BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of a Repository File Concerning Ameren Missouri's Submission of its 2011 RES Compliance Plan	)))	**File No. EO-2011-0275**
In the Matter of a Repository File Concerning The Empire District Electric Company's Submission of its 2011 RES Compliance Plan	)))	**File No. EO-2011-0276**
In the Matter of a Repository File Concerning The Kansas City Power & Light Company's Submission of its 2011 RES Compliance Plan	)))	**File No. EO-2011-0277**
In the Matter of a Repository File Concerning KCP&L Greater Missouri Operations Company's Submission of its 2011 RES Compliance Plan	)))	**File No. EO-2011-0278**

STAFF RESPONSE TO COMMENTS OF RENEW MISSOURI

COMES NOW the Staff of the Missouri Public Service Commission (Staff), by and through the undersigned counsel, and respectfully submits this *Staff Response To Comments Of Renew Missouri* to the Commission stating the following:

PROCEDURAL HISTORY

In April of 2011, The Empire District Electric Company (Empire), Union Electric Company, d/b/a Ameren Missouri (Ameren Missouri), Kansas City Power & Light Company (KCPL) and KCP&L Greater Missouri Operations Company (GMO) each filed its RES Compliance Plan for calendar years 2011 through 2013. The Missouri Coalition for the Environment, d/b/a Renew Missouri (Renew Missouri) filed comments in each of the above referenced files raising the same or similar issues with regard to each utility's RES Compliance Plan. As a result, the Commission convened a joint prehearing conference on August 4, 2011. At the prehearing conference, the parties agreed to, and have proposed to the Commission,

a procedural schedule allowing: parties to respond to Renew Missouri's initial filed comments until August 11, 2011; a reply by Renew Missouri by August 22, 2011; and oral argument before the Commission on August 31, 2011. The Commission adopted the proposed procedural schedule, except it changed the oral argument date to August 30, 2011. The issues that are the subject of this response and that are before the Commission to decide are:

- Qualifying hydropower (station or generating unit): Ameren Missouri, Empire
- Renewable Energy Credit Banking (allowed before January 1, 2011): Ameren Missouri, KCPL, GMO
- Solar exemption: Empire

QUALIFYING HYDROPOWER—NAMEPLATING

Section 393.1025 (5) defines "Renewable energy resources" to include "….hydropower…that does not require a new diversion or impoundment of water and that has a nameplate rating of ten megawatts or less…." The implementing renewable energy standard rule defines "renewable energy resources" to include "….hydropower…that does not require a new diversion or impoundment of water and that has *generator* nameplate ratings of ten (10) megawatts or less…." 4 CSR 240-20.100 (1)(K)8 (emphasis added). Renew Missouri asserts there is inconsistency between the statute and rule on qualifying hydropower and that the true meaning of name plate rating in the statute is the aggregate or the total generating capacity of the generating units at the station, not the capacity of each. Renew Missouri argues that Ameren Missouri's Keokuk hydroelectric plant and Empire's Osage Beach hydroelectric plant do not qualify as "renewable energy resources" under the statute and that the rule is inconsistent with the statute.

The Staff disagrees that nameplate rating as contained within the statute and rule mean aggregate or total generating capacity of a plant. The Staff asserts that the statute is unambiguous and the parties should interpret it using the plain and ordinary sense of the words, with technical terms understood according to technical import. Section 1.090 RSMo provides that: "[w]ords and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import." Missouri case law also supports this idea. *See generally Henry & Coatsworth Co. v. Evans*, 10 S.W. 868 (1889) and *Smith v. Missouri Pacific Railroad Co.*, 44 S.W. 718 (1898)(In construing statutes, words of common use are to be construed in their natural and ordinary meaning); Lauck v. Reis, 274 S.W. 827 (1925) (In construing a statute, effect must be given, if possible, to every word thereof.)

