BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

EARTH ISLAND INSTITUTE d/b/a RENEW MISSOURI, et al.,	)	
	)	
Complainants,	)	
	)	
v.	)	**Case No. EC-2013-0378**
	)	
THE EMPIRE DISTRICT ELECTRIC COMPANY,	)	
	)	
Respondent.	)	

THE EMPIRE DISTRICT ELECTRIC COMPANY'S
RESPONSE IN OPPOSITION TO
COMPLAINANTS' MOTION FOR SUMMARY DETERMINATION

The Empire District Electric Company ("Empire" or "the Company") hereby responds in opposition to Complainants' Motion for Summary Determination.

As set out and discussed in the Company's memorandum in support of this response, which is attached to this response and is incorporated herein by reference, Complainants' motion should be denied for at least three reasons. First, Complainant's motion fails to establish, in the manner required by law, the absence of a genuine issue of material fact necessary to establish a legal right to a judgment in Complainants' favor on any claim raised in the Complaint. Second, Complainants' motion does not establish, as required by law, that any of Empire's affirmative defenses are non-viable or otherwise fail as a matter of law. Finally, Complainants' motion fails to establish an undisputed right to a judgment as a matter of law.

In addition, Complainants' motion should be denied because it fails to comply with the requirements of the Commission's rule governing motions for summary determination, 4 CSR 240-2.117. Section (1)(B) of that rule requires such motions to, *inter alia*, "state with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue" and to support each such statement "with specific references to the pleadings, testimony, discovery, or

affidavits" to demonstrate no genuine issue of material fact exits. As described and discussed in the memorandum in support of this response, Complainants' motion does not comply with the Commission's rule because in most instances the support Complainants offer for the alleged statements of undisputed material fact does not qualify as "pleadings, testimony . . . or affidavits" as the Commission's rule specifically requires. Even if the pre-filed testimony of Ed Holt qualifies as a supporting affidavit, most of the statements from that testimony that Complainants rely on are conclusions not statements of fact, and general and legal conclusions are legally incompetent to support a motion for summary adjudication. In addition, based on applicable rules of law governing motions for summary adjudication, none of the exhibits that Complainants offer in support of their motion is legally competent support because those exhibits do not qualify as evidentiary materials that are admissible at trial.

Finally, because no issue of fact is material to the Commission's determination of the legal issues raised by the Complaint, a motion for summary determination is not the proper method for deciding those issues. A motion for summary determination – which is similar in all material respects to a motion for summary judgment in civil cases – tests whether any dispute as to *material fact* exists that would prevent the moving party from prevailing on its claims as a matter of law. In contrast, a motion to dismiss tests whether there is *any legal basis* for claims asserted. The issues the Commission must decide in this case are legal, not factual. Consequently, those issues must be resolved before the Commission can determine whether, as a matter of law, Complainants have a cause of action against Empire. Because a motion for summary adjudication simply assumes a cause of action exists, such a motion begs the legal questions that are fundamental to this case. And unless those questions are resolved in Complainants' favor, no set of facts – material or otherwise – exist under which the Commission could grant a motion for summary determination.

For each and all of these reasons, Empire urges the Commission to deny Complainants' motion. Empire further urges the Commission to grant the Company's Motion to Dismiss Complaint with respect to each count of the Complaint.

EMPIRE'S RESPONSE TO THE STATEMENTS OF MATERIAL FACT AS TO WHICH COMPLAINANTS CLAIM NO GENUINE ISSUE EXISTS

In accordance with 4 CSR 240-2.117(C), Empire makes the following response to each of the statements in paragraphs 1 through 24 of Complainants' motion as to which Complainants allege no genuine issue of material fact exists.

1. "There are no genuine issues with Complainants' rights to bring these complaints, as shown through Complainants' responses to Empire's 1st Set of Data Requests."

EMPIRE'S RESPONSE: Complainants' statement is not a statement of fact but is, instead, a conclusion. As such, it is not legally competent to support Complainants' motion. In addition, Complainants' responses to Empire's data requests (Exhibit 17) are not legally competent to support the motion because they are not evidentiary materials admissible at trial, and none of the responses is verified or supported by a sworn and signed affidavit establishing, *inter alia*, that the information in the response is based on personal knowledge.

