BEFORE THE PUBLIC SERVICE COMMISSION

STATE OF MISSOURI

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TRANSCRIPT OF PROCEEDINGS

Oral Arguments

August 30, 2011

Jefferson City, Missouri

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In The Matter Of A Repository File Concerning Ameren Missouri's Submission of Its 2011 RES Compliance Plan	))))	File No. ER-2011-0275

MORRIS L. WOODRUFF, Presiding
CHIEF REGULATORY LAW JUDGE
KEVIN D. GUNN, Chairman,
JEFF DAVIS,
TERRY M. JARRETT
ROBERT S. KENNEY,
COMMISSIONERS

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PROCEEDINGS

JUDGE WOODRUFF: We're here today for oral arguments in three [sic] different cases all concerning the 2011 RES compliance plans submitted by the various electric utilities in the state. EO-2011-0275 concerns Ameren Missouri; EO-2011-0276 concerns Empire Electric; EO-2011-0277 concerns KCP&L; and EO-2011-0278 concerns KCPL Greater Missouri Operations Company.

We'll begin today by taking entries of appearance, beginning with Staff.

MS. HERNANDEZ: Jennifer Hernandez appearing on behalf of the Staff of the Missouri Public Service Commission. Our address is P.O. Box 360, Jefferson City, Missouri 65102. Thank you.

JUDGE WOODRUFF: For Ameren Missouri.

MS. TATRO: Wendy Tatro, 1901 Chouteau Avenue, St. Louis, Missouri 63103.

JUDGE WOODRUFF: For Empire District.

MR. MITTEN: Russ Mitten, Brydon, Swearengen & England, 312 East Capitol Avenue, Jefferson City, Missouri 65102, appearing on behalf of the Empire District Electric Company.

JUDGE WOODRUFF: For KCP&L and GMO.

MR. FISCHER: Thank you, Judge. James M. Fischer, Fischer & Dority, P.C., 101 Madison Street,

Jefferson City, Missouri 65101 appearing today on behalf of Kansas City Power & Light Company And KCP&L Greater Missouri Operations Company.

JUDGE WOODRUFF: And Office of Public Counsel.

MR. MILLS: On behalf of the Office of the Public Counsel and the public, my name is Lewis Mills. My address is Post Office Box 2230, Jefferson City, Missouri 65102.

JUDGE WOODRUFF: For Renew Missouri.

MR. ROBERTSON: Henry Robertson, Great Rivers Environmental Law Center, 705 Olive, Suite 614, St. Louis, Missouri 63101.

JUDGE WOODRUFF: For MIEC.

MR. DOWNEY: Edward Downey, Bryan Cave LLP, 221 Bolivar Street, Suite 101, Jefferson City, Missouri 65101.

JUDGE WOODRUFF: For Department of Natural Resources.

MS. MANGELSDORF: Sarah Mangelsdorf appearing on behalf of Missouri Department of Natural Resources.

JUDGE WOODRUFF: Okay. I believe that's all the parties. Is there anyone I've missed?

Okay. As indicated, we're here today for oral argument, and there's no real set procedure established for this case, so I'm going to propose a procedure here and if

anybody has an objection to it, let me know.

In looking at the filings of the parties, it looks like Renew Missouri is kind of on one side and everyone is also on the other. So what I propose to do is to allow Renew Missouri to begin with making whatever argument you'd like to make. I'll give the commissioners an opportunity if they want to interrupt your argument, they can ask questions at that point or if they want to wait until the end of the argument to ask questions, they can do that. And then I'll go through the utilities and all the other parties and give them a chance to make any responsive comments and again answer questions from the commissioners, and then finally I'll give Renew Missouri the last word.

Anyone object to that procedure?

MS. HERNANDEZ: Where's the Staff in that list? I believe you said "the utilities."

JUDGE WOODRUFF: We'll put you right after the utilities, if that's acceptable.

MS. HERNANDEZ: That's fine. Thank you.

JUDGE WOODRUFF: All right.

MS. MANGELSDORF: I have just one comment. The Department of Natural Resources, they are a little bit more aligned with Renew than some of the other parties, so I don't know if that will make a difference in terms of where you would want to place us in the order.

JUDGE WOODRUFF: We'll put you right after Renew Missouri.

MS. MANGELSDORF: All right.

JUDGE WOODRUFF: All right.

COMMISSIONER DAVIS: So Judge, are we not going to break up any of the -- I mean, it's just going to be kind of all issues at once or?

JUDGE WOODRUFF: That's the way the parties have filed this case. However the parties want to -- I understand each utility is going to have different viewpoints.

MS. TATRO: I think there's only three issues in total.

JUDGE WOODRUFF: Right.

MS. TATRO: So hopefully it won't get too confusing.

JUDGE WOODRUFF: We'll see how things go and I'll be open to suggestions as we go along if we need to.

So we'll begin with Renew Missouri.

MR. ROBERTSON: Thank you. Empire District has used its compliance plan to demonstrate that it is exempt from the solar rebate and solar carve-out requirements of the RES. That's on the strength of the Statute 393.1050 that was passed by the Legislature in May of 2008, some six months before the RES was passed by the voters.

And that says that a utility is exempt from these solar requirements if it had 15 percent nameplate capacity of renewables compared to its fossil fire capacity by January 20th of 2009. Now, I filed a declaratory judgment action on behalf of two Empire customers and the solar insulation company trying to strike down the statute. But the Court said that they threw me out because I did not exhaust my administrative remedies. Or to put it another way, they said that the Commission has primary jurisdiction for the decision. And I checked at the Supreme Court at one o'clock sharp for their monthly hand-downs and found out that my application for transfer was denied. So, I have to exhaust my administrative remedies, and I'm asking your help in doing that.

Now, I know what Empire is going to say. The remedy that they want me to exhaust is to file a complaint asking the Commission to make them file a tariff for the solar rebate. But it seems to me that it doesn't much matter what the forum is. What the Western District, in its opinion, which is now the last word on the case, said is that we are able to file a complaint. It did not say that a complaint is the only remedy available to us.

This docket here presents the question whether Empire is in compliance. It has to demonstrate its compliance. The Staff, in its report, is required to note

any deficiencies that it finds and other parties may note deficiencies as well. And if they are not in compliance because the statute is invalid, then that, I think, is a proper and necessary subject in their docket for the compliance plan.

Now, first of all, there's a fact-issue identified by the Western District in its opinion. That is, did Empire have 15 percent renewable nameplate capacity by January 20th, 2009. I'm not contesting it. They demonstrated they did. I mean, Staff's report seems to confirm it, but that is a finding that apparently in the Western District's opinion is necessary to make. They say -- Empire says that Empire had reached that 15 percent in 2007, let alone January, 2009. And I admitted it in the court below, but that wasn't good enough for the Western District.

I also think that it would have been impossible as a practical matter for any of the other utilities to achieve that 15 percent in the roughly two and a half months from the passage of Prop C. They would have had to throw up wind turbines at a breakneck speed or happened to find some wind farm or whatever that's prepared to go operational by January 20th, 2009, and hadn't yet found a taker for its energy with a PPA.

