BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of The Empire District Electric Company's Submission of its 2012 RES Compliance Plan	)))	File No. EO-2012-0336

RESPONSE OF THE EMPIRE DISTRICT ELECTRIC COMPANY
TO COMMENTS REGARDING ITS 2011 RES COMPLIANCE REPORT
AND ITS 2012 RES COMPLIANCE PLAN

The Empire District Electric Company ("Empire" or "Company") hereby files its response to comments regarding the Company's 2011 RES Compliance Report ("2011 Report") and 2012 RES Compliance Plan ("2012 Plan") that were filed by a group of unaffiliated "interested parties"[1] including Earth Island Institute, d/b/a Renew Missouri (collectively "Renew Missouri"), Wind on the Wires ("Wind"), and the Missouri Department of Natural Resources ("MDNR").

1. INTRODUCTION

Renew Missouri and Wind each opposes both the 2011 Report and the 2012 Plan. Each of those parties argues that in both its 2011 Report and its 2012 Plan Empire included and improperly relied on (1) renewable energy credits ("RECs") from the Company's Ozark Beach[2] hydroelectric facility, and (2) RECs that are "ineligible" because they were generated prior to the effective date of Missouri's Renewable Energy Standard ("RES").[3] Individually, Renew Missouri also argues that Section 393.1050 is

[1] As stated in its filing, the group of interested parties consists of Renew Missouri; The Sierra Club, Missouri Chapter; the Missouri Coalition for the Environment; and the Missouri Nuclear Weapons Education Fund, d/b/a Missourians for Safe Energy. The filing also lists 14 renewable energy installation companies who "have a business interest in the successful implementation of the RES," but it is unclear whether the comments in opposition to Empire's 2011 Report and 2012 Plan were either endorsed by, or filed on behalf of, any of those companies. It also is unclear whether Renew Missouri intends for the comments filed by the group of interested parties to be replace or supplement comments that Renew Missouri earlier filed on its own behalf. That question may be academic, however, because the interested parties' comments are identical to those that were earlier filed by Renew Missouri.

[2] Renew Missouri's Comments erroneously refer to the hydropower facility at issue in this case as "Osage Beach."

[3] As stated in Section 393.1020, RSMo, Sections 393.1025 and 393.1030, RSMo, have been designated as the "Renewable Energy Standard." Unless otherwise indicated, all statutory references in this response will be to the Revised Statutes of Missouri.

invalid and therefore does not exempt Empire from Section 393.1030.1, which requires, *inter alia*, that at least two percent of an electric utility's RES compliance portfolio be derived from solar energy.

Although it does not appear to join Renew Missouri and Wind in arguing either that Empire's 2011 Report and 2012 Plan should be rejected, MDNR's comments express the view that including the disputed RECs in both the 2011 Report and the 2012 Plan is "disappointing" from a policy standpoint because doing so may be contrary to the interests of Missouri voters who, in adopting the RES initiative – sometimes referred to as Proposition C – "communicated their interest in more renewable energy than had been previously developed in Missouri."

The Commission Staff ("Staff") found no deficiencies in Empire's filings, although Staff did note that it believed the Company's RES retail impact limit calculation, which is required by 4 CSR 240-20.100(7)(B)1.F, was "not at the level of detail contemplated by that rule." Staff also noted that although Empire did not file for a waiver from the netting calculation requirement of the Commission's RES rule, that calculation would serve no purpose in the current filings because the Company's costs of compliance are significantly below the one percent retail rate impact limit imposed by law.[4]

Empire's response will focus on the arguments made and the concerns raised by Renew Missouri and Wind. Through its response, the Company will show that both the 2011 Report and the 2012 Plan are fully consistent with the requirements of applicable statutory and case law as well as the requirements of the Commission's RES rule, 4 CSR 240-20.100.

