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Memo

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From: Khristine A. Heisinger

Date: March 27, 2010

Re: Applicability of Section 393.1050, RSMo Supp. 2008, to Proposition C

FACTUAL BACKGROUND

Supporters of renewable energy standards in Missouri submitted various proposed initiative petitions to the Secretary of State for approval for circulation for signatures with a certified ballot title. Supporters obtained signatures on one of the versions and on May 4, 2008, submitted those signed initiative petitions to the Secretary of State. The Secretary of State certified the initiative petition for inclusion on the ballot on the November 4, 2008, General Election, identifying it as "Proposition C". Proposition C passed by a sizable margin — 66% yes versus 34% no.[1]

After the signatures were turned in on May 4, 2008, an interesting amendment[2] was added to an energy bill that was winding its way through the legislative process. On May 8, 2008, House Committee Substitute for Senate Committee Substitute for Senate Bill 1181 was reported do pass out of the House Special Committee on Utilities. The interesting amendment was not on the bill yet. HCS SCS SB 1181 was also approved by the Rules Committee and was reviewed by the Fiscal Review Committee. It went to the House floor on May 15, 2008, the second-to-last day of the legislative session. House Amendment 6 to the HCS was that last amendment offered, and was adopted, containing the following language:

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[1] Official Election Returns, State of Missouri General Election - 2008 General Election.

[2] There were actually two interesting amendments relating to Proposition C, but the subject of this memorandum is only the one found in section 393.1050.

> Section 1. 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.

The Revisor of Statutes codified it at Section 393.1050, RSMo Supp. 2008.

BASES FOR REMOVING SECTION (9) FROM THE PROPOSED RULE IN THE FINAL ORDER OF RULEMAKING

There are a variety of reasons, legal and practical, that the Missouri Public Service Commission should remove section (9) in its entirety from the Renewable Energy Standard Requirements rule, and renumber subsequent sections accordingly, in the Final Order of Rulemaking.

(1) The Commission is only charged by statute to adopt regulations to implement the Renewable Energy Standard. Section 393.1050 is outside of that authority.

Proposition C is comprised of Sections 393.1020 through 393.1030, RSMo Supp 2008. Pursuant to Section 393.1030.2, RSMo Supp. 2008, the people charged this Commission to make "rules necessary to enforce the renewable energy standard." The "Renewable Energy Standard" is defined in Section 393.1020, RSMo Supp., as sections 393.1025 and 393.1030. When a statute defines a term, that term is to be used in following the statute.[3]

[3] *Cf. Great Southern Bank v. Director of Revenue*, 269 S.W.3d 22, 24-25 (Mo. banc 2008)("When a statutory term is not defined, courts apply the ordinary meaning of the term as found in the dictionary.").

Accordingly, the Commission's authority to make rules necessary to enforce sections 393.1025 and 393.1030 does not include making a rule regarding section 393.1050. That statute, adopted by the General Assembly prior to the adoption of Proposition C, is not part of the Renewable Energy Standard, per the definition given it by the voters. To ignore the clear language in subsection 1 of section 393.1030 would be to step outside of the Commission's statutory authority.[4]

(2) The pending litigation regarding the applicability and validity of Section 393.1050 is a good reason to leave it out of the Final Order of Rulemaking.

On March 15, 2010, a declaratory judgment action was filed in Cole County Circuit Court seeking to have Section 393.1050 declared unlawful and invalid. (*James S. Evans, et al., v. Empire District Electric Co., et al.*, Case No. 10AC-CC00179). Until the court reaches a determination on this case, it would be reasonable for the Commission to leave section (9) out of the Final Order of Rulemaking. Should the plaintiffs prevail, the Commission would have to amend the regulation to remove section (9), incurring additional costs and time and potentially opening it up for other changes unrelated to the lawsuit. Should the plaintiffs lose, and the court declare the statute applicable to Proposition C, the statute would still be applicable without it being mentioned in the rulemaking. This is discussed in the next point.

(3) Section (9) of the Proposed Rule is not required to be promulgated – Section 393.1050 in isolation is clear and unambiguous and Section (9) simply restates the statute.

"An agency statement of policy or interpretation of law of future effect which acts on unnamed and unspecified persons or facts is a rule."[5] "An agency no doubt has discretion to fill the interstices of the statute which gave the agency purpose, at discretion by rules or adjudications."[6] In this case, however, Section 393.1050, assuming its validity, gives no room to the Commission for discretion or

[4] The Commission "is purely a creature of statute" and its "powers are limited to those conferred by the [Missouri] statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted." *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Serv. Comm'n,* 585 S.W.2d 41, 47 (Mo. banc 1979).

[5] *Missourians for Separation of Church and State v. Robertson*, 592 S.W.2d 825, 841 (Mo.App. W.D. 1979); § 536.010(6), RSMo Supp. 2008.

