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,	)	
vs.	)	Case No. 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

REPORTED BY: Monnie S. Mealy, CCR, CSR, RPR
Midwest Litigation Services
3432 W. Truman Boulevard, Suite 207
Jefferson City, MO 65109
(573) 636-7551

A P P E A R A N C E S

For Staff of the Missouri Public Service Commission:
Ms. Jennifer Hernandez
Mr. Kevin Thompson
Mr. Nathan Williams
Public Service Commission
P.O. Box 360
200 Madison Street
Jefferson City, MO 65102
(573) 751-8706

For Office of Public Counsel and the Public:
Mr. Lewis Mills
Office of Public Counsel
P.O. Box 2230
200 Madison Street
Jefferson City, MO 65102
(573) 751-4857

For The Empire District Electric Company:
Mr. Russell Mitten
Brydon, Swearengen & England, PC
312 E. Capitol Avenue
Jefferson City, MO 65102
(573) 635-7166

For MIEC:
Mr. Edward Downey
Bryan Cave
221 Bolivar Street, Suite 101
Jefferson City, MO 65102
(573) 556-6622

For Missouri Coalition or the Environment, et al.:
Mr. Henry Robertson
Great Rivers Environmental Law Center
705 Olive Street, Suite 614
St. Louis, MO 63101
(314) 231-4181

A P P E A R A N C E S (CONTINUED)

For Petitioners:

Mr. Andrew Linhares
Attorney at Law
910 E. Broadway, Suite 205
Columbia, MO 65201
(314) 471-9973

For Ameren Missouri:

Mr. Thomas Byrne
Attorney at Law
1901 Chouteau Avenue
St. Louis, MO 63103
(314) 554-2237

P R O C E E D I N G S

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

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

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

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

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

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

JUDGE WOODRUFF: All right. And for the Staff?

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

JUDGE WOODRUFF: And Public Counsel?

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

JUDGE WOODRUFF: For Ameren Missouri?

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

JUDGE WOODRUFF: For Empire?

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

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

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

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

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

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

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

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

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

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

start with Renew Missouri.

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

JUDGE WOODRUFF: You may be excused.

MR. MILLS: Thank you.

ORAL ARGUMENT

BY MR. ROBERTSON:

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

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

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

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

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

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

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

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

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

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

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

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

JUDGE WOODRUFF: Okay. Thank you.

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

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

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

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

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

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

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

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

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

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

COMMISSIONER KENNEY: Mr. Robertson?

MR. ROBERTSON: Yes, Chairman.

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

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

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

over DNR. So it requires two separate processes.

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

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

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

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

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

MR. ROBERTSON: No.

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

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

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

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

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

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

MR. ROBERTSON: Yes.

CHAIRMAN ROBERT KENNEY: But you

acknowledge that the wording in the statute has two definitions?

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

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

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

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

MR. ROBERTSON: Yes, it is, explicitly.

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

MR. ROBERTSON: You can't do

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

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

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

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

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

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

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

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

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

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

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

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

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

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

is that Earth Island Institute is trying to do?

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

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

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

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

MR. ROBERTSON: Well, if --

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

MR. ROBERTSON: Exactly.

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

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

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

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

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

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

statute to reach an absurd result.

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

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

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

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

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

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

Now, what would the -- what would the

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

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

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

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

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

MR. ROBERTSON: November 4th, 2008.

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

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

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

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

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

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

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

out as January 1st, 2010.

Before that, there is --

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

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

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

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

CHAIRMAN ROBERT KENNEY: Okay.

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

which is the Empire solar exemption, Second 393.1050.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN ROBERT KENNEY: Okay. Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the validity of JCAR's actions?

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

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

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

MR. ROBERTSON: In the JCAR suit, yes.

CHAIRMAN ROBERT KENNEY: But not here?

MR. ROBERTSON: Not here.

CHAIRMAN ROBERT KENNEY: All right. Sorry.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

rather than the individual ratings qualify.

And that's all I have at the present. I will yield to other parities unless there are more questions.

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

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

COMMISSIONER STOLL: I have no questions, your Honor.

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

ORAL ARGUMENT

BY MR. BYRNE:

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

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

Determination or if they should be set for hearing.

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

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

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

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

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

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

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

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

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

CHAIRMAN ROBERT KENNEY: Mr. Byrne?

MR. BYRNE: Yes, Mr. Chairman.