Now, the legal issue, if 1050 is not the law, then Empire's not in compliance and there is a deficiency. I

made three legal arguments in my declaratory judgment action. Two of those are Constitutional in nature, the other one is repeal by implication, which is a rule of statutory construction. The Western District is not clear whether the Commission has jurisdiction of those Constitutional issues.

But they did say that you have primary jurisdiction of the issue of repeal by implication. And I think that's really a very simple thing to decide. Empire claims to be exempt based on a statute passed in May of 2008. The RES passed in November of 2008, it applies to all IOUs, Empire included. Therefore it repealed 1050.

Now I'm raising two of our issues, and I have been hammered before and I expect to be hammered again because I did not raise these issues in the rulemaking. And all I can say is at the time, I considered them to be non-issues. And I turned out to be wrong. So I'm not asking you today to do what I want you to do. I am basing my argument on the language of the statute and the intent of the statute as it is revealed by that language and not to have the renewable energy policy derailed by any oversights I may have made.

Now, the REC banking issue, that is the retroactive REC banking utilities, can argue that they can take RECs generated in 2008 and apply them to their compliance here in 2011. I see no inconsistency there

between the rule and the statute. The rule says exactly what the statute says. So in either case, it's just a matter of how you interpret it, both the statute and the rule. And I see no inconsistency there with the position I'm taking. It just says that RECs shall exist for a period -- or may exist for three years after they're created.

Now, the utilities are saying that my interpretation would punish them for early adoption, and it does nothing of the kind. It allows them to use their existing PPAs, but the Renewable Energy Standard says that renewable energy shall constitute a given percentage of their sales for each of the compliance years. And the utilities' idea would nullify the 2011 to '13 compliance period and make it a 2008 to 2011 compliance period when the RES wasn't in force. Then they can take their 2011 RECs and apply them in 2014 and so on until they run out of banked RECs. That was not the purpose.

The purpose of the statute is to promote more renewable energy. The REC banking provision is a way of helping them carry over -- carry forward any unused RECs, RECs that are not used for compliance. And that way they can smooth out their compliance and not be stuck with any unused RECs that they can't sell on the market.

Last issue is hydropower, whether Keokuk and Osage Beach qualify under the RES. What the statute says is

hydropower, not including pump storage, that does not involve any new diversion or impoundment of water, and has a maximum capacity of ten megawatts. The idea there is to keep it small, to avoid the environmental impacts of large hydro.

And I have in my comments cited definitions from the utility industry and also from court cases to demonstrate that it is common usage for nameplate rating or nameplate capacity to mean not only the rating of physical nameplate rating on a generator, but the aggregate or total capacity of a facility, or of other things as well, like an entire sect or generation. What's the U.S. capacity -- nameplate capacity for natural gas, for instance. It has that meaning. And when the technical term has two meanings, you use the one that is most consistent with the intent of the law.

Now, you wouldn't -- I would not think anyone would think that they could build a new Keokuk with umpteen generators under ten megawatts or add umpteen generators to Keokuk, each under ten megawatts. That isn't the intent of the statute.

That's all I have for starters. Are there any questions?

JUDGE WOODRUFF: Chairman Gunn, you want to start?

CHAIRMAN GUNN: Let me just clarify the legal

argument. So you're -- you're not saying that Empire's out of -- the -- the question you're asking for us is not on the constitutionality of the statute. It's about whether or not Empire fulfilled the requirements under the previous statute, and whether that statute applies in light of the passage of the RES?

MR. ROBERTSON: I'm asking two things. One is whether they, as a matter of fact, reached that 15 percent nameplate capacity limit. And two, if they didn't, then there would be no issue with the validity of the statute. But if they have, then you must face the question of the validity of the statute.

CHAIRMAN GUNN: And you're not disputing that they have? You're just -- in terms of procedural requirements, you believe the Western District told you that you needed -- and the Supreme Court's subsequent denial of transfer said that you needed to at least have some sort of finding from the Commission as a matter of primary jurisdiction?

MR. ROBERTSON: That's correct.

CHAIRMAN GUNN: Okay. All right. I don't think I have anything else. Thank you.

MR. ROBERTSON: And as I said, it's fuzzy to me whether the Constitutional issues are within your primary jurisdiction, but at the very least, that question of repeal

by implication is within your primary jurisdiction.

JUDGE WOODRUFF: Commissioner Davis?

COMMISSIONER DAVIS: Mr. Robertson, I'm a little confused by your statements to Chairman Gunn. Are you alleging an issue of fact with regard to Empire's compliance?

MR. ROBERTSON: Yes. Under compulsion of the Western District. I admitted it in the court, but the Western District wants a factual finding.

COMMISSIONER DAVIS: All right. Okay. Mr. Robertson, you were a participant in the document entitled Joint Recommendation of the Parties filed in EO-2011-275, -276, -277, -278; were you not?

MR. ROBERTSON: Yes.

COMMISSIONER DAVIS: Let's see if I can find it here. I'm going to read to you from numbered paragraph one. It says, "The parties agree that an evidentiary hearing is not necessary. The issues are legal in nature and can be resolved by the filing of comments and oral argument."

You signed off on that pleading, did you not?

MR. ROBERTSON: I did.

COMMISSIONER DAVIS: And so now you're here alleging that there is an issue of fact?

MR. ROBERTSON: Not one that needs evidence. When we have the compliance filing of Empire and the report of the Commission, I think that suffices to address the

issue.

COMMISSIONER DAVIS: So you're saying we can take administrative notice of those filings and that we can find that Empire was in compliance on or about August 28th or 29th? Is that what you're saying?

MR. ROBERTSON: If you choose to do so, yes.

COMMISSIONER DAVIS: If we choose to do so.

MR. ROBERTSON: Yes.

COMMISSIONER DAVIS: I guess I'll just stay on that vein for a minute here. So you're saying that there is no way that the statutes can be read in harmony, 393.1030 and 393.1050; is that correct?

MR. ROBERTSON: Yes.

COMMISSIONER DAVIS: And you're saying that since 393.1050 was passed later in time, that it repeals the previous statute by implication?

MR. ROBERTSON: Well, 1030 repealed 1050.

COMMISSIONER DAVIS: I'm sorry, 1030 repealed 1050. That's your argument?

MR. ROBERTSON: That's my argument on repeal by implication, yes.

COMMISSIONER DAVIS: Okay.

MR. ROBERTSON: RES supplies all electrical corporations as defined by Commission statute, and Empire -- I think no one will dispute such an electrical corporation.

COMMISSIONER DAVIS: But you agree that 1050 became effective on August 28th, 2008?

MR. ROBERTSON: Yes.

COMMISSIONER DAVIS: Do you agree that Empire met the 1050 threshold on August 28th or August 29?

MR. ROBERTSON: They say they met it as of sometime in 2011.

COMMISSIONER DAVIS: Okay. Do you have any reason to dispute that fact?

MR. ROBERTSON: No.

COMMISSIONER DAVIS: I mean, if this Commission were to make a finding of that fact, would you object to it?

MR. ROBERTSON: No, I would not.

COMMISSIONER DAVIS: Okay. Mr. Robertson, are you familiar with Article I, Section 13 of the Missouri Constitution?