2. "Earth Island Institute, d/b/a Renew Missouri ("Renew Missouri") has an institutional mission and interest in promoting renewable energy, and was active in the campaign to pass Proposition C."

EMPIRE'S RESPONSE: Complainants' statement is not a statement of fact but is, instead, a conclusion. As such, it is not legally competent to support Complainants' motion. In addition, Renew Missouri's allegations regarding its "institutional mission" and its involvement in the campaign to pass Proposition C are not material to the question of whether Complainants are entitled, as a matter of law, to a judgment on any of the claims alleged in the Complaint.

3. "The Missouri Coalition for the Environment also has an institutional mission and interest in promoting renewable energy, and was active in the campaign to pass Proposition C."

EMPIRE'S RESPONSE: The Missouri Coalition for the Environment's allegations regarding its "institutional mission," its interest in promoting renewable energy, and its involvement in the campaign to pass Proposition C are not material to the question of whether Complainants are entitled, as a matter of law, to a judgment on any of the claims alleged in the Complaint.

4. **"Wind on the Wires has an organizational mission to overcome barriers wind energy throughout the Midwest, including Missouri, and represents the interests of its members which have lost business opportunities in Missouri as a result of Ameren's and Empire's violations of the law."**

EMPIRE'S RESPONSE: Wind on the Wires' allegations regarding its "organizational mission" and the business interests of its members are not material to the question of whether Complainants are entitled, as a matter of law, to a judgment on any of the claims alleged in the Complaint.

5. **"The Missouri Solar Energy Industry Association ("MOSEIA") has a mission to expand the solar energy industry in Missouri; MOSEIA and its members' interests in business opportunities have been harmed by Empire's failure to observe the solar rebate and solar carve-out provisions of the RES."**

EMPIRE'S RESPONSE: The Missouri Solar Energy Industry Association's allegations regarding its "mission" and the business interests of its members are not material to the question of whether Complainants are entitled, as a matter of law, to a judgment on any of the claims alleged in the Complaint.

6. **"The Alternative Energy Company is situated near Empire's service territory. It is aggrieved by the loss of solar energy business opportunities due to Empire's failure to observe the solar rebate and solar carve-out provisions of the RES."**

EMPIRE'S RESPONSE: Neither The Alternative Energy Company's alleged financial interests in solar rebates nor its standing to file a complaint against Empire under §386.390, RSMo, is material to the question of whether Complainants are entitled, as a matter of law, to a judgment on any of the claims alleged in the Complaint.

7. **"StraightUp Solar is a solar energy installation company based in St. Louis that has lost opportunities to expand into Empire's territory due to Empire's failure to observe the solar rebate and solar carve-out provisions of the RES."**

EMPIRE'S RESPONSE: Neither StraightUp Solar's alleged financial interests in solar rebates nor its standing to file a complaint against Empire under §386.390, RSMo, is material to the question of whether Complainants are entitled, as a matter of law, to a judgment on any of the claims alleged in the Complaint.

8. **"Missouri Solar Applications, LLC, is a solar installation company based in Jefferson City that has lost business opportunities due to Empire's failure to observe the solar rebate and solar carve-out provisions of the RES. Two of its employees participated in the campaign to pass Proposition C."**

EMPIRE'S RESPONSE: Neither Missouri Solar Applications, LLC's, financial interests in solar rebates, its standing to file a complaint against Empire under §386.390, RSMo, nor the alleged participation of its employees in the campaign to pass Proposition C is material to the question of whether Complainants are entitled, as a matter of law, to a judgment on any of the claims alleged in the Complaint..

9. **"It is undisputed that Ameren Missouri is using its Keokuk hydroelectric generating station to comply with the RES, and that the facility is comprised of 15 generators each with individual nameplate ratings between 7.2 and 8.8 megawatts. 2011 Ameren Missouri RES Compliance Report, p. 9, Case No. EO-2013-0351."**

EMPIRE'S RESPONSE: None of Complainants' statements regarding Ameren Missouri is relevant or material to any allegation made against Empire in Case No. EC-2013-0378 or to the question of whether Complainants are entitled, as a matter of law, to a judgment on any of the claims alleged in the Complaint filed in that case.

