**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 |

**RESPONSE TO COMMENTS OF RENEW MISSOURI**

The Empire District Electric Company ("Empire" or "Company") hereby files its response to the "Comments of Renew Missouri" ("Comments") that were filed in this docket on May 31, 2011.

1. On April 15, 2011, Empire filed its "2011 Annual Renewable Energy Standard Compliance Plan" ("Compliance Plan"), as required by 4 CSR 240-20.100(7)(B).

2. In its Comments, Renew Missouri opposed or took issue with three aspects of the Compliance Plan. First, Renew Missouri contends that Empire improperly classified its Osage Beach hydroelectric plant as a "renewable energy resource," as that phrase is defined in §393.1025(5), RSMo.[1] Second, Renew Missouri argues that §393.1050 is unlawful and does not, therefore, exempt the Company from compliance with the requirement, found in §393.1030.1, that at least two percent of a utility's renewable energy portfolio be derived from solar energy. Finally, Renew Missouri contends that Empire has not obtained from the Missouri Department of Natural Resources the verification required by 4 CSR 240-20.100(7)(B)1.G that the electricity generated by the renewable resources included in the Compliance Plan do not cause unduly and adversely impact air, water or land use.[2]

[1] All statutory references are to the Revised Statutes of Missouri unless otherwise indicated.
[2] At the scheduling conference held August 4, 2011, Renew Missouri agreed to waive its arguments regarding whether Empire's 2011 Compliance Plan satisfies the requirements of 4 CSR 240-20.100(7)(B)1.G. Consequently, the Company's response will not address that portion of Renew Missouri's Comments.

3. With regard to first issue identified in the preceding paragraph, Renew Missouri alleges that Empire's Compliance Plan failed to "demonstrate that its Osage Beach hydroelectric plant qualifies for compliance" with the Renewable Energy Standard.[3] That allegation is based on Renew Missouri's contention that the phrase "nameplate rating," as used both in §393.1025(5) and in 4 CSR 240-20.100(1)(K)(8), requires that the four generators at the Osage Beach facility – each of which has a nameplate rating of four megawatts – be aggregated to produce a "nameplate capacity" of 16 MW of hydroelectricity, which exceeds the ten megawatt maximum stated in the statute. But Renew Missouri's argument is fatally flawed because it conflates the phrase "nameplate rating," with the phrase "nameplate capacity" – a phrase that is found nowhere in either the Renewable Energy Standard statutes or in the Commission's rules implementing that standard – and thereby misinterprets the plain meaning of the language found in §393.1025(5).

4. Although the phrase "nameplate rating" is not specifically defined in the Renewable Energy Standard or in the Commission's rules, its meaning is clearly understood within the electric utility industry. A nameplate rating is defined as "[t]he full-load continuous rating of a generator, prime mover, or other electrical equipment under specified conditions" as designated by the manufacturer.[4] That definition reflects the fact that a generator's rating is displayed on a nameplate that is physically attached to it. Consequently, a nameplate rating is, and must always be, generator-specific. Thus, the phrase "nameplate rating" found in §393.1025(5) means the specific rating of *each generator* used to provide hydroelectric energy.

[3] Comments, p. 1.
[4] Edison Electric Institute, *Glossary of Electric Industry Terms*, p. 99 (April 2005).

5. Renew Missouri attempts to refute this obvious conclusion by referring the Commission to various articles and court decisions that purport to establish that: (i) "nameplate rating" and "nameplate capacity" mean the same thing and can be used interchangeably, and (ii) that "nameplate capacity" refers to the aggregate value of the nameplate ratings of multiple hydroelectric generators. But Renew Missouri's attempt fails in every respect. First, whatever "nameplate capacity" means, that phrase appears nowhere in either Missouri's Renewable Energy Statute or in the Commission's rules implementing that statute;[5] consequently, it is irrelevant to any issue in this case. Second, should the Commission desire to review the various articles cited in Renew Missouri's Comments, it will find that in each of those articles the phrase "nameplate capacity" was used in a context where the authors of those articles intended the phrase to mean the aggregate capacity of multiple generators.[6] But what the authors intended in those articles certainly is not controlling authority as to how the Commission should interpret §393.1025(5). Similarly, the cases cited by Renew Missouri as support of its argument also do not constitute controlling authority for any issue in the current docket. All of those cases come from jurisdictions beyond Missouri and therefore are not binding. Moreover, the statements in those cases relating to "nameplate ratings" or "nameplate capacity" are not holdings of the respective courts but are, instead, merely part of each court's statement of facts or its description of the positions of the parties or of the issues in the case. Finally, the statutes or regulations that