Since nameplate rating is an engineering term of art, one must read the statute and the rule using the technical meaning of "nameplate rating." See *generally Rose v. Franklin Life Ins. Co.*, 132 S.W. 613, 615 (1910) ("The words 'net value' being technical words are to be taken in their technical sense…Their meaning is for the court who may ascertain their meaning by referring to persons who have knowledge on the subject or by consulting books of reference containing information thereon…It is important to ascertain whether the words had a settled technical meaning before the statute was enacted, as in that case we must assume that the Legislature used them in that sense.") (internal citations omitted). The United States Energy Information Administration defines nameplate capacity as "….the full-load continuous rating of the generator under specified conditions, as designated by the manufacturer, and is usually indicated on a metal plate attached to the generator."[1] A glossary of electric industry terms produced by the Edison Electric Institute defines nameplate capacity as "[t]he full-load

[1] http://www.eia.gov/cneaf/electricity/page/prim2/chapter2.html

continuous rating of a generator, prime mover or other electrical equipment under specified conditions as designated by the manufacturers. It is usually indicated on a nameplate attached mechanically to the individual machine or device."[2] All of these sources support that nameplate capacity is specific to the generating unit, both for the statute and the Commission's rule.

For the sake of argument, if the statute were ambiguous, the Commission resolved any ambiguity by rule. The issue is with the utility's compliance with the specific rule, not the statute. In *State ex rel. Jackson County vs. Public Service Commission*, 532 S.W.2d 20 (1975), the case involved ambiguity between two Commission statutes that discussed methods for a utility's increase in rates. The Court said that the Commission's statutes must be read and interpreted together to avoid producing conflicts between the provisions. When reading the in question rate increase provisions together, the Court noted ambiguity but said "….we look to the construction which those assigned by law to administer those provisions have placed on them." *State ex rel. Jackson County*, 532 S.W.2d at 28. While the case at hand does not involve ambiguity between two statutes, the same principle of statutory construction applies.

The definition of hydropower as a renewable energy resource does not include the specific terms "aggregate", "total generating capacity of the plant" or even "generator capacity." However, the Commission, through the rulemaking process promulgated a rule that included the term "generator" when discussing nameplate ratings. A court will look to the Commission's construction of the statute and unless contrary to the clear intent of the statute, will uphold the Commission's rule implementing the statute.

While Renew Missouri now argues inconsistency between the statute and rule, no party to the RES rulemaking, including Renew Missouri, suggested changes to the nameplate rating language or the existence of a conflict between the statute and the proposed rule at that time.

[2] http://www.eei.org/meetings/Meeting%20Documents/TWMS-26-glossry-electerm.pdf

During the RES rulemaking workshop, the original wording of the definition for hydropower read:

8. Hydropower (not including pumped storage) that does not require a new diversion or impoundment of water and that has a generator nameplate capacity rating(s) of ten (10) megawatts or less;

In the fifth revision, the stakeholders made this change to the definition:

8. Hydropower (not including pumped storage) that does not require a new diversion or impoundment of water and that has generator nameplate ~~capacity~~ rating(s) of ten (10) megawatts or less;

In the fourteenth revision, the stakeholders removed the parentheses from the (s) following the word rating:

8. Hydropower (not including pumped storage) that does not require a new diversion or impoundment of water and that has generator nameplate ratings of ten (10) megawatts or less;

To the Staff's knowledge, no stakeholder, including Renew Missouri, suggested any substantive change to the definition of "hydropower" to remove the word "generator" or add more description language, such as "aggregate generating capacity of the station" at that time

Additionally, the Missouri Department of Natural Resources' (DNR) definition of qualifying hydroelectric resources is consistent with the Staff's interpretation of the meaning of nameplate rating in the Commission's rules. 10 CSR 140-8.010, *Certification of Renewable Energy and Renewable Energy Standard Compliance Account*, "implements provisions of the Proposition C initiative petition passed by Missouri voters on November 4, 2008…." The regulations of DNR contain a definition for hydropower. Paragraph (2)(A)8 of the rule defines "Eligible Renewable Energy Resources" as

> "[h]ydropower…that does not require a new diversion or impoundment of water and that *each generator* has a nameplate rating of ten megawatts *(10 MW) or less*.