10. **"It is undisputed that Empire is using its Ozark Beach hydroelectric facility for compliance, and that Ozark Beach is comprised of four generators of four MW each for a total of 16 MW. 2011 Empire RES Compliance Report, p. 5, Case No. EO-2012-0336."**

EMPIRE'S RESPONSE: Complainants' statement that each of the four hydroelectric generators at Osage Beach has a nameplate rating of four MW is correct. But neither that statement nor the statement that the arithmetic total of the capacities of those generators is sixteen MW it is material to the question of whether Complainants are entitled, as a matter of law, to a judgment on any of the claims alleged in the Complaint.

11. **"The only other material issue that could be considered factual is whether the statutory phrase "nameplate rating" has any meaning other than the rating on a physical nameplate attached to an individual generator. The only other issue that could be considered factual is whether the statutory phrase "nameplate rating" has any meaning other than the rating on a physical nameplate attached to an individual generator. The filed testimony of Ed Holt on behalf of Complainants establishes that the terms "nameplate rating" and "nameplate capacity" are synonymous (Direct Testimony of Ed Holt at 8) and are commonly used by utilities to refer to**

the combined generating capacity of all the generating units at a facility. Id. at 8, 10, 12 (see also EXHIBIT 6, Ameren Corporate fact sheet giving capacity of Keokuk as 140 MW and of Osage Beach as 240 MW). The two phrases are used in the same sense by government agencies such as the Federal Energy Regulatory Commission ("FERC")(EXHIBITS 1-3, FERC Form 1 using "Total installed cap" and "Gen nameplate rating" synonymously) and the Energy Information Administration ("EIA")(EXHIBIT 4, EIA Annual Electric Generator Report requesting "total generator nameplate capacity"); in the federal Public Utilities Regulatory Policies Act ("PURPA")(EXHIBIT 5, "What is the qualifying facility?"); and by the North American Renewables Registry ("NAR")(EXHIBIT 9-10, NAR Operating Rules; and EXHIBIT 11, report listing all registered assets)."

EMPIRE'S RESPONSE: The meaning of the phrase "nameplate rating" as used in §393.1025(5), RSMo, is a legal question to be decided based on well-established principles governing the interpretation of statutes by courts and administrative tribunals in Missouri. Neither the testimony of Ed Holt regarding his interpretation of that phrase nor evidence regarding how the phrases "nameplate rating" or "nameplate capacity" are interpreted outside Missouri are relevant or material to the resolution of that legal question. In addition, if and to the extent Mr. Holt's testimony can be considered an affidavit in support of Complainants' motion, some or all of that testimony is not a statement of facts. Instead, the testimony is a statement of a general or legal conclusion, neither of which is competent, as a matter of law, to support the motion. Further, Complainants' statement that "the terms 'nameplate rating' and 'nameplate capacity' are synonymous . . . and are commonly used by utilities to refer to the combined generating capacity of all generating units at a facility" is controverted by the affidavit of Tim N. Wilson, which Empire previously filed as part of its Motion to Dismiss Complaint. That affidavit, in its entirety, is incorporated into this response by reference. As a matter of law, a valid, controverting affidavit is alone sufficient to establish the existence of a genuine issue of fact.

12. **"Both Ameren Missouri and Empire have publicly acknowledged that "nameplate rating" can mean the combined generating capacity of all generating units at a hydroelectric facility in their filings with FERC (Form 1) for the year 2012. Testimony of Ed Holt at 14-15. On line 5 at p. 406 of their 2012 FERC Form 1 filings, Ameren Missouri lists the total capacity of Keokuk as 127.2 MW, while Empire gives the 16 MW aggregate capacity of Ozark Beach when asked to provide the "total installed cap (Gen nameplate rating in MW)." EXHIBITS 2, 3."**

EMPIRE'S RESPONSE: Complainants' statement is not a statement of fact but is, instead, a conclusion. As such, it is not legally competent to support Complainants' motion. In addition, the

statement is controverted by Mr. Wilson's affidavit, which states in relevant part, "I have searched Empire's records and I cannot find a single instance where the Company has referred to Ozark Beach, or to any of the Company's fossil-fuel facilities that comprise more than one generator, in the manner alleged by the complainants." As a matter of law, a valid, controverting affidavit is alone sufficient to establish the existence of a genuine issue of fact. Further, because the meaning of the phrase "nameplate rating" as used in §393.1025(5), RSMo, is a legal question to be decided based on well-established principles governing the interpretation of statutes by courts and administrative tribunals in Missouri, references to "total installed capacity" in forms that Empire is required to file with the FERC are irrelevant and immaterial to the resolution of that legal question.