MR. ROBERTSON: It must be part of the Bill of Rights, but I don't remember which one it is.

COMMISSIONER DAVIS: It's prohibition against ex post facto laws. It says that, "No ex post facto law nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."

So I'm going to lay this out for you:

393.1050 becomes effective on August 28th. Empire Electric allegedly meets that threshold, and that right that was conveyed in 1050 vested in them immediately on that day or thereabouts. Then you fast forward to November 8th in the passage of Proposition C. Haven't those rights already vested?

I mean, you can repeal -- you might be able to repeal the statute by implication, but by virtue of the fact that those rights had already vested in Empire, you can't take those rights away, can you?

MR. ROBERTSON: I don't think they had any vested right to be free from the Renewable Energy Standard. I don't see what's impaired there.

COMMISSIONER DAVIS: Well, the impairment is that they had already achieved 15 percent and that they didn't have -- they weren't -- they didn't have to offer any kind of solar rebates or anything else under the statute. So in essence, on August 28th, they got a get out of solar rebates free card, and you're saying that -- you're saying that the statute repeals it by implication and that no matter -- no matter what, your statute trumps when -- I'm concerned that they might have had a right that already vested prior to November 8th in that two-and-a-half-month period there.

MR. ROBERTSON: Well, I don't think they had

any vested rights to be exempt from something that didn't exist yet. I'm not up on the exact meaning of vested rights under that Constitutional provision, but I don't think it applies here. They were trying to preemptively take themselves out of a part of the statute that they knew was in process of passage. And they were trying to wiggle out of it by a means which I consider illegitimate.

COMMISSIONER DAVIS: But if the law granted them a special privilege or privileges and that privilege vested, then what?

MR. ROBERTSON: Well, I really can't address this Constitution -- I don't think there's any special privilege in which they're invested. One of my arguments -- one of my Constitution arguments is that they attempted to pass a special law, which they're not entitled to under another section of the Constitution to do exactly that, to invest themselves with a special privilege to which they're not entitled.

COMMISSIONER DAVIS: Well, they could have -- it could, theoretically, apply to other people.

Does anybody -- I'll stop here for now and go on.

JUDGE WOODRUFF: I think Commissioner Jarrett may --

COMMISSIONER JARRETT: Well, I just -- I'm

troubled by the way you characterized it, that Empire tried to pass a law. The General Assembly passes laws; isn't that correct?

MR. ROBERTSON: Yes.

COMMISSIONER JARRETT: Empire has no authority to pass law, do they?

MR. ROBERTSON: No.

COMMISSIONER JARRETT: So the elected officials of this state voted to pass that law, and it was signed into law by the governor; isn't that correct?

MR. ROBERTSON: That's correct.

COMMISSIONER JARRETT: So Empire can lobby, but they -- you know, the law was passed. Now, my question is: 1050 was passed by the legislature. In the initiative, was there a corresponding Section 1050?

MR. ROBERTSON: No.

COMMISSIONER JARRETT: No. Okay.

MR. ROBERTSON: I mean, an initiative is supposed to designate which laws it would repeal, but we couldn't repeal 1050 because at the time it filed the initiative, it didn't exist. So it wasn't literally, you know, repealed. It was repealed by implication.

COMMISSIONER JARRETT: And how does that work? Repeal by implication? Explain that concept to me.

MR. ROBERTSON: Yes. If there are two laws

which are in some way irreconcilably inconsistent, then the latter one repeals the earlier one to the extent of the inconsistency.

COMMISSIONER JARRETT: So if you have a general law and then you have another law that is -- that carves out a small exception to that law, you say that is irreconcilably different?

MR. ROBERTSON: The idea is that Empire is exempt under the early statute. The later statute applies to all the electrical corporations including Empire. That is the inconsistency. Is Empire or is it not subject to the RES? And the latter law, the RES says that it is.

COMMISSIONER JARRETT: Okay. I had a question on, I guess, the nameplate -- and I want to get my terms right here because we throw around the terms like they're interchangeable and maybe they're not. Nameplate capacity versus nameplate rate.

MR. ROBERTSON: Yes.

COMMISSIONER JARRETT: I guess it's your argument that those are one in the same?

MR. ROBERTSON: I have found them used synonymously, interchangeably, yes.

COMMISSIONER JARRETT: But they're also used in other definitions by other electrical associations differently, aren't they?

MR. ROBERTSON: I don't think that -- I haven't seen the nameplate capacity as considered to be something different than nameplate rating.

COMMISSIONER DAVIS: Wait. Mr. Robertson, didn't you say earlier that nameplate capacity meant both?

MR. ROBERTSON: Yes, they're synonymous as far as I can determine.

COMMISSIONER DAVIS: So you're saying that nameplate capacity meant the aggregate capacity -- could mean the aggregate capacity or the rating on an individual unit?

MR. ROBERTSON: That's right, yes. That's right.

COMMISSIONER DAVIS: Okay.

COMMISSIONER JARRETT: So you're not familiar with what Empire filed on that?

MR. ROBERTSON: Yes, I am.

COMMISSIONER JARRETT: Okay.

MR. ROBERTSON: I mean, I read it.

COMMISSIONER JARRETT: So do you dispute the authorities that they cite that referred to the actual plate on the generator as being the nameplate rating?

MR. ROBERTSON: That's what Empire and Ameren are insisting is the sole meaning of the term.

COMMISSIONER JARRETT: Well, I understand that, but they cite authority for that. So are you disputing

that authority?

MR. ROBERTSON: No, I don't for an instant dispute that it can mean the physical nameplate on an individual generator.

COMMISSIONER JARRETT: Okay.

MR. ROBERTSON: I say that it has two meanings.

COMMISSIONER JARRETT: All right.

MR. ROBERTSON: And the one that you should apply is the one that's more consistent with the intent of the statute, and that's the aggregate.

COMMISSIONER JARRETT: And where do you get from the intent of the statute?

MR. ROBERTSON: From the idea that you don't want a 98-year-old hydro capacity like Keokuk swallowing up the five percent and two percent requirements of the statute.

COMMISSIONER JARRETT: And whose idea is that, sir?

MR. ROBERTSON: Hum?

COMMISSIONER JARRETT: Whose idea is that?

MR. ROBERTSON: It's in the -- I think you can glean it from the terms of the statute, which it aims --

COMMISSIONER JARRETT: It says nameplate rating.

MR. ROBERTSON: Yes, it does. And megawatts.

And the idea that's demonstrated by the statute is that hydro facilities are supposed to be small to avoid the excessive --

COMMISSIONER JARRETT: And again, where do you get this? Where do you get the language that says it's supposed to be kept small?

MR. ROBERTSON: Language is from 393.10255, Hydropower not including pump storage that does not require a new diversion or impoundment of water and that has a nameplate rating of ten megawatts or less.

COMMISSIONER JARRETT: Okay.

MR. ROBERTSON: Now, the idea is that you're looking at the facility as a whole.

COMMISSIONER JARRETT: And whose idea is that? That's what I'm trying to get to. Whose idea is that?

MR. ROBERTSON: Well, it's -- I would say it's the intent of the people who sponsored the initiative.