[5] The only statutory reference to "nameplate capacity" that Empire could find appears in § 393.1050, RSMo, which is not part of the Renewable Energy Standard. The reference in that statute is part of the larger phrase "nameplate capacity equal to or greater than fifteen percent of such corporation's total owned fossil-fired generating capacity," which, in context, obviously refers to an aggregation of the capacity of all nameplates of all of a utility's generators.

[6] See, e.g., the article entitled "Relicensing and Environmental Issues Affecting Hydropower," which is cited at page 2 of the Comments. The initial paragraph of a section entitled "Industry Overview" describes "75.3 gigawatts of nameplate capacity" from approximately 4,500 hydroelectric facilities. Other examples cited in Renew Missouri's Comments include the article "Rocky Reach Hydro Project," which discusses generator nameplate capacity of 1,300 MW from 11 generators, and a graph in a publication entitled the "Clean Energy Data Book" that describes "U.S. Electric Nameplate Capacity: 1,121 GW" from all generating sources.

are the subjects of those cases are completely dissimilar to the definition of what constitutes a qualifying hydropower generator under the specific provisions of §393.1025(5).

6. Where the language of a statute is clear, Missouri courts and regulatory agencies, such as the Commission, must give effect to the plain meaning of the statute and must refrain from applying rules of statutory construction unless there is an ambiguity. *Ross v. Dir. of Revenue*, 311 S.W.3d 732, 735 (Mo. 2010). And that principle stated in the preceding sentence applies equally to situations where the statute in question was enacted by the General Assembly or where it was approved by the voters through the initiative process. *Missourians for Honest Elections v. Missouri Elections Comm'n.*, 536 S.W.2d 766, 775 (Mo. App. 1976).

7. In addition, although words and phrases used in statutes generally are to be taken in their "plain or ordinary and usual sense,"[7] "words and phrases having a technical meaning are to be considered as having been used in a statute or ordinance in their technical since, unless it appears that they were intended to be used otherwise and that to interpret them according to their technical import would thwart and defeat the legislative purpose." *St. Louis v. Triangle Fuel Co.*, 193 S.W.2d 914, 915 (Mo. App. 1946).

8. The language in §393.1025(5) that defines hydropower generating facilities that qualify as "renewable energy resources" is clear and unambiguous. Therefore, the Commission should not construe the phrase "hydropower . . . that has a nameplate rating of ten megawatts or less" but must, instead, give effect to the plain meaning of the words used there. Although the term "nameplate rating" used in that phrase is technical in nature, there is nothing in that statute, or elsewhere in the Renewable Energy Standard, that suggests that the term was intended to have a meaning different from the technical sense in which it routinely is used. And, as discussed

[7] §1.090, RSMo.

earlier in this response, the term "nameplate rating" routinely is used in the electric utility industry to mean the nameplate rating that is found on an individual generator. It would, therefore, be a gross distortion of that term to use it to mean, as Renew Missouri proposes, the aggregate ratings of the four generators at Empire's Osage Beach hydroelectric facility.

9. To determine whether the four generators at the Company's Osage Beach facility satisfy the statutory definition of "renewable energy resources," the Commission must look at the nameplate rating of each generator. As Renew Missouri's concedes in its Comments,[8] the nameplate rating of each of those generators is four megawatts, and because a qualifying hydropower source is any generator "with a nameplate rating of ten megawatts or less" each of Empire's generators qualifies.