[6] *Id.* (citing 1 Cooper, State Administrative Law p. 180 (1965); *SEC v. Chenery Corp.*, 332 U.S. 194, 203, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947)).

interpretation because its terms are plain, unambiguous and resolute. It leaves no gaps to be filled in by the Commission, no policy to be set forth other than what the General Assembly already set forth. Section (9) of the Proposed Rule essentially restates Section 393.1050. As such, it does not need to be promulgated as a rule to have the force and effect of law; it is a statute — it already is the law.[7]

(4) Section 393.1050 was adopted by the legislative branch in violation of the initiative power reserved exclusively to the people and is therefore void.

"Nothing in our constitution so closely models participatory democracy in its pure form" as the initiative process.[8] "Through the initiative process, those who have no access to or influence with elected representatives may take their cause directly to the people. The people, from whom all constitutional authority is derived, have reserved the 'power to propose and enact or reject laws.'"[9] Courts asked to intervene in the initiative process prior to the issue being placed before voters act with restraint and a "healthy suspicion of the partisan who would use the judiciary to prevent the initiative process from taking its course."[10] Additionally, laws of statutory construction require one to liberally construe provisions regarding initiative petitions in order to "make effective this reservation of power."[11] It is a very important power that the people reserved to themselves and must be made effective.

Missouri's General Assembly, which derives its power from the people,[12] did insert itself into the initiative process at a time when the proponents could no longer change the language of the petition. The issue is what power the legislative branch has as compared to the power the people reserved unto themselves to directly enact laws, bypassing the legislature. Does the legislature's power trump the people's power in the situation we have for Section 393.1050? We believe the answer is "no." The history of section 393.1050 was set forth at the beginning of this memorandum, but will be repeated here in short form.

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[7] For the purpose of this argument only, we set aside our position that it is an invalid law and is void.
[8] *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990).
[9] *Id.*; *accord* Mo. Const. Art. III, § 49.
[10] *Id.*
[11] *State ex rel. Blackwell v. Travers*, 600 S.W.2d 110, 113 (Mo. App. 1980)(citations omitted).
[12] Mo. Const. Art. I, §§ 1, 3, Art. III, § 1.

It was a second-to-last day of the legislative session when the General Assembly added what would be Section 393.1050 onto a popular energy bill. Section 393.1050 was offered and adopted after it was known what language was to be put before the people in November and Section 1 of SB 1181. But this is not about whether this was right or wrong in a moralistic sense; it is about whether it was lawful for the General Assembly to take this action and whether, as a result, Section 393.1050 should be given an effect by the Public Service Commission.

A situation such as this was addressed by the Missouri Supreme Court when the reservation of initiative and referendum powers to the people had fairly recently been adopted in the 1908 Constitution. In a case of a referendum (the rationale of the court still applies), our supreme court declared:[13]

> Under our system, that intangible thing we call "government," the existence of which is least felt when best administered, has its origin in and draws its life and inspiration from the people. They frame and adopt the organic law, which defines the limits of legislative action; they incorporate therein whatever provisions they may deem proper. Thus empowered, as are the people in all governments organized as is ours, the inevitable conclusion follows that if they determine, as they have in the adoption of the initiative and referendum, to limit the province or modify the purview of the Legislature in the adoption or rejection of laws, there is no power that can say them nay.

The following observation of the Court in 1922 applies nearly 80 years later:[14]

> Of what avail would a reservation be which could be rendered futile by the act of the body from which the power has been withdrawn? To place the seal of judicial approval upon such legislative action would, in effect, render the constitutional provision concerning the initiative and referendum nugatory and, as a consequence, its adoption a vain and foolish thing.

In *Drain*, the court held that once the power of referendum had been invoked, the legislature was "divested of all power in regard to the matter referred until the action of the people has been exercised by a vote upon same. This, for the reason, which seems patent from the nature and purpose of the proceeding, that the

[13] *State ex rel. Drain v. Becker, Secretary of State*, 240 S.W. 229, 230 (Mo. 1922)(en banc).
[14] *Id.* at 231-32.

Constitution does not contemplate that the General Assembly shall interfere with legislative action by the people themselves or that the latter may interfere with like action by the General Assembly until such action in each instance has been consummated."[15]

It can surely be determined that once the signed renewable energy standard initiative petitions had been submitted to the Secretary of State, the legislative branch had no authority to act on the matter that was the subject of the petition. The legislature had no authority to adopt Section 1 of SB 1181 after May 4, 2008, through November 4, 2008. The power to legislate on the matter in that initiative petition was during that time reserved to the people. As such, Section 393.1050 is an invalid statute, an act outside the power of the legislative branch. Accordingly, it should be considered void and should play no role in the application of Proposition C.

[15] *Id.* at 232.