COMMISSIONER JARRETT: Well -

MR. ROBERTSON: Now, their intent --

COMMISSIONER JARRETT: Well, that's not the intent we look at, is it? It's the intent of the voters.

MR. ROBERTSON: Right, that's the only one.

COMMISSIONER JARRETT: What's the intent of the voters?

MR. ROBERTSON: It's judged from the language of the initiative.

COMMISSIONER JARRETT: So is it your contention that the intent of the voters is that they read that and thought, We don't want large hydro to apply here?

MR. ROBERTSON: Yes.

COMMISSIONER JARRETT: That's what the voters thought when they went in the ballot box and checked it?

MR. ROBERTSON: Well, we can't be sure, of course, that the voters actually read it.

COMMISSIONER JARRETT: That's why we have to read the plain language of the statute; isn't that right?

MR. ROBERTSON: Right.

COMMISSIONER JARRETT: Thank you. I don't have any questions.

MR. ROBERTSON: I assume the voters did.

JUDGE WOODRUFF: Commissioner Kenney?

COMMISSIONER KENNEY: Mr. Robertson, thank you. Can you hear me? Is this on? Sorry.

I want to follow-up on some additional questions of the nameplate capacity or nameplate rating of the Keokuk and Osage facilities. And let me just see if I understand. You wrote the ballot initiative rating, right?

MR. ROBERTSON: I was the lead draftsman.

COMMISSIONER KENNEY: Okay.

MR. ROBERTSON: I was not strictly whatever I will put into it, but.

COMMISSIONER KENNEY: At the time that RES was being drafted, you didn't contemplate that Osage and Keokuk would satisfy the requirements of the statute, right?

MR. ROBERTSON: No, I did not.

COMMISSIONER KENNEY: The rulemaking for qualifying certain renewable resources lies with DNR, correct? I mean, wouldn't this require a rule change --

MR. ROBERTSON: It would.

COMMISSIONER KENNEY: -- to the rules that DNR wrote as well?

MR. ROBERTSON: Yes, it would.

COMMISSIONER KENNEY: So what can we do in that regard, then? What is it that we can do with respect to that narrow issue?

MR. ROBERTSON: Well, you can't do anything to DNR's rule, but to your rule.

COMMISSIONER KENNEY: Okay. But then wouldn't you still need to contend with the DNR rule?

MR. ROBERTSON: Yes, I would.

COMMISSIONER KENNEY: So whatever we do is not going to solve the problem in its entirety, correct?

MR. ROBERTSON: It would solve half of it.

COMMISSIONER KENNEY: Now, did you participate in the DNR rulemaking?

MR. ROBERTSON: I filed comments in it, yes.

COMMISSIONER KENNEY: Was this issue brought up during the DNR rulemaking?

MR. ROBERTSON: I don't recall anybody raising it.

COMMISSIONER KENNEY: Okay. Then is there case law that tells us -- I guess this is applicable to both the repeal by implication and the definition of the nameplate rating. Is there some case law that tells us that if there's a conflict, that we should interpret it as the drafters intended with respect to the nameplate rating issue?

MR. ROBERTSON: If there is, I hope I cited it in my comments. I believe there is, yes. I think that's where you would logically go when you have two technical terms which are in conflict.

COMMISSIONER KENNEY: You cite a case --

MR. ROBERTSON: You have to choose one or another.

COMMISSIONER KENNEY: -- you cite a Seventh Circuit case that says the terms "aggregate nameplate capacity" and "nameplate capacity" are used interchangeably. And I guess -- because I understand what the intention was, but I fear that the language of the statute doesn't -- as it's drafted, doesn't necessarily carry into effect what you intended.

And so how do we get from a nameplate rating

to an aggregate nameplate rating? How do we reconcile those two terms as actually meaning the same thing?

MR. ROBERTSON: I'm not --

COMMISSIONER KENNEY: Because what you intended was aggregate nameplate rating.

MR. ROBERTSON: Yeah.

COMMISSIONER KENNEY: You meant to aggregate all the generators together, which would clearly be more than ten megawatts.

MR. ROBERTSON: Yes. I don't have the language of the rule in front of me. It might be as simple as striking the word "generator," or maybe one or two other words.

COMMISSIONER KENNEY: So if we -- okay, so we would redraft our rules to say something to the effect that it's in the aggregate or strike the word "generator?"

MR. ROBERTSON: Right.

COMMISSIONER KENNEY: Are we going to get --

MR. ROBERTSON: Substitute "aggregate" for "generator."

COMMISSIONER KENNEY: Aren't we going to get sued by somebody else, then, that our rules are in conflict with the statute?

MR. ROBERTSON: I would think that Ameren and Empire would react in some such way, yes.

COMMISSIONER KENNEY: All right. I ask the questions because -- just to put a fine point on the difficult position that we're in.

Let me ask you about this other -- the repeal by implication. The Western District instructed you that you had to exhaust your administrative remedies first?

MR. ROBERTSON: Yes.

COMMISSIONER KENNEY: And one of it was for -- one of those administrative remedies was for us to declare that 1050 is repealed by implication?

MR. ROBERTSON: Yes. To decide that issue one way or the other.

COMMISSIONER KENNEY: Doesn't that require some sort of constitutional analysis, though?

MR. ROBERTSON: Repealed by implication does not. It's regarded strictly as a rule of statutory construction. What I don't understand is the result is the same if you declare a statute unconstitutional. It's no longer in the books. But the courts seem to be making a distinction between constitutional arguments that you can't consider and unconstitutional arguments that you can decide.

COMMISSIONER KENNEY: Okay. All right. Thank you.

JUDGE WOODRUFF: Commissioner -- Chairman Gunn, Commissioner Jarrett, Commissioner Davis, any further

questions?

CHAIRMAN GUNN: I just have a couple follow-up questions. I appreciate that.

So let's assume you're right. All right? Let's say all of this, we find on every single deficiency in your favor. What then? I mean, we don't have the authority to -- do we just wait until the next RES filing, or are there any -- there are no penalties for being out of compliance and we can't -- we don't have the authority to force them to refile their RES compliant, or we don't have the authority to force them into compliance.

MR. ROBERTSON: The rule is really silent about it. But it talks about deficiencies, and it seems to me what's implied in that is deficiencies must be corrected.

CHAIRMAN GUNN: Well, we had deficiencies in our IRP rule, previous to the new IRP rule. And the way that -- the way that that worked is we found deficiencies, and then we said correct them in your next IRP. And three years went past, and if they did it in the next IRP and we found deficiencies, then we said correct them in your next IRP. We didn't have -- I mean, part of the reason why we changed our IRP rules we didn't have any enforcement authority over these deficiencies. And so since the statute is really silent on it, and the rule's really silent on it, what authority do we have now to take any action, you know, just because the word

-- I mean, because in past practice, deficiencies, we have not, as a Commission, said that the mere mention of the word deficiencies gives us the authority to act or authority to order or punish or penalize or whatever.

MR. ROBERTSON: Well, the statute does have penalties, which is double the market price of the RECs that they would need to retire in order to meet the standard. So yes, unless they rectified it quickly enough, they would be subject to penalties under the statute.

