

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

EARTH ISLAND INSTITUTE d/b/a           )  
RENEW MISSOURI, et al.,                )  
  )  
                  Complainants,            )  
  )  
                                  v.             )  
  )  
THE EMPIRE DISTRICT ELECTRIC        )  
COMPANY,                                 )  
  )  
                                  Respondent.    )

Case No. EC-2013-0378

**ANSWER**

The Empire District Electric Company (“Respondent”), through its undersigned attorneys, hereby answers and responds as follows to the Complaint filed with the Missouri Public Service Commission (“Commission”) on January 30, 2013, by Earth Island Institute d/b/a Renew Missouri; Missouri Coalition for the Environment; Missouri Solar Energy Industries Association; Wind on the Wires, Alternative Energy Company, LLC; StraightUp Solar; and Missouri Solar Applications, LLC (collectively “Complainants”):

1. Respondent lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 1 of the Complaint; therefore, Respondent denies each and all of those allegations.
2. Respondent lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2 of the Complaint; therefore, Respondent denies each and all of those allegations.

3. Respondent lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 3(a), (b), and (c) of the Complaint; therefore, Respondent denies each and all of those allegations.

4. Respondent lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 4(a), (b), and (c) of the Complaint; therefore, Respondent denies each and all of those allegations.

5. Respondent lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 5 of the Complaint; therefore, Respondent denies each and all of those allegations.

6. Respondent admits the allegations in paragraph 6 of the Complaint.

7. Respondent denies each and all of the allegations in paragraph 7 of the Complaint.

8. Respondent denies each and all of the allegations in paragraph 8 of the Complaint.

9. Respondent lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 9 of the Complaint; therefore, Respondent denies each and all of those allegations.

10. Respondent lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 10 of the Complaint; therefore, Respondent denies each and all of those allegations.

11. Respondent admits that in November 2008 Missouri voters approved an initiative designated Proposition C, later codified as the “Renewable Energy Standard,” Sections 393.1020 through 393.1035, RSMo. Respondent denies each and all of the remaining allegations in paragraph 11 of the Complaint.

12. Respondent admits that paragraph 12(a) of the Complaint accurately quotes an excerpt from Section 393.1025, RSMo, and that paragraphs 12(b), (c), and (d) accurately quote excerpts from Section 393.1030, RSMo. Respondent denies each and all of the remaining allegations in paragraphs 12(a), (b), (c), and (d).

13. Respondent admits that on December 2, 2009, the Commission opened a rulemaking docket to adopt rules necessary to implement the requirements of the Renewable Energy Standard. Respondent further admits that after taking comments in the rulemaking docket and holding a public hearing the Commission, on June 2, 2010, transmitted one or more orders of rulemaking to the Missouri Secretary of State and to the Joint Committee on Administrative Rules.

14. Respondent admits the allegations in paragraph 14 of the Complaint.

15. Respondent admits that to comply with the requirements of 4 CSR 240-20.100(7) Respondent filed, on April 15, 2011, a document entitled *2011 Annual Renewable Energy Standard Compliance Plan*, which set out Respondent's plan to comply with the Renewable Energy Standard for the years 2011 through 2013. Respondent further admits that in Case No. EO-2011-0276 the Commission heard oral arguments, received written comments, or both from one or more interested persons or entities. Respondent denies each and all of the remaining allegations in paragraph 15.

16. Respondent admits that on October 5, 2011, the Commission issued its *Notice Regarding Empire's 2011 RES Compliance Plan* in Case No. EO-2011-0276. Respondent denies each and all of the remaining allegations in paragraph 16 of the Complaint.

17. Respondent admits that to comply with the requirements of 4 CSR 240-20.100(7)(A) Respondent filed, on April 15, 2012, a document entitled *2012 Annual Renewable*

*Energy Standard Compliance Plan* in Case No. EO-2012-0036, which set out the results of Respondent's efforts to comply with the Renewable Energy Standard for 2011. Respondent further admits that 2011 was the first year in which Respondent was required to achieve compliance with the requirements of the Renewable Energy Standard.

