission,
23 and that should be in EFIS under WD-74896.

24 The Western District found -- well
25 not found, discussed that case, that Footnote 3,

1 how you harmonize certain statutes or whether they
2 can be.

3 And in this particular footnote,
4 they're talking about 393.1045, which was passed
5 along with 393.1050. So both 393.1045 and 393.1050
6 came before the passage of Proposition C.

7 And the courts in that footnote, they --
8 they talk about 393.1045, which the General
9 Assembly enacted in 2008, noting not long before
10 the approval of Proposition C and likely mindful of
11 proposition C. And it goes on to talk about what
12 that provision is about, the retail rate impact of
13 renewable energy -- of the renewable energy
14 mandate.

15 So the related -- the Court says
16 related statutes are to be harmonized and construed
17 together if possible. But if they are
18 inconsistent, a statute is impliedly repealed by a
19 later one that revises the subject matter of the
20 first.

21 Well, in this decision, the Court
22 found that 393.1045 and the Renewable Energy
23 Standard, 393.1030 could be harmonized with each
24 other. And it didn't find an issue with this 1045
25 being passed before 1030, the voter initiative, in

1 November -- on November 4, 2008, came along.

2 So I think you can take -- although
3 it wasn't a direct question before the Court, 1050
4 wasn't before the Court, you can take that same
5 analysis that they used for 1045, which was passed
6 at the same time as 1050, and apply that to whether
7 you can reconcile these two statutes and whether
8 the timing of the he -- the 1050 and then the
9 passage of Prop C, whether that voids 1050.

10 And then I think another point that's
11 important for the Commission to look at in deciding
12 whether you can reconcile 1040 with 1050 is the
13 recently effective House Bill 142.

14 And that Bill, now law, on page 10 of
15 -- this Bill, at lines 55 and 56, says, As provided
16 for in this section, except for those electrical
17 corporations that qualify for an exemption in
18 Section 393.1050.

19 So in effect, House Bill 142 has
20 amended the RES Statute 393.1030 and has
21 specifically included the solar exemption from
22 393.1050 into 393.1040.

23 So by doing so, the Legislature has
24 reaffirmed 393.1050, and the Commission can use
25 that to find that these statutes can be harmonized

1 with each other.

2 So in summarizing Staff's position, I
3 would, you know, ask the Commission to look at the
4 pleadings, the responses that Staff has filed in
5 this case. It will have all the case citations and
6 some of the interpretations that I've mentioned
7 here in that pleading for their use.

8 But we would ask that the Commission
9 interpret the statute way that Staff and the
10 utilities have done so. And unless there's any
11 questions --

12 JUDGE WOODRUFF: All right. Thank
13 you.

14 MS. HERNANDEZ: Thank you.

15 JUDGE WOODRUFF: All right. As I
16 said at the beginning, I'll give the parties a
17 chance to come back and give me any responsive
18 comments to the arguments that were presented by
19 the other parties beginning with Renew Missouri.

20 MR. ROBERTSON: Ten minutes, tops.

21 JUDGE WOODRUFF: Okay.

22 CONTINUED ORAL ARGUMENT

23 BY MR. ROBERTSON:

24 MR. ROBERTSON: At least this time I
25 know for sure where I should be looking. I think

1 I've already responded to most of these arguments.

2 I do want to make one thing very
3 clear is that we are not -- we have never in this
4 complaint proceeding said that you should say this
5 is what the statute means because we say so,
6 because it's our subjective intent.

7 We have very clearly based our
8 arguments on the language of the statute and the
9 objectives and policies of the RES law as can be
10 inferred in RES laws in other states, and that's
11 according to the testimony substantiated by our
12 expert witness Ed Holt.

13 Ameren attempts to say that there is
14 a difference between name plate rating, name plate
15 capacity. They cite no example, give no authority
16 for this, and, in fact, I think they contradict it
17 referring to the name plate capacity on the
18 generator itself, synonymous.

19 This -- this thing about the DNR
20 rule, I -- I do not want to be caught in a Catch 22
21 here, and that's -- however, what they're trying to
22 do. They're saying we can't attack the
23 Commissions' rule because there is a DNR rule. We
24 could go to the DNR and say, Oh, we can't change
25 our rule because they're the Commission's rule.