10. Renew Missouri also asks the Commission to find in this docket that §393.1050 "was unlawfully passed or, if initially valid, was repealed."[9] Should the Commission decide to make such a finding, Renew Missouri further asks the Commission to reject Empire's Compliance Plan – which is based, in part, on the Company's exemption from that portion of the Renewable Energy Standard that mandates that at least two percent of each portfolio requirement be derived from solar energy – on grounds that the plan fails to comply with 4 CSR 240-20.100(7)(B)1.A.[10]

11. Renew Missouri's requests should be rejected because, as the Commission is aware, the lawfulness of §393.1050 – with respect to both its initial passage and to whether it was repealed, by implication, as a result of the approval by Missouri voters of the Renewable

[8] Comments, p. 1.
[9] *Id.*, p. 5.
[10] *Id.*, p. 6.

Energy Standard statutes – is the subject of a pending declaratory judgment action.[11] In its opinion issued May 31, 2011, the Missouri Court of Appeals – Western District held that the Commission has primary jurisdiction over questions relating to the lawfulness of the solar exemption statute but that those issues must be presented to the Commission through "a complaint with the PSC under 4 C.S.R. 240-2070 [sic.] and section 386.390."[12] Although Renew Missouri is not a party to that lawsuit, both Renew Missouri and the plaintiff's in that case are represented by the Great Rivers Environmental Law Center, so Renew Missouri's counsel are well aware of the court's ruling. Consequently, if the Commission is to consider the legal questions regarding §393.1050 it should do so in the manner specifically prescribed by the Court of Appeals – *i.e.*, a formal complaint filed under § 386.390 – and not as part of the current docket.

WHEREFORE, for all of the reasons stated above, the Commission should issue an order denying Renew Missouri the relief requested in its Comments. That order should approve the Compliance Plan filed by Empire and, further should grant the Company such other relief in this docket as the Commission may deem appropriate.

Respectfully submitted,

L. Russell Mitten MO Bar # 27881
BRYDON, SWEARENGEN & ENGLAND, P.C.
312 East Capitol Avenue
P. O. Box 456
Jefferson City, Missouri 65102-0456

[11] *Evans v. Empire District Electric Company,* 2011 Mo. App. LEXIS 741 (May 31. 2011). (The Court of Appeals has denied transfer of the case, but a separate motion for transfer is pending before the Missouri Supreme Court).
[12] *Id.*, p. 5. A copy of the court's decision is attached to this response as Appendix A.

Telephone: (573) 635-7166
Facsimile: (573) 636-6450
Email: rmitten@brydonlaw.com

ATTORNEYS FOR
THE EMPIRE DISTRICT ELECTRIC COMPANY

1 of 1 DOCUMENT

**JAMES EVANS, ET AL., Appellants, v. EMPIRE DISTRICT ELECTRIC COMPANY, ET AL., Respondents.**

**DOCKET NUMBER WD73376**

**COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT, DIVISION ONE**

***2011 Mo. App. LEXIS 741***

**May 31, 2011, Decided**
**May 31, 2011, Opinion Filed**

**NOTICE:**

NOT FINAL UNTIL EXPIRATION OF THE REHEARING PERIOD.

**PRIOR HISTORY:** [*1]

Appeal from the Circuit Court of Cole County, Missouri. The Honorable Paul C. Wilson, Judge.

**COUNSEL:** Henry B. Robertson, St. Louis, MO, for appellants.

Diana C. Carter, Jefferson City, MO, for respondent Empire District Electric Company.

James R. Layton, Jefferson City, MO, for respondent Missouri Public Service Commission.

**JUDGES:** Before Division One: Gary D. Witt, Presiding Judge, James E. Welsh, Judge and Alok Ahuja, Judge. All concur.

**OPINION BY:** Gary D. Witt

**OPINION**

James Evans, Kelly Cardin, and Power Source Solar appeal the trial court's Final Judgment of Dismissal of their claims against Empire District Electric Company and the Missouri Public Service Commission. We affirm.