18. Respondent admits that in its *2011 Annual Renewable Energy Standard Compliance Report*, filed in Case No. EO-2012-0336, Respondent retired 68,786 RECs from its Ozark Beach hydroelectric facility, which Respondent accumulated during 2008 and 2009. Respondent further admits: (i) that because the Ozark Beach facility is a renewable energy resource located in the state of Missouri, under 4 CSR 240-20.100(3)(G) each of the RECs produced by that facility counts as 1.25 RECs, which increased to 82,858 the vintage RECs from the Ozark Beach facility that Respondent was able to use to comply with 2011 Renewable Energy Standard requirements; (ii) that the Ozark Beach facility is in its 100<sup>th</sup> year of operation, comprises four (4) separate turbine generators, each of which has a nameplate capacity of four MW, and that the total generating capacity of the Ozark Beach facility is 16 MW; and (iii) that Respondent's *2011 Annual Renewable Energy Standard Compliance Report* states that Section 393.1050, RSMo, exempts Respondent from the provisions of the Renewable Energy Standard that otherwise would require two percent of Respondent's compliance portfolio to come from solar energy. Respondent denies each and all of the remaining allegations in paragraphs 18(a) and (b) of the Complaint.

19. Respondent admits that in late May 2012 one or more interested persons or entities submitted comments in Case No. EO-2012-0336 regarding Respondent's April 15, 2012, filing in that docket, and that the persons or entities who submitted comments included the Missouri Department of Natural Resources and various groups who self-identified themselves as

organizations instrumental to the passage of the Renewable Energy Standard or renewable energy installation companies that have a business interest in the successful implementation of the Renewable Energy Standard. Respondent denies each and all of the remaining allegations in paragraph 19 of the Complaint.

20. Respondent admits the allegations in paragraph 20 of the Complaint.

21. Respondent admits the allegations in paragraph 21 of the Complaint.

#### COUNT I: HYDROPOWER

22. Respondent incorporates by reference each and all of its responses to paragraphs 1 through 21 of the Complaint.

23. Respondent denies each and all of the allegations in paragraph 23 of the Complaint.

24. Respondent denies each and all of the allegations in paragraph 24 of the Complaint.

25. Respondent admits that the phrase “hydropower generator rating” does not appear in the Renewable Energy Standard, and further admits that the definition of “renewable energy resources” found in Section 393.1025, RSMo, includes the phrase “hydropower . . . nameplate rating of ten megawatts or less.” Respondent further admits that the definition of “renewable energy resource(s)” found in 4 CSR-240-20.100(1)(K)(8) includes the phrase “hydropower . . . that has generator nameplate ratings of ten (10) megawatts or less.” Respondent denies each and all of the remaining allegations in paragraph 25 of the Complaint.

26. Respondent admits that in certain contexts the word “nameplate” occasionally is used informally to refer to the total, combined MW ratings of two or more electric generator nameplates. Respondent denies each and all of the remaining allegations in paragraph 26 of the Complaint.

27. Respondent lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 27 of the Complaint; therefore, Respondent denies each and all of those allegations.

28. Respondent lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 28 of the Complaint; therefore, Respondent denies each and all of those allegations.

29. Respondent denies each and all of the allegations in paragraph 29 of the Complaint.

COUNT II: PRE-COMPLIANCE ERA RECs

30. Respondent incorporates by reference each and all of its responses to paragraphs 1 through 21 of the Complaint.

31. Respondent denies each and all of the allegations in paragraph 31 of the Complaint.

32. Respondent admits that, with the exception of Complainant's emphasis of the word "unused," paragraph 32 of the Complaint correctly quotes a portion of Section 393.1030.2, RSMo. Respondent further admits that in Case No. EO-2012-0336 Respondent asserted that it met the Renewable Energy Standard's target for Compliance Year 2011 by retiring 68,786 RECs from the Ozark Beach hydroelectric facility that Respondent had accumulated since January 1, 2008.

33. Respondent denies each and all of the allegations in paragraph 33 of the Complaint.

34. Respondent denies each and all of the allegations in paragraph 34 of the Complaint.

35. Respondent admits that paragraph 35 of the Complaint correctly quotes 4 CSR 240-20.100(7)(A)G. Respondent denies each and all of the remaining allegations in paragraph 35.