II. OZARK BEACH

Renew Missouri alleges that Empire's 2011 Report and 2012 Plan fail to "demonstrate that its Ozark Beach hydroelectric plant qualifies for compliance" with the RES under the definition of "renewable energy sources" found in Section 393.1025(5).[5] Wind similarly alleges that it was improper for the Company to use Ozark Beach for compliance with the RES because "Ozark's total generating

[4] Staff Report, p. 2.
[5] Renew Missouri Comments, p. 3.

capacity exceeds the 10 megawatt limitation placed on the size of hydropower facilities in the statute."[6] Renew Missouri further argues that Empire improperly claims the 25 percent in-state multiplier for Ozark Beach.[7]

The allegations of both Renew Missouri and Wind are based on the argument that the phrase "nameplate rating," as used in both §393.1025(5) and 4 CSR 240-20.100(1)(K)(8), requires that the generating capacities of the four generators at Empire's Ozark Beach facility – each of which has a nameplate rating of four megawatts – be aggregated to produce a total "nameplate capacity"[8] of 16 MW of hydropower. Renew Missouri and Wind argue that the aggregated capacity of the four generators disqualifies Ozark Beach as a "renewable energy resource" because, under Section 393.1025(5), qualifying hydropower resources are limited to those that have "a nameplate rating of ten megawatts or less."

But this argument is fatally flawed. For one thing, the argument attributes a meaning to the phrase "nameplate rating" that is not supported by the language of the applicable statute. Although the phrase "nameplate rating" is not specifically defined in either the RES or in the Commission's rules,[9] its meaning is clearly understood within the electric utility industry. A glossary published by the Edison Electric Institute defines the phrase "nameplate rating" as "[t]he full-load 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."[10] An online glossary on the website of the United States Nuclear Regulatory Commission similarly defines "generator nameplate capacity" as "[t]he maximum amount of electric energy that a generator can produce under

[6] Wind's Comments, p. 4.
[7] *Id.*
[8] The phrase "nameplate capacity" does not appear anywhere in the RES or in the Commission's rules implementing the RES.
[9] The only reference to "nameplate capacity" that Empire could find in Chapter 393 appears in Section 393.1050, which is not part of the RES. As will be discussed in more detail later in the Company's response, the reference in that section 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.
[10] Edison Electric Institute, *Glossary of Electric Industry Terms*, p. 99 (April 2005).

specific conditions, as rated by the manufacturer. Generator nameplate capacity is usually expressed in kilovolt-amperes (kVA) and kilowatts (kW), as indicated on the nameplate that is physically attached to the generator."[11] Both of these definitions make clear that a nameplate rating is generator-specific because it is something that is stamped on the nameplate that is physically attached to an individual generator. Consequently, the phrase "nameplate rating" found in §393.1025(5) must mean the specific rating of *each generator* used to provide hydropower and not an aggregate capacity of all generators at a hydroelectric facility, as Renew Missouri and Wind suggest.

Where the language of a statute is clear, Missouri courts and regulatory agencies 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. banc 2010). Missouri law also instructs that "words and phrases having a technical meaning are to be considered as having been used in a statute or ordinance in their technical sense, 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). The preceding paragraph shows that the technical meaning of "nameplate rating" is both clear and well-established. In addition, there is nothing in Section 393.1025(5) that either requires or suggests that any meaning other than that technical meaning was intended when the phrase was used in the statute. Arguments to the contrary by Renew Missouri and Wind are self-serving, unsupported by any credible evidence, and do not withstand close analysis.

For example, Wind suggests one way to test the legitimacy of the interpretation of the statute advocated by Empire is to substitute the words "generator" and "hydroelectric facility" for the statutory term "hydropower" to see which definition makes most sense.[12] But this argument is faulty because Wind proposes to insert the proposed alternate word/phrase at the wrong place in the statute. If the test proposed by Wind has any validity, the terms "generator" and "hydroelectric facility" should not be substituted for

[11] www.nrc.gov/reading-rm/basic-ref/glossary/generator-nameplate-capacity.html.
[12] Wind's Comments, p. 5.

the word "hydropower" but should, instead, be inserted in the statute before the phrase "nameplate rating." Making that substitution yields the phrases "generator nameplate rating" and "hydroelectric facility nameplate rating." As the recognized technical definitions presented *supra* make clear, the second of those two phrases – hydroelectric facility nameplate rating – has no recognized technical meaning because both "nameplate rating" and "generator capacity rating" refer to the nameplate that is affixed to an individual generator. An entire hydroelectric facility does not have a nameplate, so it cannot have a nameplate rating. Consequently, the phrase "nameplate rating" cannot possibly have the meaning suggested by Wind.