**Factual Background**

James Evans, Kelly Cardin, and Power Source Solar ("Appellants") filed suit against Empire District Electric Company ("Empire") and the Missouri Public Service Commission ("PSC") seeking a declaratory judgment that *section 393.1050* [1] (the Renewable Energy Standard) is invalid. To understand that statute and the Appellants' claim below, we must first provide a cursory explanation of adoption and the subsequent statutory scheme for the Renewable Energy Standard. At the General Election on November 4, 2008, Missouri voters approved [*2] an initiative petition designated Proposition C, ("Proposition C") which established by statute a "Renewable Energy Standard" for utility companies operating in Missouri. The statutory scheme mandates certain levels of energy production from renewable resources and provides incentives for compliance and penalties for noncompliance for utility companies operating in Missouri. *See sections 393.1020- 393.1035. Section 393.1050*, the statute being challenged, was not contained in Proposition C, and is an exemption from certain aspects of the statutory scheme (established by Proposition C) for utility companies that meet certain renewable energy standards. *Section 393.1050* was passed by the Missouri General Assembly on May 16, 2008, and was signed by the Governor and became effective on August 28, 2008, three months prior to the

adoption of Proposition C by Missouri voters.

> 1 All statutory citations are to RSMo 2000 as updated through the 2010 Cumulative Supplement, unless otherwise indicated.

Appellants sought the same relief - a declaratory judgment that *section 393.1050* is invalid - on three theories. First, they argued the General Assembly lacked authority to amend Missouri's Renewable [*3] Energy Standard by enacting *section 393.1050* before Proposition C, which established Missouri's Renewable Energy Standard, had been passed by Missouri voters. Second, they argued *section 393.1050* was in irreconcilable conflict with Proposition C, and, as Proposition C was the later-enacted law, *section 393.1050* was repealed by implication. Third, they argued that *section 393.1050* only applied to Empire and no other electrical company and there was no rational basis for exempting Empire but no other electrical corporation from the requirements of Missouri's Renewable Energy Standard and, therefore, *section 393.1050* was an unconstitutional special law.

Both Empire and PSC filed motions to dismiss. The trial court agreed with Empire that Appellants were first required to address their complaints concerning the statute before the PSC which has "primary jurisdiction" over Empire and the application of *section 393.1050.*

**Standard of Review**

> "The standard of review for a trial court's grant of a motion to dismiss is de novo." *Lynch v. Lynch, 260 S.W.3d 834, 836 (Mo. banc 2008).* "When this Court reviews the dismissal of a petition for failure to state a claim, the facts contained in the petition [*4] are treated as true and they are construed liberally in favor of the plaintiffs." *Id.*

*Adams v. One Park Place Investors, LLC, 315 S.W.3d 742, 753 (Mo. App. W.D. 2010).*

**Analysis**[2]

> 2 "Although neither party has raised the issue, this Court has the duty to address its jurisdiction *sua sponte.*" *Mo. Prosecuting Attorneys and Circuit Attorneys Ret. Sys. v. Pemiscot Cnty., 217 S.W.3d 393, 399 (Mo. App. S.D. 2007). Article V, section 3 of the Missouri Constitution* provides that "[t]he supreme court shall have exclusive appellate jurisdiction in all cases involving the validity . . . of a statute . . . of this state." "The Missouri Supreme Court, however, does not have exclusive jurisdiction, and transfer to that court is not required, where it is not necessary to construe the constitution or determine the constitutionality of a statute to resolve the issues presented on appeal." *Whitaker v. City of Springfield, 889 S.W.2d 869, 873 (Mo. App. S.D. 1994).* Although Appellants have raised issues concerning the constitutional validity of *section 393.1050* in this action, none of the parties ask us to resolve those issues in this appeal; instead, this appeal involves only the correctness of the trial court's [*5] dismissal of the case on primary jurisdiction grounds, without reaching Appellants' constitutional arguments. In these circumstances, *article V, section 3* does not vest exclusive appellate jurisdiction in the Supreme Court.