CHAIRMAN GUNN: Enforced by the Commission?

MR. ROBERTSON: Yes.

CHAIRMAN GUNN: So we would find at the end of this that their RES -- that the RES was not complied with and then we would impose penalties?

MR. ROBERTSON: Yes.

CHAIRMAN GUNN: Any opportunity for them to correct the deficiencies?

MR. ROBERTSON: I would certainly think that in light of the penalties, they would correct them as rapidly as they possibly could. Whether you could make some exemption for what you view as good faith action on their part, I can't say. It's not in literal terms of the statute or rule, although there's a force majeure provision. For circumstances beyond their control, they would not be subject to penalties.

CHAIRMAN GUNN: Okay. All right. Thank you.

JUDGE WOODRUFF: Commissioner Jarrett?

COMMISSIONER JARRETT: Yeah, I have just a couple. First thing was it -- was in your exchange with Commissioner Kenney. And this goes to you and it goes to all the lawyers here.

Is there any case law in Missouri that says if you're interpreting laws drafted by initiative, that you look at the intent of the drafters? Can anybody point me to any case law that says you look at the intent of the drafters in an initiative process?

MR. ROBERTSON: I have researched that, and I'm not sure there's any Missouri case that addresses it, but the rule is that in the case of initiative, the intent of the drafter is irrelevant. You can only look, as you said, at the intent of the voters and that could only be what the voters could read in the initiative language itself.

COMMISSIONER JARRETT: Thank you. I appreciate that. And the second thing that I wanted to ask, you pointed out the penalties in the statute.

MR. ROBERTSON: Yes.

COMMISSIONER JARRETT: So this is a punitive statute, in a way, because it does include penalties. Now, there's case law, whether you're talking about tax, laws, or any other type of laws, where there are penalties, those have

to be narrowly construed, correct? So if you have a -- so if you have a phrase that has two reasonable meanings, don't you have to interpret that in favor of the person you're imposing the penalties against?

MR. ROBERTSON: Well, yeah --

COMMISSIONER JARRETT: I mean, they're -- nameplate rating, if they're going to be penalized, they get the benefit of the doubt on if there's two reasonable interpretations. Isn't that what the case law says?

MR. ROBERTSON: No, I don't think that penalties have anything to do with that question of which definition applies.

COMMISSIONER JARRETT: Well, if they don't meet it, there's penalties, right?

MR. ROBERTSON: There is.

COMMISSIONER JARRETT: Okay. So --

MR. ROBERTSON: Unless, as I said, you waive it as a result of a force majeure.

COMMISSIONER JARRETT: -- we're trying to interpret that phrase. You say it means one thing, a lot of the other people say it means another. If they're subject to penalties, it has to be construed narrowly and in their favor, if there's two reasonable readings?

MR. ROBERTSON: Well, that's the rule with regard to criminal penalties --

COMMISSIONER JARRETT: Well, it's also for tax, isn't it?

MR. ROBERTSON: -- but a rule initiative, I'm not familiar with civil penalties.

COMMISSIONER JARRETT: I believe it is for tax as well. Mr. Downey would know that. Right, Mr. Downey?

MR. DOWNEY: That is correct.

COMMISSIONER JARRETT: Thank you. No further questions.

JUDGE WOODRUFF: Commissioner Davis.

COMMISSIONER DAVIS: All right. Mr. Robertson, I think I heard you earlier take credit for helping draft Proposition C. I think I've heard P.J. Wilson take credit for drafting Proposition C. I've heard Renew Missouri take credit for passing Proposition C. Are those -- is that a valid statement?

MR. ROBERTSON: Well, there were many people who contributed to the content of it. The actual language, the actual wording was primarily my doing.

COMMISSIONER DAVIS: Okay. All right. Once again, you waived Renew Missouri's right to an evidentiary hearing in this case, did you not?

MR. ROBERTSON: Yes.

COMMISSIONER DAVIS: Would you agree with me that Renew Missouri produced publications in support of

Proposition C's passage?

MR. ROBERTSON: Yes.

COMMISSIONER DAVIS: And are you aware that P.J. Wilson and other people made public appearances on radio shows, TV shows, and other venues in support of Prop C's passage?

MR. ROBERTSON: Yes.

COMMISSIONER DAVIS: Okay. So speaking in terms of -- of legislative intent, can you produce one published article, one recorded interview, or any other publicly available record that this tribunal might take administrative notice of that your client, Renew Missouri, or anyone else taking this position prior to the meeting held at this Commission, I think it was last year, where Ameren Missouri verbally notified you of their intent to count each of the 15 Keokuk generators towards their -- their Renewable Energy Standard because they have nameplate capacity of ten megawatts? Can you point to any public record that supports your claim on that issue?

MR. ROBERTSON: I very much doubt that it was ever raised by our side one way or the other. I would be very surprised if there was such a document.

COMMISSIONER DAVIS: Okay. So you don't have anything that says here's proof, here's our golden ticket that this is what we intended at that time?

MR. ROBERTSON: No. And as I was discussing with Commissioner Jarrett, that would be irrelevant anyway. It's only language of the statute that you look at to determine the intent of the initiative, which is the intent of the voters, not the intent of me or Renew Missouri.

COMMISSIONER DAVIS: So are you saying -- let me just ask it this way now, then: Sir, are you saying that when the Commission enacted this rule, and I think it's CSR 240-20.100, Subsection 1(k)(8), that we, in fact, adopted a rule that was unlawful?

MR. ROBERTSON: I'm not sure I'd use that strong word. I just think that the intent of the statute is more consistent with the aggregate interpretation, rather than the individual nameplate interpretation.

COMMISSIONER DAVIS: So you're saying that the definition that we have right now is, in fact, consistent, it's just not the one that you like?

MR. ROBERTSON: No, it's -- the one that's -- the intent of the statute is to use small hydro as I'm saying. No new diversion or impoundment of water of ten megawatts or less. That means a small facility. It's not supposed to be a big dam or another Keokuk or the existing Keokuk. It's supposed to be what they call a small run-of-the-river hydro or micro hydro. I know that's not in the statute, but the intent of the statute is, I think, clear

from the wording.

COMMISSIONER DAVIS: Mr. Robertson, you recall that these rules, in fact, went to a JACAR hearing, do you not?

MR. ROBERTSON: Yes.

COMMISSIONER DAVIS: And at any point in time, you've never raised this issue, correct, until -- until Ameren Missouri and Empire gave you their notice that they were intending to count their existing hydroelectric facilities?

MR. ROBERTSON: Yes, I never went to JACAR. That was the utilities and that issue was not raised.

COMMISSIONER DAVIS: And you intimately participated in the -- the rulemaking process here at the Commission, did you not?

MR. ROBERTSON: I did.

COMMISSIONER DAVIS: And did you read Ms. Hernandez's brief?

MR. ROBERTSON: Yes.

COMMISSIONER DAVIS: I thought it was quite good. What did you think?

MR. ROBERTSON: Well, I disagree with it.

COMMISSIONER DAVIS: You disagreed with it. But, you know, she pointed out that there were 14 or 15 formal revised versions of the rule, and this section was --

this section was revised at least two or three times.