The language in §393.1025(5) that defines the hydropower that qualifies as "renewable energy resources" is clear and unambiguous. Therefore, the Commission should does not need to construe the phrase "hydropower . . . that has a nameplate rating of ten megawatts or less." Instead, the Commission only needs to give effect to the plain meaning of the words used in the statute. Where the language of a statute is clear, Missouri law requires courts and regulatory agencies to give effect to the plain meaning of the statute and to 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 applies equally to statutes enacted by the General Assembly as well as those 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).

In an attempt to cover a glaring defect in their argument, both Renew Missouri and Wind refer the Commission to various articles and court decisions that purport to establish that (1) "nameplate rating" and "nameplate capacity" mean the same thing and can be used interchangeably, or (2) that either or both of those phrases refers to the aggregate value of the nameplate ratings of multiple hydroelectric generators. For example, Renew Missouri's comments cite examples where the phrase "nameplate capacity" has been used in an aggregate sense to denominate the total generation capacities of a single

generating facility (i.e. multiple generators operating at a single location),[13] an individual utility,[14] or the utility industry as a whole.[15] But this argument, and the articles and cases cited in support of it, are nothing more than a smokescreen designed to confuse the question that is at issue in this case: What is the legal meaning of the phrase "nameplate rating" as used in Section 393.1025(5)?

For descriptive and presentation purposes, various groups, and even utilities themselves, sometimes informally use the word "nameplate" or the phrase "nameplate capacity" as a shorthand method of referring to the total generating capacity of multiple individual generators. But such informal usage does not change the fact that the recognized formal and technical meaning of the phrase "nameplate rating" is the amount that is stamped on a nameplate that is physically attached to an individual generator. And, absent some evidence of a legislative intent to the contrary, it is that formal and technical meaning that applies to Section 393.1025(5).

Moreover, an analysis of the out of state court cases cited in its comments suggests that Renew Missouri simply searched for cases where the phrase "nameplate capacity" or some similar phrase could be found without any regard for the legal significance of those references. Consequently, as the following description of those cases cited shows, none provides any help or guidance as to how the phrase "nameplate rating" should be interpreted under Missouri law.

- The question at issue in *Don't Waste Oregon Committee v. Energy Facility Citing Council*, 881 P.2d 119 (Ore. 1994), was whether, under an Oregon law, there is a difference between a generator's generating capacity and its nameplate rating. Because there is no similarity between the Oregon statutes and Section 393.1025(5), how the Oregon Supreme Court resolved that Oregon-specific question has no relevance or application to any question related to Empire's 2011 Report or its 2012 Plan.

[13] *See, e.g.*, article cited at footnote 3 of Renew Missouri's Comments, which describes the Rocky Reach Hydro Project.

[14] *See, e.g.*, Attachment A to Wind's Comments.

[15] *See, e.g.*, references cited at footnotes 7 and 8 of Renew Missouri's Comments, which shows the generating capacity of electric utilities in the United States aggregated by the type of fuel used for generation.

- As part of its statement of facts underlying a state *ad valorem* tax issue, the Oregon Supreme Court, in *Portland General Electric Co. v. State Tax Commission*, 437 P.2d 827 (1968), simply noted that a utility had entered into an easement agreement where easement payments were based on the aggregate nameplate capacity of the utility's generation facilities. The terms of that contract are of no consequence or help in determining the meaning of the phrase "nameplate rating" used in Section 393.1025(5).
- *Philadelphia Corp. v. Niagara Mohawk Power Corp.*, 723 N.Y.S.2d 549 (N.Y. App. Div. 2001), involved a contract dispute over output from a hydroelectric plant. The court's passing reference to "nameplate capacity" in the statement of facts – "information describing the output an nameplate capacity of the plant is detailed in the 1984 license for the facility" – is not relevant or helpful to the resolution of any issue in this case.
- In *State ex rel. Utilities Commission v. Edmisten*, 252 S.E.2d 516 (1979), the North Carolina Court of Appeals used the phrase "nameplate capacity" to describe the aggregate generating capacities of two utilities involved in the case. The court's informal use of that phrase in its description has no bearing on the formal, technical meaning of the phrase "nameplate rating" found in Section 393.1025(5).
- *Madison Gas & Electric Co. v. EPA*, 25 F.3d 526 (7th Cir. 1994), involved the interpretation of a statute that provided an exemption from emission allowances to "a utility operating company whose aggregate nameplate fossil fuel steam electric capacity" exceeds 250 megawatts. The word "aggregate" appears nowhere in Section 393.1025(5), so the court's reference to, or interpretation of, a statute containing that word provides no guidance as to the meaning of the phrase "nameplate rating" that is at issue in the current case.

