BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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**

COMMENTS OF RENEW MISSOURI

The Missouri Coalition for the Environment, d/b/a Renew Missouri, is pleased to offer these comments on Empire District Electric's RES Compliance Plan for 2011–2013, required by 4 CSR 240-20.100(7)(B).

I. 4 CSR 240-20.100(7)(B)1.A, Planned Actions to Comply

EDE's compliance plan is contrary in major respects to the meaning and intent of the Renewable Energy Standard law.

A. Osage Beach

EDE fails to demonstrate that its Osage Beach hydroelectric plant qualifies for compliance. The law includes as a renewable resource "hydropower…that has a nameplate rating of ten megawatts or less…" § 393.1025(5), RSMo. Renew Missouri's research reveals that Osage Beach has a rating of 16 MW, with four 4-MW generators. EDE also claims the 25% in-state REC multiplier for Osage Beach.

Ameren Missouri asserted at one of the roundtables in Case No. EW-2011-0031 that nameplate rating or capacity refers solely to the physical nameplate on a generator. EDE has evidently adopted this argument, but it is at odds with their own usage.

EDE's solar exemption statute, § 393.1050, applies to "any electrical corporation…which…achieves an amount of eligible renewable technology nameplate capacity

equal to or greater than fifteen percent of such corporation's total owned fossil-fired generating capacity…" Here "nameplate capacity" clearly refers to "aggregate" or "total" nameplate capacity even though neither of those words is used.

EDE continues this usage in Attachment 1 to its compliance plan, repeatedly using "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 (compliance plan, p. 8).

The statute does not say "hydropower generator" rating, simply "hydropower … nameplate rating." Nameplate is commonly used to refer to total or aggregate rating even when neither of those adjectives is used. This is the intent of the statute. Hydropower is limited to 10 MW to reduce its environmental impact, along with the prohibition against "a new diversion or impoundment of water," § 393.1025(5). It is certainly not the intent of the law to allow Ameren's Keokuk plant, with its 15 generators, to swallow up the renewable energy targets until they reach 10% in 2018.

Nameplate capacity can be used to refer to total US hydroelectric generating capacity, as in this paper for EIA by Reichenbach and Hankey, "Relicensing and Environmental Issues Affecting Hydropower," p. ix:[1]

> In 1994, the hydroelectric power industry, including utility and nonutility facilities, operated around 4,500 units with 75.3 gigawatts of nameplate capacity at conventional facilities and 18.4 gigawatts at pumped storage facilities.

It is used by the Bureau of Reclamation to refer to Hoover Dam with its 17 turbines: "The plant has a nameplate capacity of about 2080 MW." [2] Chelan County (Washington) PUD says of its

[1] http://tonto.eia.doe.gov/ftproot/features/hydro.pdf

11-generator Rocky Reach Hydro Project: "Generator nameplate capacity is 1,300 MW."[3]

Nameplate rating has the same meaning, as when Tacoma Power gives the "Installed capacity (nameplate rating)" of its Cushman hydro project.[4] Nameplate capacity is defined as "full-load rating" by the Bureau of Reclamation.[5] "Capacity rating" has been defined as "nameplate rating."[6]

Examples abound of "nameplate capacity" being used for aggregate capacity. The NREL's Clean Energy Data Book uses it for total US generating capacity.[7] The American Public Power Association uses it for total capacity by fuel type and utility type.[8] The Department of Energy's EERE "2009 Renewable Energy Data Book" uses it for total US hydro (slide 88) and many other generation types.[9]

Legal authority is to the same effect. In Don't Waste Oregon Committee v. Energy Facility Siting Council, 320 Or. 132, 881 P.2d 119, 124 (1994), the "total generating capacity" of a plant is defined as the "nominal or nameplate capacity." Another opinion of the same court refers to the "nameplate capacity" of the combined generating facilities of two separate dams. Portland General Electric Co. v. State Tax Commission, 249 Or. 239, 437 P.2d 827, 829 (1968).

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[2] http://www.usbr.gov/lc/hooverdam/faqs/powerfaq.html
[3] http://www.chelanpud.org/rocky-reach-hydro-project.html
[4] http://www.chelanpud.org/rocky-reach-hydro-project.html
[5] http://www.expertglossary.com/water/definition/generator-nameplate-capacity
[6] http://www.puc.state.tx.us/rules/subrules/electric/25.109/25.109.doc
[7] http://www.nrel.gov/applying_technologies/state_local_activities/energy_data_book/#
[8] http://appanet.cms-plus.com/files/PDFs/GenerationStatistics.pdfhttp://appanet.cms-plus.com/files/PDFs/GenerationStatistics.pdf (slides 1–3, 6, etc.)
[9] http://www1.eere.energy.gov/maps_data/pdfs/eere_databook.pdf

In Philadelphia Corp. v. Niagara Mohawk Power Corp., 723 N.Y.S.2d 549, 550–1 (A.D. 2001), the opinion refers to the "nameplate capacity" as the total capacity of a "run of the river" hydro plant that originally had three generators, later replaced by a single large turbine.

The hydropower assets of two utilities are described thus in State ex rel. Utilities Commission v. Edmisten, 40 N.C.App.109, 252 S.E.2d 516, 521 (1979): "Tapoco's two North Carolina facilities have a nameplate capacity of 155,000 KW; Nantahala's eight plants (subject to New Fontana Agreement) have nameplate capacity of approximately 98,000 KW."