So, I mean, do you feel like in adopting these rules, I mean, was Renew Missouri just asleep at the wheel, or did you somehow get hornswoggled by the lawyers for these big utilities?

MR. ROBERTSON: I didn't get hornswoggled. If I had known what I know now about Keokuk, I would have seen that there was a problem. But I did not know, and that's my fault.

COMMISSIONER DAVIS: Okay. Now -- so this whole issue turns on the definition of renewable energy sources found in 393.1025, subsection 5, correct?

MR. ROBERTSON: Yes.

COMMISSIONER DAVIS: And just reading the statute, for hydropower to qualify as a renewable energy resource, it's got to do four things: It's got to produce electric energy; it's got to be hydropower, not including pump storage; can't require a new diversion or impoundment of water; and then the fourth criteria is that it has a, quote, nameplate rating of ten megawatts or less.

Do you agree with that definition?

MR. ROBERTSON: Yes.

COMMISSIONER DAVIS: And the only argument that you're here to make today is that Keokuk is not a renewable energy resource pursuant to that section because it

does not have a nameplate rating of ten megawatts or less, correct?

MR. ROBERTSON: In light of the fact that there's no new diversion or impoundment of water, that's talking about more than just one generator. That's talking about whole facilities. It's not a single generator that has a -- causes a diversion or impoundment of water.

COMMISSIONER DAVIS: Right. But the statute doesn't say single generator or multiple generators, does it?

MR. ROBERTSON: No, it doesn't.

COMMISSIONER DAVIS: Okay. I mean, but for your argument to be true, that question that I asked you would also have to be true, correct?

MR. ROBERTSON: I'm sorry, what does that --

COMMISSIONER DAVIS: All right. Well, Mr. Robertson, if you look at 393.1025, do you see the word "capacity" anywhere in that section? Is the word "capacity" there in any way, shape, or form?

MR. ROBERTSON: I don't believe so. Nameplate rating is as close as it comes.

COMMISSIONER DAVIS: Okay. So you don't dispute that the nameplate rating on each of Ameren's 15 units at Keokuk is ten megawatts, do you?

MR. ROBERTSON: I don't personally know it, but I don't dispute it, no.

COMMISSIONER DAVIS: Okay. Do you dispute that Empire's units with approximately four megawatts a piece?

MR. ROBERTSON: I looked it up on line and that's what I found.

COMMISSIONER DAVIS: Okay. And so basically your argument is that you cannot have a hydroelectric plant or facility in this state that qualifies under your statute that's larger than ten megawatts of any kind?

MR. ROBERTSON: That's right, except that I think it would also allow an upgrade of an existing facility of ten megawatts aggregate.

COMMISSIONER DAVIS: Going back to your initial comments. You said that the -- the statute -- this is -- these are from your written comments, page 1, your initial comments.

The statute does not say hydropower generator rating, simply hydropower...nameplate rating. Nameplate is commonly used to refer to total or aggregate rating, even when neither of those adjectives is used.

So if I understand that statement correctly, you're saying that -- in that sentence -- that you had -- on page 1 of your initial comments, that the words "hydropower" and "rating" are both adjectives, that "nameplate" is the noun and it's commonly used to refer to total or aggregate

rating; is that correct?

MR. ROBERTSON: Yeah, well, "nameplate's" the adjective and "rating" is the noun, I think, but yeah.

COMMISSIONER DAVIS: Okay.

MR. ROBERTSON: If the term is used without "generator," then it can or does mean aggregate or total.

COMMISSIONER DAVIS: So --

MR. ROBERTSON: If it's used -- if you just say "nameplate rating" or "nameplate capacity," I've cited examples to show that even though those total or aggregate or generator is not included there, it can mean both.

COMMISSIONER DAVIS: When you say in your pleadings and when you say here today that that's the intent of the statute, how -- I mean, how -- how do we know? I mean, are we just supposed to trust you that that's really what you meant at the time?

MR. ROBERTSON: No, I am basing it on the language of the statute.

COMMISSIONER DAVIS: You're basing it on the language of the statute?

MR. ROBERTSON: No new diversion or impoundment of water in a nameplate rating of ten megawatts or less. I think it's clear that that refers to a facility rather than simply individual generators.

COMMISSIONER DAVIS: All right. Well, let's

skip ahead, then. Let's get back to are you familiar with any of the canons of statutory construction in this state?

MR. ROBERTSON: I hope so.

COMMISSIONER DAVIS: Are you aware that you can look to the title of an Act as a source of legislative intent?

MR. ROBERTSON: I believe you can, yes.

COMMISSIONER DAVIS: Okay. What is the title to this Act that we're talking about here today?

MR. ROBERTSON: Renewable Energy Standard.

COMMISSIONER DAVIS: Okay. It's not New Renewable Energy Standard, is it?

MR. ROBERTSON: No.

COMMISSIONER DAVIS: It's just Renewable Energy Standard; is that correct?

MR. ROBERTSON: That's right.

COMMISSIONER DAVIS: Would you agree that there is nothing in the title that indicates that already existing sources of renewable energy don't qualify?

MR. ROBERTSON: Already existing sources do qualify if they meet the definition of renewable energy sources. And I'm contending that Keokuk and Osage Beach do not.

COMMISSIONER DAVIS: Right, but would you agree that there's nothing in the title?

MR. ROBERTSON: Well, the title is very short.

COMMISSIONER DAVIS: Renewable Energy Standard. You could have said New Renewable Energy Standard, couldn't you?

MR. ROBERTSON: I could have, yes.

COMMISSIONER DAVIS: And you didn't?

MR. ROBERTSON: No.

COMMISSIONER DAVIS: And you drafted it?

MR. ROBERTSON: Uh-huh.

COMMISSIONER DAVIS: Okay. Mr. Robertson, do you have any written or verbal examples to support your position that the word "nameplate" in and of itself means total or aggregate rating?

MR. ROBERTSON: Nameplate by itself?

COMMISSIONER DAVIS: Nameplate by itself.

MR. ROBERTSON: No.

COMMISSIONER DAVIS: I mean, let's get back to the page 1 of your initial comments. Do you have anything -- can you give me any analogy? I mean, is there anything written or verbal or anything else you can give me where just the word "nameplate" in and of itself has that -- that total or aggregate meaning?

MR. ROBERTSON: No, I don't think it could, because it's a thing.

COMMISSIONER DAVIS: Okay. Let me ask you

this question, then, Mr. Robertson: I'm going to assume that this really was your intent all along, that we weren't going to have any new hydroelectric plants in this state of ten megawatts or -- more than ten megawatts. Should that trump the fact that you put something into the statute that went before the voters that said something different?

MR. ROBERTSON: Well, if someone can find a place to put a larger hydroelectric project, they can do so. It just won't qualify for the RES.

COMMISSIONER DAVIS: That was not my question, Mr. Robertson. I mean, does that -- I mean, in the statute you used the word "nameplate rating." Would you agree that we wouldn't even be here right now if you had used the phrase "nameplate capacity" instead of "nameplate rating?"

MR. ROBERTSON: I don't think that would have changed anything.

COMMISSIONER DAVIS: You don't think that would have changed anything?