Renew Missouri also cites *State ex re. Slinkard v. Grebe*, 249 S.W. 468, 470 (Mo. App. 1952), for the proposition that when a statutory term is of uncertain meaning courts may look to the subject matter of the statute, the object to be accomplished, and the consequences of any proposed construction. Based on

its interpretation of the holding in that case, Renew Missouri argues that the intent of the RES is to "prevent the environmental impact of dams," and it cites the ten megawatt or less limitation found in Section 393.1025(5) as evidence of that fact.[16]

But there are holes in this argument too. For one thing, Section 393.1025(5) is not ambiguous. In addition, a fair reading of the RES suggests that its primary purposes were (1) to promote the use of renewable energy resources by Missouri's electric utilities, (2) to prescribe specific renewable energy targets that must be met to achieve that objective, and (3) to specify the ways in which utilities could meet those renewable energy targets. If, as Renew Missouri suggests, preventing the environmental impact of dams also was an objective of the RES, that objective was, at best, of secondary or tertiary importance. But whatever the objective or objectives of the RES are, they only apply prospectively. Consequently, even if the Commission were to accept as fact that the RES is intended to prevent the environmental impact of future dams (that is, dams constructed after the effective date of the RES), that objective will not, and cannot, be frustrated by Empire's reliance on the hydroelectric generators at Ozark Beach because those generators were in lawful operation long before the effective date of the RES. Finally, there is no language in the RES that suggests that renewable energy resources in existence at the effective date of those statues should be treated differently than those developed after the effective date.

Renew Missouri further argues that the meaning of "nameplate rating" that Empire urges for Section 393.1025(5) is inconsistent with the Company's interpretation of the similar phrase "nameplate capacity" for purposes of Section 393.1050.[17] The contexts in which those two phrases are used in the respective statutes, however, is completely different. In Section 393.1050, "nameplate capacity" is used as part of the larger phrase "nameplate capacity equal to or greater than fifteen percent of such corporation's total owned fossil-fired generating capacity." Including the word "total" within Section 393.1050 clearly indicates that for purposes of that statute the intent was to aggregate the nameplate ratings of all of a utility's renewable and fossil-fired generators. But neither the word "total" nor any similar word appears

[16] Renew Missouri's Comments, pp. 5-6.
[17] *Id*., p. 3.

in Section 393.1025(5). Consequently, Empire is simply complying with the legislative intent of the two statutes when it applies the phrase "nameplate capacity" in an aggregate sense for purposes of Section 393.1050 but applies the phrase "nameplate rating" in a generator-specific sense for purposes of Section 393.1025(5).

In determining the intent of a statute, words must be considered in context. *Bd. of Ed. of St. Louis v. State Bd. of Ed.*, 271 S.W.3d 1, 17 (Mo. 2008). Considered in context, the phrase "nameplate capacity" in Section 393.1050 has a completely different meaning than the phrase "nameplate rating" in Section 393.1025(5). As noted in the preceding paragraph, the word "total," which appears in Section 393.1050, clearly evidences a legislative intent that nameplate capacity, as used in that statute, means the aggregate capacity of all generators. But the context of Section 393.1025(5) is very different; neither the word "total" nor any similar word appears in that statute. Consequently, there is no basis to conclude that the meaning of "nameplate rating," as used in Section 393.1025(5) means anything other than the recognized technical definition of that phrase: the full load capacity of an individual generator as reflected on the nameplate that is affixed to that generator.

There is one final point that needs to be made regarding Renew Missouri's objections to the way in which Empire has treated Ozark Beach for purposes of both the 2011 Report and the 2012 Plan. Renew Missouri fully participated in the rulemaking proceeding that led to the adoption of 4 CSR 240-20.100, and at no time during that proceeding did Renew Missouri oppose any of the provisions of the Commission's rules related to hydropower. Yet by its comments in this case, Renew Missouri is seeking to negate or effect a change in those rules. The Commission should not allow that effort to succeed.