1 So, clearly, they're two separate
2 rules. They have to be dealt with separately.
3 There's not a thing we can do about the DNR rule
4 here. There is nothing we can do at DNR about the
5 Commission's rule.

6 The argument about DNR having
7 exclusive certification authority, they did make a
8 rule defining hydro power. But nevertheless, the
9 Commission also made a rule defining hydro power.

10 So, I mean, yes, there are two
11 different rules. They're recorded slightly
12 differently. We have to deal with them. And if
13 the Commission had no authority over the definition
14 of hydro power, then why does the rule exist, and
15 why is it being enforced in the manner in which it
16 is?

17 The Commission has the primary
18 authority -- the Commission, in consultation with
19 DNR make whatever rules are necessary in order to
20 enforce the RES. That's what the statute says.

21 So the Commission is the primary
22 enforcer of the RES and DNR's role is limited, and
23 we must deal with DNR as DNR.

24 Yes, Ameren brings up their green
25 pricing program, their pricing program where they

1 buy RECs from a wind farm. That has nothing to do
2 with the RES. The RES explicitly says so.

3 I don't know if any of our utilities
4 ever sold their pre-2011 RECs to other states,
5 utilities in other states to satisfy other RES
6 laws. But if they did, it's because those RES laws
7 already existed. Missouri's did not exist till
8 2011, and that's the date at which RECs must begin
9 to be generated if they're going to represent
10 electricity that satisfies the standard.

11 Empire's arguments, I certainly agree
12 with Mr. Mitten. This is a purely a matter of a
13 legal question. There are no factual issues, and
14 that's exactly why it's right for summary
15 determination.

16 Empire says you can -- the Commission
17 cannot invalidate 1050. Staff says you cannot
18 declare it void. That's splitting hairs. We're
19 very specific about -- I mean, to bring this --
20 what we actually said in our complaint was we asked
21 the Commission to, quote, find that Empire is not
22 exempt from the solar requirements of the RES and
23 order Empire to comply with such requirements.

24 That is exactly what the Court of
25 Appeals said we had to do. We had to get the

1 Commission's determination whether the 1050 and the
2 statute are -- the RES statute are consistent or
3 can be harmonized. And order Empire to comply,
4 that refers to the statement in the Court of
5 Appeals' opinion that's saying that Empire, quote,
6 would be required to file tariffs with the PSC to
7 implement the relevant Proposition C requirements
8 if it were found not to be exempt.

9 So that's what we mean. We're simply
10 asking the Commission to do what the Court of
11 Appeals said.

12 And you asked how would you make the
13 finding whether or not 1050 is consistent with the
14 statute. It seems to me that would be in the
15 context of summary determination. The dismissal
16 would be for lack of jurisdiction or collateral
17 attack or whatever.

18 The substantive issue of whether 1050
19 is valid or not is an issue for the Motion for
20 Summary Determination which deals with the
21 substantive issues in the complaint.

22 MIEC raises the specter of rate
23 increases. This is constantly coming up, always
24 ignoring the fact that there is a protection in the
25 -- built into the statute that says it cannot raise

1 rates on an average of more than 1 percent.

2 Staff -- I understand why the
3 utilities don't want the RES to work. I don't
4 understand why Staff doesn't want it to work, and I
5 find it very disappointing that they bought the
6 utilities' arguments hook, line and sinker. I
7 think they simply wanted this to be over when the
8 rule-making was over.

9 And we all wanted it to have been
10 over. But the rule, again, cannot be inviolate
11 forever, even if it emerges that there is a
12 conflict of the statute.

13 Specific fact situations arise which
14 may show that there is a conflict, and the rule is
15 always subject to change.

16 Ms. Hernandez referred to some kind
17 of we were on notice from DNR as to their rule. I
18 don't know what she refers to. I can tell you that
19 the DNR rule was promulgated after the Commission's
20 rule.