MR. ROBERTSON: No, they mean, as far as I can tell, the same thing, in the examples that I cited.

COMMISSIONER DAVIS: Is it fair to say that in your initial comments there on pages 2 through 4 that you used the terms "nameplate capacity" and "nameplate rating" interchangeably?

MR. ROBERTSON: Based on the sources I cited,

they are used interchangeably. And if someone wants to build a thousand megawatt dam across the Missouri River, I think it's very clear that that would not qualify under the Renewable Energy Standard, but it can still be done.

COMMISSIONER DAVIS: Okay. In your initial comments, I noted that you had nine footnotes and six case citations that you have referred to earlier as your support that nameplate rating actually means nameplate capacity; is that correct?

MR. ROBERTSON: Well, they don't all say that, but that's --

COMMISSIONER DAVIS: That's the gist of your argument that we're supposed to glean, correct?

MR. ROBERTSON: That nameplate rating or nameplate capacity means aggregate, as well as individual generator.

COMMISSIONER DAVIS: Okay. But we're not talking about whether nameplate capacity means aggregate or total capacity, are we?

MR. ROBERTSON: I thought we were. I'm sorry.

COMMISSIONER DAVIS: What does the statute say, Mr. Robertson?

MR. ROBERTSON: Nameplate rating.

COMMISSIONER DAVIS: It says nameplate rating. It doesn't say nameplate capacity, does it?

MR. ROBERTSON: No, it doesn't.

COMMISSIONER DAVIS: Okay. Looking at page 2 of your initial comments, you've got -- you've got three footnotes there that are all citations to the term "nameplate capacity." Would you agree with me that if you went to all three of those web sites and looked at them, that there is no reference to the word "nameplate rating" or even the word "rating" on any of those three web sites that you cited in footnotes number one, two, and three?

MR. ROBERTSON: I don't remember. There may not be, but there's a paragraph in my comments where I discuss how the terms are used as synonymous.

COMMISSIONER DAVIS: Okay. Well, we'll get to that. But to the best of your knowledge, there is no reference to the word "nameplate rating" or "rating" on -- in any of those first three footnotes, correct?

MR. ROBERTSON: I don't remember.

COMMISSIONER DAVIS: Okay. Your fourth footnote appears to be an error in then it's a repeat of footnote number three, when you're actually referring to Tacoma Power's Cushman hydro project; is that correct?

MR. ROBERTSON: I didn't catch the error, if there is one.

COMMISSIONER DAVIS: You didn't catch the error. Your fourth footnote actually refers to the Cushman

hydro project, that's a Tacoma Power project, and it uses the phrase "installed capacity" and then it has in parentheses the "nameplate rating," or the words -- there's a, I guess, an open parentheses nameplate rating, closed parentheses; is that correct?

MR. ROBERTSON: Yes.

COMMISSIONER DAVIS: Okay. Isn't that, in fact, a reference to the fact that there are two generating units at Cushman 1 and three generating units at Cushman 2, in that for example, Cushman 2 has three generating units of 27,000 kilowatts each that give Cushman 2 a total of 81,000 kilowatts installed capacity? Isn't that what that's actually referring to?

MR. ROBERTSON: I read it to mean that the installed capacity is the same as nameplate rating and was used there in the aggregate sense.

COMMISSIONER DAVIS: In fact, isn't that reference to the term "nameplate rating" more likely to the fact that it's the installed capacity based on the nameplate rating of the three individual generators? Would you agree with that?

MR. ROBERTSON: No, I wouldn't read it that way.

COMMISSIONER DAVIS: You don't read it that way. Mr. Robertson, do you know much about hydropower?

MR. ROBERTSON: No.

COMMISSIONER DAVIS: Are you familiar with the fact that hydropower is known for being a lot less reliable in some circumstances than wind, and it's seldom that you get that full 100 percent generation capacity that's -- at the installed rating?

MR. ROBERTSON: I am aware of that, yes.

COMMISSIONER DAVIS: You are aware of that. Okay. That's good.

Now, footnote 5 is a reference to a web site, expertglossary.com. Mr. Robertson, do you have the full definition to your -- to your citation handy?

MR. ROBERTSON: Not with me here, no.

COMMISSIONER DAVIS: Not with you?

MR. ROBERTSON: I have it on my hard drive.

COMMISSIONER DAVIS: You've got it on your hard drive. Let me see if I can pull it out here. Let me read this to you, and let me see if this sounds correct.

Generator nameplate capacity: The full load continuous rating of a generator, prime mover or other electric power production equipment under specific conditions as designated by the manufacturer. Installed generator nameplate rate: Something usually indicated on a nameplate physically attached to the generator.

Is that the definition from expertglossary?

MR. ROBERTSON: That is familiar to me as the definition that I believe is being cited by some of the utilities and maybe Staff.

COMMISSIONER DAVIS: Well --

MR. ROBERTSON: I wasn't aware that I used that because it wouldn't apply because it says "generator nameplate rating" and therefore, obviously, it's not the aggregate nameplate rating and only the first individual generator nameplate rating.

COMMISSIONER DAVIS: Well, let me go here, see if I can find your comments.

Mr. Robertson, can you come up and approach the bench here?

MR. ROBERTSON: [Witness complies.]

COMMISSIONER DAVIS: I'm going to read this out loud here. There's a -- this is your brief, is it not?

MR. ROBERTSON: It is.

COMMISSIONER DAVIS: There's no signature on the back, but this looks like your brief, isn't it?

MR. ROBERTSON: Yes.

COMMISSIONER DAVIS: And that's your footnote number 5, isn't it?

MR. ROBERTSON: Yes.

COMMISSIONER DAVIS: So http://www.expertglossary.com/water/definition/generator-name

plate-capacity; is that correct?

MR. ROBERTSON: Uh-huh, yes.

COMMISSIONER DAVIS: Judge, can you pull that web site up on the big screen up there?

JUDGE WOODRUFF: I'm not sure how to do it on the big screen. I don't have access to the big screen from my computer.

COMMISSIONER DAVIS: You don't have the access to the big screen. Well, maybe we can just short-circuit that. That is the web site that you cited in your -- in your brief, Mr. Robertson, isn't it?

MR. ROBERTSON: That, I assume, I got it correct. I'm not sure about the context, though, unless I look at my comments.

COMMISSIONER DAVIS: Okay. And I've got a printed copy here. Do you want to come back up and look at it and see if this is the web site? Is that -- does that ring any bells?

MR. ROBERTSON: Well, that's the definition of "generator" and "nameplate capacity," yes.

COMMISSIONER DAVIS: Okay. Then that's the definition that you cited in your brief, isn't it?

MR. ROBERTSON: I guess it is.

COMMISSIONER DAVIS: Okay. And just to be clear, that definition doesn't say anything about aggregate.

It's talking about the little metal plate that's on the side of any generator, prime mover, or electric power production equipment, correct?

MR. ROBERTSON: Yes, because it's the definition of "generator nameplate capacity."

COMMISSIONER DAVIS: And that's the definition that you cited in your initial comments, correct?

MR. ROBERTSON: Yes.

COMMISSIONER DAVIS: Okay. Footnote 6 is a reference to the Texas PUC rules for self-generators, correct?