13. "It is undisputed that Ameren Missouri refers to the aggregate "nameplate generation" of Pioneer Prairie wind farm on pg. 6 of its 2011 RES Compliance Report (EO-2012-0351)."

EMPIRE'S RESPONSE: None of Complainants' statements regarding Ameren Missouri is relevant or material to any allegation made against Empire in Case No. EC-2013-0378 or to the question of whether Complainants are entitled, as a matter of law, to a judgment on any of the claims alleged in the Complaint.

14. "It is undisputed that Empire refers to the "power plant ratings" of all its plants as the sum of all units in EXHIBIT 8, Empire Fast Facts. In EXHIBIT 7, the history page of its website, Empire states that Ozark Beach "supplies" 16 MW and that the Asbury plant's "capacity" is the sum of its two units' capacity. In EXHIBIT 12, Empire's 2009 – 2013 construction plans slide show, says that Ozark Beach "produces" 16 MW."

EMPIRE'S RESPONSE: The meaning of the phrase "nameplate rating" as used in §393.1025(5), RSMo, is a legal question to be decided based on well-established principles governing the interpretation of statutes by courts and administrative tribunals in Missouri. Empire's references in various publications to "power plant ratings," to the total amount of power supplied or produced by Ozark Beach, and to the total capacity of the two generators at the Company's Asbury facility are irrelevant and immaterial to resolution of that legal question.

15. "There is no genuine issue with regard to the fact that Empire, in its compliance filings, repeatedly uses "nameplate capacity" to refer to aggregate capacity, as in, "Empire's renewable energy nameplate capacity as of January 20, 2009 is 255 MW," referring to the two Kansas wind farms with which it has PPAs (see, e.g., 2011 Empire RES Compliance Report, pp. 14-15, Case No. EO-2012-0336). "

EMPIRE'S RESPONSE: The meaning of the phrase "nameplate rating" as used in §393.1025(5), RSMo, is a legal question to be decided based on well-established principles governing the interpretation of statutes by courts and administrative tribunals in Missouri. Empire's metaphorical use of the phrase "nameplate capacity" to describe the aggregate amount of renewable wind energy in its portfolio of generating assets is irrelevant and immaterial to the resolution of that legal question.

16. "It is undisputed that Ameren Missouri attempted to retire RECs that were created prior to 2011 for compliance with the RES for 2011. 2011 Ameren Missouri RES Compliance Report, p. 13, Case No. EO-2012-0351."

EMPIRE'S RESPONSE: None of Complainants' statements regarding Ameren Missouri is relevant or material to any allegation made against Empire in Case No. EC-2013-0378 or to the question of whether Complainants are entitled, as a matter of law, to a judgment on any of the claims alleged in the Complaint.

17. "It is undisputed that Empire attempted to retire RECs that were created prior to 2011 for compliance with the RES for 2011. 2011 Empire RES Compliance Report, p. 5, Case No. EO-2012-0336."

EMPIRE'S RESPONSE: Complainants' statement is correct, but it is not material to the question of whether Complainants are entitled, as a matter of law, to a judgment on any of the claims alleged in the Complaint.

18. "It is undisputed that Ameren Missouri relied on solar RECs ("SRECs") purchased from the Western Renewable Energy Generation Information System ("WREGIS") associated with power that was never sold to Missouri customers in claiming to meet the 2% "solar carve-out" of the RES. 2011 Ameren Missouri RES Compliance Report, p. 8, Case No. EO-2012-0351."

EMPIRE'S RESPONSE: None of Complainants' statements regarding Ameren Missouri is relevant or material to any allegation made against Empire in Case No. EC-2013-0378 or to the question

of whether Complainants are entitled, as a matter of law, to a judgment on any of the claims alleged in the Complaint.

19. "It is undisputed that Empire failed to offer or pay solar rebates in 2011 and did not attempt to retire any solar RECs for compliance with the solar provisions of the RES for 2011, and that their claimed reasons for such non-compliance are the provisions of Section 393.1050, RSMo. 2011 Empire RES Compliance Report, pp. 14-15, Case No. EO-2012-0336."