> If an improvement to an existing hydropower facility does not require a new diversion or impoundment of water and incrementally increases the nameplate rating of *each generator*, up to ten megawatts (10 MW) *per generator*, the improvement qualifies as an eligible renewable energy resource…."

(emphasis added). As discussed in the purpose of the rule, DNR's regulation intended to implement the provisions of Proposition C, Section 393.1025 RSMo. The definition of hydropower within DNR's implementing rule is the same as the Commission's implementing rule, i.e., generator specific, and supports the Staff's position in this case.

Finally, and a perhaps most telling flaw in Renew Missouri's argument is the few number of resources that would qualify under the "aggregate" interpretation of generator capacity. To the Staff's knowledge, presently only one hydropower plant within the state, owned by an electric cooperative, would qualify as a hydropower renewable energy resource. Certainly, with Renew Missouri's purpose to encourage use of renewable energy within the state, its "aggregate" argument defeats that purpose.

RENEWABLE ENERGY CREDIT BANKING

Renew Missouri argues that all RECs used by the parties in meeting their renewable portfolio requirements for 2011 must originate beginning January 1, 2011, not January 1, 2008.[3] As the cases and statute cited in the previous discussion indicate, the plain meaning of the statute's words control unless they have a technical meaning or the statute is ambiguous. The statute is clear in defining a REC and its date of applicability or expiration.

Section 393.1025(4) defines a "renewable energy credit" or "REC" as "….a tradeable certificate of proof that one megawatt-hour of electricity has been generated from renewable energy resources." Section 393.1030.2 provides that "[a]n unused [REC] credit may exist for up to three years from the date of its creation. A credit may be used only once to comply with

[3] The date January 1, 2008, is determined by taking the immediately preceding three years from the first compliance year beginning January 1, 2011.

sections 393.1020 to 393.1030." The RES rule is exact in application but reads slightly differently: "An REC represents that one (1) megawatt-hour of electricity has been generated from renewable energy resources…An REC expires three (3) years from the date the electricity associated with that REC was generated…." 4 CSR 240-20.100 (1)(J).

While Renew Missouri now argues a utility cannot use 2008 RECs to meet its 2011 Compliance Plan, no party to the RES rulemaking, including Renew Missouri, suggested changes to the language to require the use of 2011 RECs during 2011, or the existence of a conflict at that time. The original draft of the proposed rule contained the following subsection:

(3) Renewable Energy Credits.
(D) RECs, S-RECs and SO-RECs that are created after November 4, 2008 may be utilized for compliance with the RES.

In the fourth revision of the proposed rule, the Stakeholders annotated the following comment:

(3) Renewable Energy Credits.

(D) RECs, S-RECs or SO-RECs that are created after November 4, 2008 [[Stakeholder comment]: why 11/4/08? May be better to remove this section and let it default to beginning of 2008] may be utilized for compliance with the RES.

In the seventh revision of the proposed rule, the stakeholders relocated the 3-year requirement:

(3) Renewable Energy Credits.
(A) RECs are valid for a maximum period of three (3) years from the date of the REC creation.

In the eighth revision, the following language existed:

(3) Renewable Energy Credits.
(A) RECs are valid for a maximum period of three (3) years from the date of the underlying electrical generation.

In the tenth revision and beyond, the stakeholders relocated the language to the Definitions section of the rule:

(1) Definitions.