The trial court granted Empire and the PSC's motions to dismiss because it found that the PSC had "primary jurisdiction" over the case. This court has described the doctrine of "primary jurisdiction" in this way:

> Under the doctrine of primary jurisdiction, a court will not decide a controversy involving a question within the jurisdiction of an administrative tribunal until after the tribunal has rendered its decision "(1) where administrative knowledge and expertise are demanded; (2) to determine technical, intricate fact questions; [and] (3) where uniformity is important to the regulatory scheme." *Killian v. J & J Installers, Inc., 802 S.W.2d 158, 160 (Mo. banc 1991).* The doctrine of exhaustion of remedies is a jurisdictional requirement that all remedies be exhausted at the administrative level before applying to the courts for relief. *Pettigrew v. Hayes, 196 S.W.3d 53, 56 (Mo. App. W.D.2005)* (citing *Green v. City of St. Louis, 870 S.W.2d 794, 796 (Mo. banc 1994)).* [*6] "If all administrative remedies have not

> been exhausted, the circuit court lacks subject matter jurisdiction to judicially review the administrative decision."

*Oanh Thile Huynh v. King, 269 S.W.3d 540, 543-44 (Mo. App. W.D. 2008)*. However, in light of the Missouri Supreme Court's holdings in *J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. banc 2009)* and *McCracken v. Wal-Mart Stores East, LP* (Mo. banc 2009), a re-examination of the concept of "primary jurisdiction" is in order.

In *Webb* the Missouri Supreme Court made clear that there are only two types of jurisdiction: personal and subject matter. *Webb, 275 S.W.3d at 252*. "[T]he subject matter jurisdiction of Missouri's courts is governed directly by the state's constitution. *Article V, section 14* sets forth the subject matter jurisdiction of Missouri's circuit courts in plenary terms, providing that '[t]he circuit courts shall have original jurisdiction over *all* cases and matters, civil and criminal.'" *Id. at 253*. Insofar as prior cases have held that the failure to exhaust administrative remedies is a question of subject matter jurisdiction, those cases have been overruled by the Supreme Court. "When a statute speaks in jurisdictional [*7] terms or can be read in such terms, it is proper to read it as merely setting statutory limits on remedies or elements of claims for relief that courts may grant." *Id. at 255*. Therefore, the concept of "primary jurisdiction" is really a question of whether the trial court has a statutory right to proceed. *See Coleman v. Missouri Sec'y of State, 313 S.W.3d 148, 154 (Mo. App. W.D. 2010)*.

The distinction between whether the circuit court has subject matter jurisdiction or the statutory authority to proceed is more than a semantic one. *McCracken, 298 S.W.3d at 477*. Subject matter jurisdiction cannot be waived and can be addressed for the first time during trial or on appeal. *Id.* (citing *Gunn v. Dir. of Revenue, 876 S.W.2d 42, 43 (Mo. App. E.D. 1994))*. Other non-jurisdictional defenses are matters of trial error and are waived if not raised in a responsive pleading or otherwise under Missouri law. *See id. at 476* ("[I]f a matter is not jurisdictional but rather is a procedural matter required *by statute* or rule or an affirmative defense of the sort listed in *Rule 55.08*, then it generally may be waived if not raised timely.") (Emphasis added). [3] This issue was timely raised in the case before [*8] us and there is no argument that this issue has been waived.

> 3 The Eastern District of this Court has continued to determine *sua sponte* whether the trial court has exceeded its statutory right to proceed. *See e.g., Linhardt v. Director of Revenue, 320 S.W.3d 202, 204 (Mo. App. E.D. 2010)*. This is inapposite of our understanding of *Webb* which made clear that the distinction between errors of jurisdiction and the statutory right to proceed is more than a semantic one. *McCracken, 298 S.W.3d at 477*. Whether the trial court has the statutory right to proceed is *not* a matter of subject matter jurisdiction but a matter of trial error that is waived by the parties if an objection is not brought before the trial court. *Id. at 476*. The Eastern District, in support of its interpretation, cites to *Webb*, but we can find no support in *Webb* for the proposition that the appellate courts have the authority *sua sponte* to confine the trial court to its statutory authority, an issue which can be waived if not raised before the trial court.