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

MR. BYRNE: Sure.

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

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

CHAIRMAN ROBERT KENNEY: Sure.

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

initiative Petition say.

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

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

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

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

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

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

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

MR. BYRNE: Yes, your Honor.

CHAIRMAN ROBERT KENNEY: Okay.

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

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

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

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

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

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

This rule unequivocably states that the 10 megawatt limit is to be applied on a per generator basis.

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

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

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

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

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

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

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

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

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

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

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

DNR's rule.

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

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

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

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

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

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

specific generating unit.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

three years, they clearly qualify for RES compliance purposes.

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

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

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

CHAIRMAN ROBERT KENNEY: Can I ask a quick question?

MR. BYRNE: Sure.

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

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

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

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

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

determination?

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

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

CHAIRMAN ROBERT KENNEY: Okay. Thank you.

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

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

Again, there's simply no basis for

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

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

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

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

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

quote.

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

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

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

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

I don't want to leave the Commission

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

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

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

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

As a consequence, the complaint

against Ameren Missouri must be dismissed. Thank you.

JUDGE WOODRUFF: Commissioners have any questions?

CHAIRMAN ROBERT KENNEY: I do not.

COMMISSIONER STOLL: I do not either.

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

MR. BYRNE: Okay.

JUDGE WOODRUFF: Okay.

MR. BYRNE: Thank you.

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

ORAL ARGUMENT

BY MR. MITTEN:

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

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

for Summary Judgment or Summary Determination.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

raised by Empire are not viable.

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

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

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

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

As a bit of background, Empire's

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

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

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

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

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

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

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

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

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

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

And the Commission has no legal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

pleadings, such an attack is unlawful.

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

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

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

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

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

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

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

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

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

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

And Complainants claim to know the

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

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

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

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

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

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

The language of the statute and only

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

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

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

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

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

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

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

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

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

There is no way to rationally interpret

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

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

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

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

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

complaint.

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

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

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

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

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

But the Court was also very clear as

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

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

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

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

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

JUDGE WOODRUFF: Okay.

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

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

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

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

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

part of the same Legislative act.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUDGE WOODRUFF: Okay.

MR. MITTEN: Thank you.

JUDGE WOODRUFF: MIEC?

ORAL ARGUMENT

BY MR. DOWNEY:

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

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

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

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

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

Missouri.

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

ORAL ARGUMENT

BY MS. HERNANDEZ:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2011, WL2118937, the portion that's I'll talk about are on page 4. But the 393.1050 reads, Not withstanding any other provision of law, any electrical corporation which, by January 20th, 2009, achieved an amount of eligible renewable energy technology name plate capacity equal to or greater than 15 percent of such corporation's total owned fossil fire generating capacity shall be exempt thereafter from a requirement to pay any installation subsidy fee or rebate to its customers that install their own solar electric energy system and shall be exempt from any mandated solar energy standard requirements.

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

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

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

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

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

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

how you harmonize certain statutes or whether they can be.

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

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

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

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

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

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

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

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

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

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

with each other.

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

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

JUDGE WOODRUFF: All right. Thank you.

MS. HERNANDEZ: Thank you.

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

MR. ROBERTSON: Ten minutes, tops.

JUDGE WOODRUFF: Okay.

CONTINUED ORAL ARGUMENT

BY MR. ROBERTSON:

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

I've already responded to most of these arguments.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

rates on an average of more than 1 percent.

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

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

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

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

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

The argument we left the dates -- left out

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

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

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

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

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

CONTINUED ORAL ARGUMENT

BY MR. BYRNE:

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

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

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

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

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

Under the Missourians for Honest

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

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

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

JUDGE WOODRUFF: No.

MR. BYRNE: Thank you, your Honor.

JUDGE WOODRUFF: For Empire?

CONTINUED ORAL ARGUMENT

BY MR. MITTEN:

MR. MITTEN: Again, briefly, your

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

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

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

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

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

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

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

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

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

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

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

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

three years from the time it was created.

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

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

JUDGE WOODRUFF: All right. Thank you. MIEC?

MR. DOWNEY: No rebuttal.

JUDGE WOODRUFF: Staff?

CONTINUED ORAL ARGUMENT

BY MS. HERNANDEZ:

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

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

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

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

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

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

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

(The proceedings were concluded at 12:05 p.m. on September 12, 2013.)

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 certify that I was personally present at the proceedings as 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

I N D E X