21 Maybe we -- there was some
22 preliminary knowledge about what the DNR rule was
23 supposed to be. But, actually, the Commission's
24 rule was promulgated first.

25 The argument we left the dates -- left out

1 dates concerning the -- the pre-2011 RECs, again,
2 the date is in the statute. All you have to do is
3 stop obsessing about this one sentence and look at
4 statute as a whole. You see that the RES begins
5 January 2011. That's when the RECs begin to
6 accumulate that represents the electricity that
7 makes the standards.

8 She also said that this issue of the
9 outdated RECs will at the end of this year because
10 then the pre-2010 RECs will all have been used up.
11 That's not the case because that has allowed them
12 -- having those RECs available has allowed them to
13 accumulate RECs from 2011, 2012, and it will keep
14 rolling for a while. So this issue is not going to
15 be over at the end of this year.

16 And I did not follow her -- I did not
17 -- I don't recall seeing in Mrs. Hernandez'
18 argument the 1045 and the Western District opinion,
19 so I can't respond to that. I noticed 1045 was
20 passed at the same time and in the same Bill as
21 1050. And if one of them was repealed by Prop C,
22 then the other one was, too, to the extent that it
23 might have been inconsistent with Prop C.

24 And I don't think I need to say
25 anymore, unless you have any questions, Judge.

1 JUDGE WOODRUFF: All right. Thank
2 you, sir. For Ameren?

3 CONTINUED ORAL ARGUMENT

4 BY MR. BYRNE:

5 MR. BYRNE: Just a couple of brief
6 points, your Honor. One point is on the -- on the
7 question of whether the application of the 10
8 megawatt limitation on generators versus plant.

9 I think the DNR rule is controlling.
10 I think the DNR certification is controlling.
11 Mr. Robertson acts like they're equal rules from
12 the Public Service Commission and DNR, and that's
13 not really true.

14 DNR is given the power under the
15 statutes to determine what qualifies and what does
16 not. DNR has made that determination, and that
17 resolves that issue as far as I can tell.

18 Secondly, you know, the --
19 Mr. Robertson's argued the intent of the drafters a
20 couple of times, and I know the Chairman had a
21 question about that when I was up here.

22 The intent of the drafters of this
23 Legislation, whatever it might have been, is
24 completely irrelevant to its interpretation.

25 Under the Missourians for Honest

1 Elections versus Missouri Elections Commission,
2 which Mr. Mitten cited in his argument 536
3 Southwest Second 766, it is clear that in -- in the
4 case of an initiative Petition at least, the intent
5 of the drafter means nothing, and -- and Courts and
6 I guess the Commission, to the extent its
7 interpreting the law, looks to the language of the
8 statute for interpretation.

9 I think part of that is because you
10 can't know what a hundred thousand voters or
11 however many voters voted for a particular statute
12 may have intended. They may have intended all
13 sorts of different things, and so that's why courts
14 look to the language of the statute.

15 And I guess the final thing I'd say
16 is it's a rare case where the utilities the Staff
17 and the industrial customers are on the same page,
18 and I think that suggests that we're on the right
19 page. Any questions?

20 JUDGE WOODRUFF: No.

21 MR. BYRNE: Thank you, your Honor.

22 JUDGE WOODRUFF: For Empire?

23 CONTINUED ORAL ARGUMENT

24 BY MR. MITTEN:

25 MR. MITTEN: Again, briefly, your

1 Honor. Mr. Robertson claims that we've put the
2 Complainants in this case in a Catch 22 situation.
3 It's not a Catch 22 situation if you go about it in
4 the right way.

5 You simply can't have this Commission
6 interpreting what constitutes too qualifying hydro
7 power under the RES in a manner that's different
8 from the way the Department of Natural Resources
9 has defined it.

10 You have the -- the situation where
11 you have generators that have been certified as
12 renewable resources being disqualified for purposes
13 of meeting the portfolio standards in 2011 if you
14 adopt that -- the Complainants' interpretation of
15 the Commission's rule.

16 At its very basis here, the issue
17 that they have is with the Department's rule.
18 There's a mechanism provided for in Chapter 536 for
19 them to -- to take on the Department's rule.