The PSC has been given the authority, *per statute*, over regulated entities in the first instance. Accordingly, the issue of whether the circuit court has the statutory [*9] authority to proceed before the matter is brought before the PSC "should be raised as an affirmative defense to the circuit court's statutory authority to proceed with resolving his claim." *Treaster v. Betts, 324 S.W.3d 487, 490 (Mo. App. W.D. 2010)* (quoting *McCracken, 298 S.W.3d at 476-77*). Affirmative defenses "must be pleaded and proved as provided in *Rules 55.08* and *55.27*. It is not a defense that may be raised in a motion to dismiss." *Id.* (quoting *McCracken, 298 S.W.3d at 479*). "A pre-trial dismissal based on an affirmative defense must be granted under the standards of summary judgment." *Id.* (citing *Fortenberry v. Buck, 307 S.W.3d 676, 679 (Mo. App. W.D. 2010))*. An exception exists, however, whereby a defendant may properly file a motion to dismiss for failure to state a claim under *Rule 55.27(a)(6)* [4] when it appears from the face of the petition that an affirmative defense is applicable. *Fortenberry, 307 S.W.3d at 649 n.2*. This is the case at bar. The trial court granted Empire's motion to dismiss based on the affirmative defense that the PSC had "primary jurisdiction" over Empire and the application thereto of *section 393.1050*.

> 4 All rule citations are to the Missouri Supreme [*10] Court Rules (2010), unless otherwise

indicated.

In Point One, the Appellants argue that the trial court erred in granting Empire's motion to dismiss their Petition [5] because Appellants have no adequate remedy to exhaust before the PSC in that agency remedies need not be exhausted where the validity of a statute is in issue, and a complaint before the PSC would not be an adequate remedy since the PSC has no jurisdiction to declare a statute invalid, as it would have to do before compelling Empire to file a solar rebate tariff.

> 5 Appellants filed its Petition and subsequently filed an Amended Petition, without leave of court and while the Respondent's motion to dismiss was pending. The trial court found that the legal analysis on the motion to dismiss was equally applicable to Appellants' Petition and their Amended Petition. Therefore, the trial court refused to rule whether Appellants were required to seek leave to file their Amended Petition and as such a ruling was unnecessary. Neither party challenges this portion of the trial court's Judgment. Therefore, it is unnecessary to determine whether it was Appellants' Petition or Amended Petition that was dismissed by the trial court, as [*11] the relevant allegations contained therein are identical between the two Petitions. We will, therefore, refer to the petition that was dismissed by the trial court as "the Petition."

Generally, a litigant must exhaust his available administrative remedies before a court will assume jurisdiction (now authority over an action). *Premium Standard Farms, Inc. v. Lincoln Tp. of Putnam Cnty., 946 S.W.2d 234, 237 (Mo. banc 1997)*. "Our Supreme Court has determined that the regulation and fixing of rates or charges for public utilities, and the classification of the users or consumers to whom the rates are chargeable is the function of the [PSC]." *Inter-City Beverage Co., Inc. v. Kansas City Power & Light Co., 889 S.W.2d 875, 877 (Mo. App. W.D. 1994)* (citing *State ex rel. Kansas City Power & Light Co. v. Buzard, 350 Mo. 763, 168 S.W.2d 1044, 1046 (Mo. banc 1943))*.

> Chapters 386 and 393 [ . . . ] set forth the scheme by which the [PSC] is granted the exclusive jurisdiction to determine, in the first instance, the interpretation of the lawful rate applicable to the service provided to the customer. See also, *DeMaranville v. Fee Fee Trunk Sewer, Inc., 573 S.W.2d 674 (Mo.App.1978)*, in which the court held that [*12] the first step to obtaining a decision must be before the [PSC]. [T]he [PSC] makes its decision regarding the rates and classification. Matters within the jurisdiction of the [PSC] must first be determined by it in every instance before the courts have jurisdiction to make judgments in the controversy.

*Id. at 878*. There can be no question that the PSC has authority to review the provisions of *section 393.1050* and its application to Empire. The application of *Section 393.1050* raises factual issues as to whether Empire meets the renewable energy standards specified in that section, and whether Appellants would otherwise be entitled to the benefits they claim from Empire under Proposition C. Further, if Empire is subject to the provision of Proposition C from which *section 393.1050* arguably would exempt it, it would be required to file tariffs with the PSC to implement the relevant Proposition C requirements. 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 the provision of a statute adopted by an initiative petition (Proposition [*13] C), is a matter which must be considered first by the PSC.