36. Respondent denies each and all of the allegations in paragraph 36 of the Complaint.

37. Respondent admits that to satisfy the Renewable Energy Standard's target for Compliance Year 2011 Respondent used RECs that it accumulated during 2008 and 2009. Respondent denies each and all of the remaining allegations in paragraph 37 of the Complaint.

### COUNT III: SOLAR EXEMPTION

38. Respondent incorporates by reference each and all of its responses to paragraphs 1 through 21 of the Complaint.

39. Respondent admits the allegations in paragraph 39 of the Complaint.

40. Respondent admits that paragraph 40 of the Complaint accurately quotes a portion of Section 393.1050, RSMo.

41. Respondent denies each and all of the allegations in paragraph 41 of the Complaint.

42. Respondent denies each and all of the allegations in paragraphs 42(a), (b), and (c) of the Complaint.

43. Respondent denies each and all of the allegations in paragraph 43 of the Complaint.

44. Each and all of the allegations in the Complaint not specifically admitted in this Answer are denied.

### RELIEF REQUESTED

45. Respondent denies that Complainants are entitled to any of the relief requested in paragraphs 1 through 6 of the prayer for relief.

### ADDITIONAL DEFENSES

46. Respondent alleges that the Complaint fails to state a claim upon which the Commission can grant relief because, without limitation, the Commission has authority under 4 CSR 240-20.100(10) to grant waivers from compliance with any or all of the Electric Utility Renewable Energy Standard Requirements found in 4 CSR 240-20.100.

47. Respondent alleges that the Commission lacks jurisdiction to decide one or more of the issues raised by the Complaint because, without limitation, the Commission has no statutory authority (i) to void any legislative enactment, as alleged in Count III of the Complaint, (ii) to consider challenges to its final order of rulemaking in Case No. EX-2010-0169 after the date for filing applications for rehearing in that case has passed, and (iii) to void or refuse to enforce rules adopted by the Missouri Department of Natural Resources, under authority of Section 393.1030.4, RSMo, that establish a certification process for electricity generated by hydropower and other renewable resources.

48. Respondent alleges that the Commission lacks jurisdiction to decide the lawfulness of the rule adopted by the Missouri Department of Natural Resources defining “hydropower,” 10 CSR 140-8.010(2)8, because, without limitation, (i) Complainants have not demonstrated that they, individually or collectively, have standing under Section 536.053, RSMo, to challenge that rule, and (ii) Section 536.050.1, RSMo, vests the judicial branch with exclusive jurisdiction to determine the validity of that rule.

49. Respondent alleges that Count I of the Complaint constitutes an unlawful collateral attack on the Commission’s final order of rulemaking in Case No. EX-2010-0169, because Count I challenges the definition of “hydropower” in 4 CSR 240-20.100(1)(K)8, which was included in rules adopted by the Commission in its final order of rulemaking in Case No. EX-2010-0169. Although some or all of the Complainants participated in Case No. EX-2010-0169, none of the Complainants filed for reconsideration of the Commission’s final order of rulemaking in that case. Thus, Complainants are barred by Section 386.550, RSMo, from seeking judicial review of any of the rules adopted in the final order or from collaterally attacking that order in this complaint proceeding.



50. Respondent alleges that some or all of Complainants' claims are barred by the doctrines of res judicata and collateral estoppel, because in *State ex rel. Missouri Energy Dev. Assn. v. Pub. Serv. Comm'n.*, 386 S.W.3d 165 (2012), the Missouri Court of Appeals determined that the rules adopted by the Commission in Case No. EX-2010-0169 are lawful and reasonable.

WHEREFORE, having fully answered the Complaint, Respondent requests the Commission to dismiss the Complaint with prejudice or to otherwise dispose of the Complaint in a manner that ensures Complainants take nothing by their Complaint, and to grant Respondent such other relief as the Commission deems appropriate.

Respectfully submitted,

BRYDON, SWEARENGEN & ENGLAND, P.C.

By:

/s/ L. Russell Mitten

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ATTORNEYS FOR THE EMPIRE DISTRICT  
ELECTRIC COMPANY

### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served, via e-mail, on counsel for each of parties of record on the 4<sup>th</sup> day of March, 2013.

/s/ L. Russell Mitten