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**

COMMENTS IN OPPOSITION TO THE REPORT AND PLAN

The following interested parties offer these comments on Empire District Electric's RES Compliance Report for 2011, required by 4 CSR 240-20.100(7)(A), and plan for 2012 required by 4 CSR 240-20.100(7)(B).

The Interested Parties

These parties are united in their position in this case, though their interests are to some extent diverse.

The following organizations were instrumental in the passage of the Proposition C ballot initiative of 2008 that enacted the Renewable Energy Standard through sponsorship, volunteer and/or financial contributions:

- Earth Island Institute, d/b/a Renew Missouri, which also participated in the RES rulemaking and commented on the 2011 utility compliance plans;
- The Sierra Club, Missouri Chapter, 7164 Manchester Rd. St. Louis, MO 63143;
- Missouri Coalition for the Environment, 6267 Delmar Blvd., Ste. 2E, St. Louis, MO 63130;
- Missouri Nuclear Weapons Education Fund, d/b/a Missourians for Safe Energy, 804-C E. Broadway, Columbia, MO 65201;

The Missouri Solar Energy Industries Association, P.O. Box 434040, St. Louis, MO 63143, also participated in the rulemaking and has an interest in the implementation of the RES.

The following renewable energy installation companies have a business interest in the successful implementation of the RES:

- StraightUp Solar, 9100 Midland Blvd., St. Louis, MO 63114;
- The Alternative Energy Co., 2733 E. Battlefield Rd., No. 246, Springfield, MO, 65804;
- Certified Energy Solutions, 928 Arbor Dr., St. Charles, MO, 63304;
- Missouri Solar Applications LLC, P.O. Box 1727, Jefferson City, MO 65102;
- Mid America Solar, 5029 Countryside Dr., Imperial, MO 63052;
- CMO Solar LLC, 670 Southwest County Rd. VV, Centerview, MO 64019;
- Good Energy Solutions, 2105 Carolina St., Lawrence, KS 66046;
- Microgrid Energy, 14 S. Central, Ste. 200, St. Louis, MO 63105;
- Power Source Solar, 639 W. Walnut, Springfield, MO 65806;
- Butterfly Energy Works, 8787 Big Bend Blvd., St. Louis, MO 63119;
- Free Energy, 605 N. High St., Independence, MO 64050;
- Heartland Alternative Energy, 17631 Lisa Valley Ct., Chesterfield, MO 63005-4267;
- Lake Ozark Solar, P.O. Box 81, Lake Ozark, MO 65049;
- Tech Power Systems, P.O. Box 5827, Kansas City, MO 64171.

COMMENTS

Each electrical corporation must file an annual report documenting its compliance with the RES. § 393.1030.2(c); 4 CSR 240-20.100(7)(A)M. EDE's compliance report 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 2 to its compliance report, 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 report, Attachment 2, pp. 14–5).

The statute does not say "hydropower generator" rating, but simply "hydropower… nameplate rating." The word nameplate is commonly used to refer to the total or aggregate rating, even where 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, for example, 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 a paper for EIA by Reichenbach and Hankey entitled "Relicensing and Environmental Issues Affecting Hydropower," (stating: "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.")(p. ix).[1] 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 11-generator Rocky Reach Hydro Project: "Generator nameplate capacity is 1,300 MW."[3]

"Nameplate rating" here 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" also has been defined as "nameplate rating."[6]

Examples abound of "nameplate capacity" being used interchangeably to mean aggregate capacity. The NREL's Clean Energy Data Book uses the phrase for total US generating capacity.[7] The American Public Power Association uses it for total capacity by fuel type and

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

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).

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

[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

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. REC Banking.

Empire now joins KCPL, GMO and Ameren in availing themselves of retroactive REC banking, claiming that they can meet the 2011 RES target with RECs they've collected since January 1, 2008. Since Osage Beach did not produce enough RECs in 2011 to meet the 2% target, Empire claims that it may use RECs from 2008 and 2009 to meet the entire 2011 requirement with Osage Beach alone (Report, pp. 3, 4–5, 5–6; revised affidavit of compliance) This is at odds with the meaning and intent of the RES.