EMPIRE'S RESPONSE: With the exception of the phrase "claimed reasons for non-compliance," Complainants' statement is correct, but the statement is not material to the question of whether Complainants are entitled, as a matter of law, to a judgment on any of the claims alleged in the Complaint. Because Empire qualifies for the exemption provided by §393.1050, RSMo, the Company is not required to pay solar rebates or to retire any solar RECs in order to comply with the RES. Empire has never claimed that the lack of such rebates or retirements constitutes a reason non-compliance with the RES because the Company believes it has fully complied with the RES.

20. "There is no genuine issue that Section 393.1050, RSMo, as part of Senate Bill 1181 (2008), was enacted on May 16, 2008 with an effective date of August 28, 2008. Missouri Senate Journal for 2008, p. 1729; House Journal, p. 1992."

EMPIRE'S RESPONSE: Complainant's statement is correct, but in the form submitted by Complainants the uncertified or otherwise unauthenticated excerpt from the House Journal is not legally competent to support the motion because it is not evidence that would be admissible. In addition, the statement is not material to the question of whether Complainants are entitled, as a matter of law, to a judgment on any of the claims alleged in the Complaint.

21. "There is no genuine issue that the Secretary of State certified the ballot title for Proposition C on February 25, 2008. EXHIBIT 13."

EMPIRE'S RESPONSE: Complainant's statement is correct, but in the form submitted by Complainants an uncertified or otherwise unauthenticated document (Exhibit 13) is not legally competent to support the motion because it is not evidence that would be admissible. In addition, the statement is not material to the question of whether Complainants are entitled, as a matter of law, to a judgment on any of the claims alleged in the Complaint.

22. **"There is no genuine issue with the fact that the signed petitions for Proposition C were received by the Secretary of State on May 4, 2008. EXHIBIT 14."**

EMPIRE'S RESPONSE: Complainant's statement is correct, but in the form submitted by Complainants an uncertified or otherwise unauthenticated document (Exhibit 14) is not legally competent to support the motion because it is not evidence that would be admissible. In addition, the statement is not material to the question of whether Complainants are entitled, as a matter of law, to a judgment on any of the claims alleged in the Complaint.

23. **"There is no dispute that the RES, or Proposition C, passed on November 4, 2008 and became effective on that date, which appears in the Revised Statutes of Missouri for §§ 393.1020-393.1035, RSMo."**

EMPIRE'S RESPONSE: Complainant's statement is correct, but in the form submitted by Complainants the statement is hearsay and therefore is not legally competent to support the motion because it is not evidence that would be admissible at trial. In addition, the statement is not material to the question of whether Complainants are entitled, as a matter of law, to a judgment on any of the claims alleged in the Complaint.

24. **"It is undisputed that no Missouri investor-owned utility besides Empire has ever claimed to be exempt from the solar requirements of the RES or to have had by Jan. 20, 2009, an amount of eligible renewable energy technology nameplate capacity equal to 15% of their total owned fossil-fired generating capacity. 2011 Ameren Missouri RES Compliance Report, pp. 10-11, Case No. EO-2012-0351; 2011 KCPL RES Compliance Report, pp. 4, 5-6, 7, Case No. EO-2012-0348; 2011 GMO RES Compliance Report, pp. 4-5, 6, 7, 8, Case No. EO-2012-0349."**

EMPIRE'S RESPONSE: Complainant's statement is correct, but in the form submitted by Complainants the statement is hearsay and therefore is not legally competent to support the motion because it is not evidence that would be admissible at trial. In addition, the statement is not material to the question of whether Complainants are entitled, as a matter of law, to a judgment on any of the claims alleged in the Complaint against Empire in Case No. EC-2013-0378.

Respectfully submitted,

/s/L.Russell Mitten

L. Russell Mitten MBE #27881
Paul A. Boudreau MBE #33155
BRYDON, SWEARENGEN &
ENGLAND P.C.
312 E. Capitol Avenue
P. O. Box 456
Jefferson City, MO 65102
(573) 635-7166
(573) 634-7431 facsimile

ATTORNEYS FOR THE
EMPIRE DISTRICT ELECTRIC COMPANY