The Appellants' argument that they have no remedy to exhaust before the PSC because the PSC cannot declare a statute invalid has no merit, is belied by the claims in their petition. The PSC has been given the statutory authority to interpret statutes pursuant to the administration of their charge; the PSC's interpretation is afforded great weight by Missouri courts. *See State ex rel. Sprint Missouri, Inc. v. Pub. Serv. Comm'n of Missouri, 165 S.W.3d 160, 164 (Mo. banc 2005)* (citing *Foremost-McKesson, Inc. v. Davis, 488 S.W.2d 193, 197 (Mo. banc 1972))*. Appellants are correct that the PSC has no authority to declare a statute invalid or interpret a statute in such a way that is contrary to the plain terms of the statute. *State ex rel. Springfield Warehouse & Transfer Co. v. Pub. Serv. Comm'n, 240 Mo. App. 1147, 225 S.W.2d 792, 794 (Mo. App. 1949)*. This is because the PSC only has the power granted to it by the Legislature and may only act in a manner directed by the

Legislature or otherwise authorized by necessary or reasonable implication. *Id.*

However, when the PSC is confronted with a new or amended statute, it must take that statute and interpret [*14] its meaning and application to the facts at hand. In other words, the PSC must construe the statute in light of the entire statutory scheme. Appellants argue in Count II of their Amended Petition that *section 393.1050* was repealed by implication because it is in irreconcilable conflict with Proposition C, and, since Proposition C was passed later in time, it prevails. We do not express an opinion as to the merits of this claim; however, such a claim is based on a general rule of statutory construction that statutes are to be harmonized if possible, but, if they are inconsistent, a statute is impliedly repealed by a later one which revises the subject matter of the first. *See Gregory v. Kansas City, 244 Mo. 523, 149 S.W. 466, 470 (Mo. banc 1912)*; *see also Knight v. Carnahan, 282 S.W.3d 9, 19 (Mo. App. W.D. 2009)* (quoting BLACK'S LAW DICTIONARY 1299 (6th ed. 1990)) ("Repeal means:[t]he abrogation or annulling of a previously existing law by the enactment of a subsequent statute [ . . . ] which contains provisions so contrary to or irreconcilable with those of the earlier law that only one of the two statutes can stand in force (called 'implied' repeal"). Construction of the statutory scheme by the [*15] PSC, in accordance with their judgment as to the intent of the Legislature, is the process that is envisioned for the administrative system in Missouri. Contrary to Appellants' assertion, relief may be found in the first instance before the PSC. The 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 are able to file a complaint with the PSC under *4 C.S.R. 240-2.070* and *section 386.390* and the PSC is able to grant relief. The trial court did not err in finding that Appellants failed to exhaust their remedies before the PSC and that, therefore, the PSC has primary statutory authority over the cause.

Point One is denied.

In Point Two, the Appellants argue the trial court abused its discretion in granting the PSC's motion to dismiss because the PSC is an interested party required to be joined under *section 527.110*, in that Proposition C gives the PSC authority to enforce its provisions through rulemaking, and this gives rise to a justiciable, existing controversy over the PSC's authority to enforce by rule a statute alleged to be invalid, which creates a controversy [*16] that is ripe even without a present threat of enforcement.

The Final Judgment of Dismissal dismissed the Petition as to both Empire and PSC for failure to state a claim because there is a "lack of a genuine and present dispute among the parties that is ripe for judicial resolution given the [PSC's] primary jurisdiction and Plaintiffs' failure to seek relief from the [PSC] in the first instance." For the reasons stated in Point One, the trial court did not err in dismissing the Petition as against the PSC on this basis as well.

Point Two is denied.

**Conclusion**

For the aforementioned reasons, the trial court's Final Judgment of Dismissal of Appellants' claims against Empire District Electric Company and the Missouri Public Service Commission is hereby affirmed.

Gary D. Witt, Judge

All concur

**Certificate of Service**

I hereby certify that the foregoing has been sent by United States mail, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record on this the 11th day of August, 2011.