Empire submits that the language in Section 393.1025(5) that defines the hydropower that qualifies as renewable energy resources is clear and unambiguous, which means the Commission must give effect to the meaning of the words used in that statute. The phrase "nameplate rating" has a well-established and clearly understood technical meaning, and there is nothing in Section 393.1025(5) or elsewhere in the RES that suggests that the term was intended to have a meaning different from that

meaning. To determine whether the four generators at Empire's Ozark Beach facility qualify as renewable energy resources the Commission must look at the nameplate rating of ***each*** generator. Even Renew Missouri concedes that 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 the Company's Ozark Beach generators satisfies that definition and qualifies as a renewable energy resource.

III. REC BANKING

Section 393.1025(4) defines "renewable energy credit" or "REC" as "a tradeable certificate of proof that one megawatt-hour of electricity has been generated from renewable energy resources." That definition is significant because Section 393.1030(1), which establishes the portfolio requirement for all Missouri electric utilities to generate or purchase electricity generated by renewable resources, specifically states that "[a] utility may comply with the [renewable energy] standard in whole or in part by purchasing RECs." Subsection 2 of that same statute further states that "[a]n unused [renewable energy] credit may exist for up to three years."

Consistent with the statutory language cited in the preceding paragraph, Empire, like other Missouri investor-owned utilities, began accumulating and "banking" RECs soon after the January 1, 2008, effective date of the RES. Renew Missouri and Wind claim that such action was inappropriate because those parties interpret the RES as prohibiting the accumulation and banking of RECs until 2011, the first year that the portfolio requirements contained in Section 393.1030(1) take effect.[18] But there is a fatal flaw in the interpretation of the RES urged by Renew Missouri and Wind: there is no language in the statute to support it.

As noted above, Section 393.1030(2) simply states that an unused REC can exist for up to three years from the date of its creation. There is no language anywhere in the statute that states or suggests

[18] Renew Missouri's Comments, pp. 6-7; Wind's Comments, pp. 2-3.

when an REC can be created, and there most certainly is no language that says an REC used to comply with the portfolio standard cannot be created until 2011.

In *BHA Group Holding, Inc. v. Pendergast*, 173 W.W.3d 373, 379 (Mo. App. 2005), the Missouri Court of Appeals – Western District held that although it is not a strict canon of statutory construction, courts should avoid interpreting statutes to include qualifiers where such an interpretation impermissibly adds language to the statute. Yet that is precisely what Renew Missouri and Wind are asking the Commission to do: add language to Section 393.1030(2) that would prohibit a utility from accumulating and banking RECs prior to 2011. If such a limitation had been intended, it would have been included in the legislation. Because no such limitation exists, it should be presumed none was intended, and under such circumstances the law prohibits courts and administrative agencies, like the Commission, from adding one.

Wind argues that allowing Empire to use RECs accumulated prior to 2011 circumvents the requirements of the RES. But that interpretation is unreasonable. Armed with the knowledge that commencing with 2011 it would have to begin complying with the portfolio standards imposed by Section 393.1030(1), Empire would have been imprudent if it had waited until 2011 to put in place the means it would need to comply with the RES. And because using RECs is one means of compliance specifically authorized by the RES, Empire reasonably concluded that it could begin accumulating and banking RECs in 2008 for use in 2011. After all, RECs accumulated in 2008 and afterward could be used in 2011 because they were within the three-year expiration period prescribed in the statute.

Renew Missouri also argues that it makes no sense to refer to 2008 RECs as unused when there was nothing to use them on.[19] That argument, however, misconstrues the purpose of the statute. Using Renew Missouri's logic, if Empire accumulated more RECs in 2011 than it needed to comply with the portfolio standard established for that year, those RECs also would be "unused" and therefore ineligible to help achieve compliance in future years. But that is precisely the scheme the statute envisioned: RECs

[19] Renew Missouri's Comments, p. 7.

unused in one year could be banked for use in the future as long as they were used within three years of their creation.

The same defect afflicts Renew Missouri's argument that Empire's interpretation of the accumulation and banking provisions of Section 393.1030(2) amounts to a "time out" from the RES based on three years of past generation.[20] Applying RECs accumulated in 2011 for compliance in 2012, 2013, or 2014 also could be cynically viewed as a "time out" from the RES, because doing so would relieve the utility from the obligation to develop or procure additional renewable resources during any period when banked RECs are used. But even Renew Missouri does not argue that this result is improper under the RES. However, if one type of "time out" is permitted by the statute, there is no basis for the Commission to conclude that a slightly different type is prohibited.