"An unused credit [REC] may exist for up to three years from the date of its creation." § 393.1030.2, RSMo. However, the statute also provides: "Such portfolio requirement shall provide that electricity from renewable energy resources shall constitute the following portions of each electric utility's sales: (1) No less than two percent for calendar years 2011 through 2013…" § 393.1030.1, RSMo.

Therefore renewable energy must actually "constitute" the requisite portion of sales for a given calendar year. The REC banking provision allows leftover RECs to carry over to a subsequent year. It does not allow old RECs to carry forward from a time when the portfolio

standard did not even exist. The standards begin in 2011; therefore all RECs used for compliance must originate beginning January 1, 2011, not January 1, 2008. RECs created before 2011 could not represent energy that "constituted" a portion of sales beginning in 2011.

It also makes no sense to speak of 2008 RECs as "unused" when there was nothing in 2008 to use them on. In saying that "An unused credit may exist for up to three years from the date of its creation," the statute refers to RECs that could have been used for RES compliance but were surplus to a utility's needs in the year of their creation. The only use within the scope of the statute is use for compliance with the statute: "A credit may be used only once to comply with sections 393.1020 to 393.1030…" and, "An electric utility may not use a credit derived from a green pricing program." (§ 393.1030.2, RSMo.) "Unused" does not refer to RECs sitting in a REC bank account (something whose existence in Missouri was not even contemplated on January 1, 2008) waiting for a RES to be enacted.

The RES grandfathers in existing renewable generating assets. It does not follow that it grandfathers the energy generated in the past. The purpose of a RES is to foster renewable energy going forward. Retroactive REC banking amounts to a "time out" — based on three years of past generation, the utilities claim a right to take three years off. Those three years happen to be the first compliance period. Retroactive REC banking effectively moves that period back in time to 2008–10, contrary to the plain numbers in the law—2011–2013.

The utilities' perverse version of REC banking is a lamentable attempt to escape the law through a loophole they have created with the flimsiest of logic.

C. 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…" (Report, p. 7 and Attachment 2, pp. 14–15.)

In Evans v. Empire District Electric, 346 S.W.3d 313 (Mo.App. WD 2011), the Court of Appeals held that the Commission has primary jurisdiction over this exact issue. It held that the Commission must determine the factual issues of whether Empire meets the renewable energy requirements of § 393.1050 and, if it finds that Empire is not exempt from these solar provisions, require it to file a tariff. 346 S.W.3d at 318. The Commission must also decide the validity of the statute in the first instance. *Id.* at 318–9.

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. Missouri Constitution, Art. III, § 51.

Section 393.1050 reads:

> 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-fired 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. Any disputes or denial of exemptions under this section may be reviewable by the circuit court of Cole County as prescribed by law.

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 constitutional 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, including the solar carveout and solar rebate, 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 when the voters pass a later law 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. In Jefferson County Fire Protection Districts Association v. Blunt, 205 S.W.3d 866, 870 (Mo. Banc 2006), the Court struck down a law that applied to fire protection districts in first class counties with populations between 198,000 and 199,200; only one county fit that description. The Court held that where an ostensibly open-ended classification was so narrow that as a practical matter others could not fall into it, the presumption that an open-ended law is a general law fails, and it will be struck down as a special law to avoid contravening the intention of the Constitution.

A classification can be narrow in time as well as in population. Within two and a half months of the passage of the RES, another utility that wanted the solar exemptions 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 2 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 and legal matter.

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

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 Empire to file a tariff implementing the solar rebate;
- Reject Empire's 2011 Compliance Report as well as Empire's 2012 Compliance Plan and order the Company to amend and refile them, or in the alternative schedule a hearing;
- 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.

Henry Robertson
Great Rivers Environmental Law Center
705 Olive Street, Ste. 614
St. Louis, MO 63101
(314) 231-4181
hrobertson@greatriverslaw.org

Attorney for commenters