(I) REC, Renewable Energy Credit …… A REC expires three (3) years from the date the electricity associated with that REC was generated;

Nothing in these sections of the statute or final rule indicate in what year a utility must use a credit, other than a utility must use a credit prior to its expiration. As drafters, Renew Missouri was very specific in providing dates for compliance with renewable energy portfolios in Section 393.1030.1, and could have applied that specificity to the dates for the applicability of RECs. Renew Missouri's identification of a "loophole" as they describe it does not give them the authority to alter a clear statute and rule without going through the proper avenues to do so. As the statute reads, it is clear in that a REC exists for a utility's use up to three years from its creation. However, even if one argues ambiguity, a court will look to the construction which those assigned to administer the law have placed on them. The Commission should deny the relief sought by Renew Missouri.

SOLAR EXEMPTION

Renew Missouri argues in its May 31, 2011 comments that "[i]f the Commission is satisfied that Empire met the prerequisite of 393.1050, [Empire] must still be held to the terms of the RES because 393.1050 was unlawfully passed or, if initially valid, was repealed."[4] Section 393.1050 provides:

> ….any electrical corporation…which, by January 20, 2009, achieves an amount of eligible renewable energy technology nameplate capacity equal to or greater than fifteen percent of such corporation's total owned fossil-fired generating capacity, shall be exempt thereafter from a requirement to pay any installation subsidy, fee, or rebate to its customers that install their own solar electric energy system and shall be exempt from meeting any mandated solar renewable energy standard requirements….

Despite Renew Missouri's attempt to address the issue in Empire's RES docket, this issue is not properly before the Commission for decision at this time.

[4] *Comments of Renew Missouri*, File No. EO-2011-0276, p. 5.

Renew Missouri has raised the same arguments before the Circuit Court of Cole County and most recently before the Western District Court of Appeals in *Evans v. Empire District Electric Company*. In that case, the Court stated:

> [t]he 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 the provision of a statute adopted by an initiative petition (Proposition C), is a matter which must be considered first by the PSC.

Evans v. Empire District Electric Company, 2011 WL 2118937, p. 4, (Mo. App. W.D., 2011). While the Court did not express an opinion as to the merits of the claims, it stated:

> [t]he PSC has the power to determine if the provisions of Proposition C are in irreconcilable conflict or can in fact be harmonized with the provisions of section 393.1050. Appellants [including Renew Missouri] are able *to file a complaint* with the PSC under 4 CSR 240-2.070 and section 386.390 and the PSC is able to grant relief.

Id. (emphasis added). Renew Missouri has failed to bring its argument before the Public Service Commission through the complaint process.

While this matter is currently pending before the Missouri Supreme Court, Section 393.1050 remains a valid and enforceable statute, with parties able to take full advantage of its provisions. Until the Commission finds through the complaint process that the provisions of the RES statute, Sections 393.1020-393.1035, and Section 393.1050 are in irreconcilable conflict, or the Supreme Court directs otherwise, Section 393.1050 remains valid. As such, the Commission in this matter should deny the relief sought by Renew Missouri.

SUMMARY

WHEREFORE, the Staff submits this response for the Commission's information and consideration and recommends that the Commission issue an Order that accepts the

Staff's Report and Recommendation filed in each of the above mentioned dockets and denies all relief requested by Renew Missouri.

Respectfully submitted,

/s/ Jennifer Hernandez
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via electronic mail to the parties of record in EFIS this 11th day of August 2011.

/s/ Jennifer Hernandez

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AFFIDAVIT OF MICHAEL E. TAYLOR

STATE OF MISSOURI)
) **ss**
COUNTY OF COLE)

Michael E. Taylor, of lawful age, on oath states: that he participated in the rulemaking for the Renewable Energy Standard; he has knowledge of the matters set forth in the Staff Response to Comments of Renew Missouri; and that such matters are true and correct to the best of his knowledge, information and belief.

Michael E. Taylor

Subscribed and sworn to before me this 11th day of August, 2011

SUSAN L. SUNDERMEYER
Notary Public - Notary Seal
State of Missouri
Commissioned for Callaway County
My Commission Expires: October 03, 2014
Commission Number: 10942086

Notary Public