In Madison Gas & Electric Co. v. USEPA, 25 F.3d 526, 529 (7th Cir. 1994), the terms "aggregate nameplate capacity" and "nameplate capacity" are used interchangeably.

When a word has an uncertain meaning, courts look to the subject matter of the statute, the object it is meant to accomplish, and the consequences of any proposed interpretation. State ex rel. Slinkard v. Grebe, 249 S.W.2d 468, 470 (Mo.App. ED 1952). The RES allows only small hydro in order to prevent the environmental impacts of dams; the 10 MW capacity limit is aggregate. The interpretation proposed by EDE and Ameren allows this intent to be defeated by applying the limit to large numbers of small generators, as at Keokuk. Of the two possible meanings of "nameplate rating," total rating, not individual generator rating, is the correct one.

The Commission should (a) disallow Osage Beach as a renewable resource and (b) start a proceeding to amend 4 CSR 240-20.100(1)(K)8, to make clear that aggregate rating is the intended meaning.

B. Solar Compliance

EDE claims to be exempted from the solar carve-out and solar rebate by § 393.1050, RSMo, which exempts an 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…"

Attachment 1 to the Compliance Plan is, to our knowledge, Empire's first attempt to demonstrate that it reached that level of renewable capacity by the specified date. Unless the Commission makes a finding that Empire did so, EDE must be held to the terms of the RES.

If the Commission is satisfied that Empire met the prerequisite of 393.1050, EDE must still be held to the terms of the RES because 393.1050 was unlawfully passed or, if initially valid, was repealed. Section 393.1050 was passed in May 2008 and became effective August 28 of that year; the RES was passed and became effective on Nov. 4, 2008. There are three independent reasons, each sufficient in itself, why 393.1050 is a void law.

First, the legislature cannot repeal or modify an initiative until after it is passed, not while it is in the process of enactment. State ex rel. Drain v. Becker, 240 S.W. 229, 232 (Mo. Banc 1922); 82 C.J.S. Statutes, § 143, p. 188. Otherwise the electorate would be denied their right to vote on the measure as it was put before them, or would no longer know what they were voting on.

Second, when two statutes are repugnant in any of their provisions, the later act, even if it lacks a specific repealing clause, repeals the earlier act to the extent of the inconsistency. State ex rel. Francis v. McElwain, 140 S.W.3d 36, 38 (Mo. Banc 2004). The RES applies to all electrical corporations, including Empire, so it repealed 393.1050. The "Notwithstanding any

other provision of law" clause in 393.1050, if it was meant to apply to any law that might be passed at any time in the future, is of no avail. One session of the legislature cannot bind future sessions. State ex rel. City of Springfield v. Smith, 125 S.W.2d 883, 885 (Mo. Banc 1939). By the same token it cannot bind the electorate in a later law passed by initiative, which has the same effect as a statute passed by the legislature.

Third, 393.1050 is a special law contrary to the Missouri Constitution, Article III, § 40 (28 and 30), because there is no rational basis why the exemption should apply to EDE but not to KCPL or Ameren. The classification in the statute is disguised as open-ended; it was theoretically possible for one of the other utilities to meet its requirement by the arbitrary date of January 20, 2009, but this was not possible as a practical matter. Jefferson County Fire Protection Districts Association v. Blunt, 205 S.W.3d 866, 870 (Mo. Banc 2006). Within two and a half months of the passage of the RES they would have had to throw up wind farms in record time or find some nearly completed renewable resources that still could offer PPAs. Empire well knew that it already met the requirement if Attachment 1 is to be believed. The deadline is a transparent ploy to avoid having the statute struck down as a special law, and it is within the Commission's competence and expertise to declare this as a factual matter.

The Commission should direct EDE to comply with the solar requirements of the RES.

4 CSR 240-20.100(7)(B)1.G, Environmental Impact

EDE says that "to its knowledge" the facilities it is utilizing to comply with the RES have received all necessary permits and are in compliance with environmental standards (compliance filing, p. 7). This hardly amounts to what the rule requires: "Verification that the utility has met the requirements for not causing undue adverse air, water, or land use impacts

pursuant to subsection 393.1030.4. RSMo, and the regulations of the Department of Natural Resources."

The statute charges DNR with devising a certification process. § 393.1030.4. The DNR rule allows either the utility or the generation facility to initiate the process. 10 CSR 140-8.010(4)(C)3. This does not condone willful ignorance on the part of the utility. Evidently EDE has no idea whether the wind farms with which it has PPAs are causing undue environmental impacts or are in compliance with environmental laws.

Under the Commission rule, verification is the duty of the utility. The compliance plan should be rejected until EDE provides the necessary verification. Conclusory statements like "to its knowledge" do not amount to verification, especially when it is clear that the utility has made no inquiry but has simply assumed that the responsibility lies elsewhere.

Conclusion

Renew Missouri asks the Commission to:

- Find that Ozark Beach is not a qualified renewable energy resource;
- Find that EDE is subject to the solar energy requirements of the RES and order EDE to comply with those provisions;
- Order EDE to commence the DNR certification process for its renewable energy resources or investigate whether the facility owners/operators have done so;
- Open a docket to amend the RES rule to prevent the abuses identified above; and
- Take whatever further action the Commission deems necessary to ensure that the compliance plan conforms to the statute and rule.

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