Simply stated, there is nothing in either Section 393.1025 or Section 303.1030 that supports the arguments by Renew Missouri and Wind that Empire was not permitted to begin accumulating RECs in 2008 for use within the three-year period the RECs remain viable. Perhaps the drafters of Proposition C intended to prohibit utilities from beginning to accumulate RECs prior to 2011. But if that was their intent, they completely failed to express that intent in the initiative language they submitted to the voters. It is, however, the language the voters actually approved that governs whether Empire's 2011 Report and its 2012 Plan comply with the requirements of the RES.

IV. SOLAR COMPLIANCE

Section 393.1050 states, in relevant part, as follows:

> Notwithstanding any other provision of law, any electrical corporation as defined by subdivision 15 of section 386.020, RSMo, 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-fuel 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.

[20] *Id*.

Because Empire achieved the renewable energy threshold prescribed in that statute by January 20, 2009, the Company is exempt from Section 393.1030(1), which requires that at least two percent of each year's portfolio requirement be derived from solar energy. Empire's 2011 Report and its 2012 Plan each reflect and rely on that exemption.

Renew Missouri argues that the Company is not entitled to an exemption from the solar energy requirements of Section 393.1030(1) "because 393.1050 was unlawfully passed or, if initially valid, was repealed" through adoption of the RES.[21] But this argument should be rejected in this case for both procedural and substantive reasons.

From a procedural standpoint, Renew Missouri's attempt to raise the validity of Section 393.1050 in this proceeding should be rejected because in *Evans v. Empire District Electric Co.*, 346 S.W.3d 313 (2011), the Missouri Court of Appeals held that while the Commission has primary jurisdiction to rule on the claim that Section 393.1050 is invalid, Renew Missouri must raise that claim through a formal complaint filed under Section 386.390 and 4 CSR 240-2.070.[22] The court provided the following explanation as to why a formal complaint is required:

> 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.

A complaint case also would require Renew Missouri to bear the burden of proof to show, by clear and convincing evidence, why the exemption Empire claims under the statute is invalid.[23]

Although Renew Missouri was not a party to *Evans*, both Renew Missouri and the plaintiff/appellant in *Evans* are represented by the Great Rivers Environmental Law Center. So Renew Missouri's counsel is well aware of the court's ruling. Consequently, if it is to consider the legal questions

[21] *Id*., p. 8.
[22] *Evans v. Empire District Electric Co.*, at p. 319.
[23] *See* Section 386.410.

regarding Section 393.1050 that have been raised by Renew Missouri, the Commission should require Renew Missouri to present those questions in the manner specifically prescribed by the Court of Appeals – that is, through a formal complaint filed under Section 386.390 – and not as part of the current RES case.

For the reasons stated previously, Empire does not believe substantive arguments regarding the validity of Section 393.1050 can or should be adjudicated in this case; however, the Company will briefly address those arguments to show they are unfounded.

Renew Missouri's comments state three reasons why Section 393.1050 is no longer valid. Those reasons are: (1) the legislature cannot repeal or modify a statute until after it is passed; (2) if two statutes are repugnant to one another the latter act prevails; and (3) Section 393.1050 violates Article III, Section 40 of the Missouri Constitution because there is no rational basis why the exemption provided by the statute should apply only to Empire.

Missouri law does not recognize a "later in time" rule like the one posited by Renew Missouri. In *Berdella v. Pender*, 821 S.W.2d 846, 849 (1991), the Missouri Supreme Court, *en banc*, held

> The general rule in Missouri is and has been that acts adopted in the same legislative session are to be construed in harmony, and, if they cannot be construed in harmony, then the more specific act takes precedence over the more general..

Although *Berdella* dealt with the reconciliation of two legislative acts that were passed during the same legislative session – instead of with an initiative passed shortly after a legislative session, which was the case with Proposition C and Section 393.1050 – the Court's reasoning and analysis are both germane and persuasive in the current context. The key principle espoused in *Berdella* is that a reviewing court must attempt to harmonize allegedly conflicting statutory provisions in order to avoid effectively repealing one of the provisions. The provisions of Proposition C can be easily harmonized with Section 393.1050. The exemption provided in the statute is a very narrow one, created only for electrical corporations that meet very specific requirements by a specified date. Neither the provisions of Proposition C nor its primary objective – to promote the use of renewable energy resources by Missouri electric utilities – are nullified

or rendered moot by the exemption provided by Section 393.1050. Because they can be harmonized, Proposition C should not be read to nullify or moot the exemption provided by the statute.