20 They haven't done that first. They
21 can't come to the Commission hoping to short-stop
22 that process and get the relief that they're asking
23 for.

24 They also claim that in their
25 complaint they're not asking the Commission to

1 invalidate Section 393.1050. I invite you to
2 read Count 4 of the complaint against Empire.

3 There are legal arguments printed in
4 the complaint as to why the statute is invalid.
5 And the final paragraph in Count 3 specifically
6 says that, Because Section 393.1050 failed to
7 exempt Empire from its solar obligations under the
8 RES that Empire failed to comply with the portfolio
9 standard for 2011.

10 I don't know how the Commission can
11 make that finding in the face of Section 393.1050
12 unless it first invalidates the statute.

13 And, finally, Mr. Robertson addressed
14 something that Ms. Hernandez had said during her
15 argument, and that is that the problem with bank
16 RECs or at least RECs that were banked prior to
17 January 1, 2011, is going to go away because those
18 RECs will no longer be viable once you reach 2014
19 or at least past 2014.

20 Mr. Robertson complained that it's
21 not going to go away because utilities will be
22 allowed to use RECs that they banked in 2011 to
23 comply.

24 You can't have it both ways. The RES
25 specifically says that a REC remains viable for

1 three years from the time it was created.

2 Even under Mr. Robertson's interpretation
3 of the statute that you can't start banking RECs
4 until 2011, you would be able to use RECs that you
5 accumulated in 2011 to comply in 2012, 2013 and
6 2014.

7 He now says that that's not what the
8 RES was intended to accomplish. Again, you can't
9 have it both ways. The statute specifically says
10 that they have a three-year shelf life. The only
11 question is when that shelf life begins. Thank
12 you.

13 JUDGE WOODRUFF: All right. Thank
14 you. MIEC?

15 MR. DOWNEY: No rebuttal.

16 JUDGE WOODRUFF: Staff?

17 CONTINUED ORAL ARGUMENT

18 BY MS. HERNANDEZ:

19 MS. HERNANDEZ: Just two short
20 comments, if -- if you will. First of all, in
21 responding to Renew Missouri, Staff does not want
22 the Renewable Energy Standard to fail. I take a
23 lot of objection at that comment.

24 Staff is charged to advise the
25 Commission in different matters. And in this

1 situation, we have advised the Commission on what
2 we think the plain reading of the statute is.

3 I will not apologize for what we
4 believe that meaning is. But it is not that Staff
5 wants the Renewable Energy Standard to fail. We
6 actually do put in a lot of work reviewing many --
7 their annual filings s, the utilities' annual
8 filings and whether they do or do not comply with
9 the Renewable Energy Standard or its rules.

10 The last thing is the comment I was
11 referring to by DNR was filed in the Commission's
12 rule-making, EW-2009-0324, and that is where they
13 specifically said -- DNR specifically said that
14 AmerenUE's Kiakuck facility would qualify as a
15 renewable energy resource. Thank you.

16 JUDGE WOODRUFF: Thank you very much.
17 All right. Thank you all. It's been an
18 interesting two hours. And even though the
19 Commissioners weren't her for parts of this, of
20 course, this will be transcribed and they will have
21 an opportunity to view it on the -- on the screen
22 as well since this was all web cast and it will be
23 available on the Commission's web site.

24 So thank you all for coming. And
25 with that, we are adjourned.

1 (The proceedings were concluded at 12:05 p.m.
2 on September 12, 2013.)
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REPORTER'S CERTIFICATE

STATE OF MISSOURI)

) ss.

COUNTY OF OSAGE)

I, Monnie S. Mealy, Certified Shorthand Reporter,
Certified Court Reporter #0538, and Registered Professional
Reporter, within and for the State of Missouri, do hereby
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set forth in the caption sheet hereof; that I then and there
took down in stenotype the proceedings had at said time and
was thereafter transcribed by me, and is fully and accurately
set forth in the preceding pages.

IN WITNESS WHEREOF, I have hereunto set my hand and
seal on _____, 2013.

Monnie S. Mealy, CSR, CCR #0538
Registered Professional Reporter

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