In addition, there is an axiom of statutory construction in Missouri that "repeal by implication is disfavored, and if two statutes can be reconciled then both should be given effect." *St. Charles County v. Director of Revenue*, 961 S.W.2d 44, 47 (Mo. banc 1998). There is no conflict between the provisions of Section 393.1050 and Proposition C that would require the statute to be repealed by implication or otherwise. In enacting Section 393.1050, the General Assembly unambiguously granted an exemption from "any" "mandated solar energy requirements." The respective effective dates of the legislation versus the Proposition C should be irrelevant because the exemption contained within the statute may be applied without disturbing the effect of any of the other requirements contained within the voter-approved initiative.

Even it were determined there is ambiguity concerning the General Assembly's intentions when it enacted Section 393.1050, to help resolve the ambiguity a court or administrative agency who is asked to interpret a statute must consider "extrinsic matters, such as a statute's history, surrounding circumstances and objective to be accomplished through the statute." *Riordan v. Clark*, 67 S.W.3d 610, 613 (Mo. App. W.D. 2001).

Another oft-cited axiom of statutory construction is that "when the legislature enacts a statute, it is presumed to have acted with a full awareness and complete knowledge of the current state of the law . . .". *State ex rel. Hunter v. Lippold*, 142 S.W.3d 241, 244 (Mo. App. 2004). For purposes of determining the lawfulness of a statute, the General Assembly must be presumed to have been aware of the pending Proposition C initiative. The General Assembly also must be presumed to have consciously created a means for qualifying electric utilities to be exempt from certain of the portfolio standards proposed in the initiative. At the time the General Assembly enacted Section 393.1050 the intent of Proposition C was well known to its proponents, the public, and the General Assembly. Therefore, it must be presumed that

the General Assembly acted in cognizance of the potential passage of Proposition C when it enacted the disputed exemption language contained in Section 393.1050.

In accord with this reasoning, there is the long line of appellate decisions instructing that courts must presume that the legislature does *not* enact meaningless legislation. *See e.g. Edwards v. Gerstein,* 237 S.W.3d 580, 581 (Mo. banc 2007); *Weeks v. State,* 140 S.W.3d 39, 46 (Mo. banc 2004). Moreover, not only must a court presume meaning in a duly passed act of the legislature, it must also take care to never construe a statute in a manner that would moot the legislative changes. *See State ex rel. Public Counsel v. Pub. Serv. Comm'n.,* 259 S.W.3d 23, 31 (Mo. App. 2008).

Finally, there is no basis on which the Commission could reasonably conclude in this case that the exemption provided by Section 393.1050 violates Article 3, Section 40(28) or (30), which prohibits the General Assembly from passing special laws that benefit a specific entities. The language of Section 393.1050 applies to "*any* electrical corporation . . . that 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 . . ." (emphasis added) Consequently, any electrical corporation – and not just Empire – could qualify for the exemption. And it is a well-established principle of constitutional law in Missouri that a law is not considered to be "special," and therefore unconstitutional, if it applies to all of a given class alike and the classification is made on a reasonable basis. See, e.g., *Hansen v. Dept. of Social Services*, 226 S.W.3d 137, 143 (Mo. banc 2007).

CONCLUSION

For all of the reasons stated in this response, the Commission should issue an order accepting Empire's 2011 Report and 2012 Plan and should reject the objections that were expressed in the comments filed by Renew Missouri and Wind. The Commission also should disregard the concerns expressed by MDNR, at least insofar as this proceeding is concerned. If those concerns are to be

addressed, they should be addressed in a rulemaking proceeding that has general application for all electric utilities subject to the RES.

Respectfully submitted,

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ATTORNEYS FOR
THE EMPIRE DISTRICT ELECTRIC COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response of The Empire District Electric Company was served, via e-mail, on counsel for each of parties of record on the 3rd day of July, 2012.

/s/ L. Russell Mitten