MR. ROBERTSON: Let me, if I may, get my comments.

COMMISSIONER DAVIS: Do you have your comments in front of you now, Mr. Robertson?

MR. ROBERTSON: Yes, I do.

COMMISSIONER DAVIS: So footnote 6 is a reference to the Texas PUC's rules for self-generators, correct?

MR. ROBERTSON: Uh-huh, yes.

COMMISSIONER DAVIS: Now, seeing as how you had to go get your -- get your copy of your comments, you don't happen to have a copy of Section 25.109 with you, do you?

MR. ROBERTSON: No, I don't, but my point on

that paragraph, that's a paragraph in which I show that capacity and nameplate are used interchangeably. And nameplate rating and capacity rating are used interchangeably.

COMMISSIONER DAVIS: Okay. Can we take administrative notice of those documents, since they are regulations of the Texas Public Utility commission?

JUDGE WOODRUFF: I believe we can, yes.

COMMISSIONER DAVIS: Mr. Robertson, do you have a problem with that?

MR. ROBERTSON: I'm not sure if administrative notice applies to out-of-state rules.

COMMISSIONER DAVIS: Okay. I actually happen to have a copy of Section 25.109 here. Did you know that it has a definition section, Mr. Robertson?

MR. ROBERTSON: I don't recall.

COMMISSIONER DAVIS: Do you recall looking at the -- at the rule on the web?

MR. ROBERTSON: I did.

COMMISSIONER DAVIS: Okay. So do you recall what you were searching for when you went out and found this reference?

MR. ROBERTSON: Well, I was Googling combinations of capacity rating, nameplate rating, hydro.

COMMISSIONER DAVIS: Okay.

MR. ROBERTSON: I went through a number of different searches.

COMMISSIONER DAVIS: Okay. So you were just out there searching and this was -- this was one of the things that you found. And it's for the -- you're saying it's for the premise that capacity rating means --

MR. ROBERTSON: Nameplate rating.

COMMISSIONER DAVIS: -- nameplate rating. Okay. All right. I didn't bring copies for everyone. I apologize. Section 25.109, subsection B, has the definition section. Subsection b(2) has definition for the words "nameplate rating." Did you find that definition in your research, Mr. Robertson?

MR. ROBERTSON: I don't recall exactly what it was that I found.

COMMISSIONER DAVIS: Okay. So let me just read this definition to you. It says: Nameplate rating. The full load continuous rating of a generator under specified conditions as designated by the manufacturer.

Do you agree with that definition, Mr. Robertson?

MR. ROBERTSON: Yes, that's a possible definition of nameplate rating. That's one of the definitions.

COMMISSIONER DAVIS: Does the Texas Commission

have another definition for nameplate rating that we're not aware of?

MR. ROBERTSON: I don't know.

COMMISSIONER DAVIS: You don't know. Okay. So your reference is actually to Section C, is it not?

MR. ROBERTSON: I didn't catch that in my footnote.

COMMISSIONER DAVIS: You didn't catch that in your footnote. So -- okay. Would you -- so you don't even know what Section C says, then, do you?

MR. ROBERTSON: Not at the moment, no.

COMMISSIONER DAVIS: But you were citing it for the premise that capacity ratings and generator or nameplate rating is used interchangeably, correct?

MR. ROBERTSON: Yes.

COMMISSIONER DAVIS: Okay. Well, I'm going to read this section to you. C, capacity ratings, for purposes of this section, the capacity of generating units shall be reported as follows: One, renewable resource generating units shall be rated at the nameplate rating.

Do you have any reason to dispute that statement, that that's the actual rule, Mr. Robertson?

MR. ROBERTSON: No.

COMMISSIONER DAVIS: Well, it says renewable resource generating units shall be rated at the nameplate

rating. To me, that sentence says that the individual units shall be rated at the nameplate rating that's whatever -- whatever the little metal plate on the side of the generator says. Would you agree with that?

MR. ROBERTSON: Yes.

COMMISSIONER DAVIS: And that's a reference to an individual generating unit, isn't it?

MR. ROBERTSON: Yes. It's not a reference to aggregate or total capacity of a rating.

COMMISSIONER DAVIS: Would you agree with me that the final three footnotes there that you have, numbers seven, eight, and nine, are all for the proposition that nameplate capacity means aggregate capacity?

MR. ROBERTSON: That's why I cited them, yes.

COMMISSIONER DAVIS: Okay. So nameplate capacity can mean nameplate rating or it can mean, you know, the entire amount of generation at a particular facility or maybe even in the state or even all across North America, correct?

MR. ROBERTSON: That's correct.

COMMISSIONER DAVIS: Can you produce one -- one public document cited anywhere that shows that nameplate rating has any other meaning than the little metal plate that sits on the side of the generator?

MR. ROBERTSON: I thought I had. I didn't

review these definitions for today. I just relied on my comments.

COMMISSIONER DAVIS: Mr. Robertson, have you ever heard of the Low Impact Hydropower Institute in Portland, Maine?

MR. ROBERTSON: Yes, I have.

COMMISSIONER DAVIS: Are you familiar with their web site?

MR. ROBERTSON: I probably looked at it way back in '07 or '08.

COMMISSIONER DAVIS: Do they sound like a group that might be an authoritative source on the issue of nameplate rating?

MR. ROBERTSON: Perhaps when it comes to low impact hydro, they would be.

COMMISSIONER DAVIS: Okay. Well, I'm going to read to you a quote from their web site, and I want you to tell me if they are using the phrase "nameplate rating" in the sense that you are asking this Commission to use it, or whether they're using it in the sense that Ameren and Empire and everybody else appears to be using it. So this is from the Low Impact Hydropower Institute web site from a posting dated October 22nd, 2010, that's still a live link on the Internet discussing the Ashton hydroelectric project on the Henry's Fork River in Idaho.

And I'm just going to shorten it and say LIHI states: The development features a reinforced concrete powerhouse located at the right bank, with integral intakes controlled by vertical slide gates and containing two generating units, each with a nameplate rating at 2,000 kilowatts and one generating unit rated at 2,850 kilowatts.

Would you agree that when the Low Impact Hydropower Institute is using the term "nameplate rating" in this sentence, they're using it in the sense that Ameren and Empire have both sought to use it?

MR. ROBERTSON: They are. It doesn't preclude the possibility that they would also aggregate those nameplate ratings for a total nameplate rating.

COMMISSIONER DAVIS: Well, that's true, but then aggregate nameplate rating is not nameplate rating, is it?

MR. ROBERTSON: It is, depending on the context in which it's used.

COMMISSIONER DAVIS: Well, if you were going to -- if you had intended aggregate nameplate rating, why didn't you just say aggregate nameplate rating when you were crafting the statute?

MR. ROBERTSON: I thought I had done a good enough job.

COMMISSIONER DAVIS: What about Wikipedia?

Are you familiar with Wikipedia?

MR. ROBERTSON: I am. I don't always trust them overly much. I'd rather not cite them if I can avoid it.

COMMISSIONER DAVIS: Okay. Wikipedia does -- they don't have a definition for nameplate rating, do they?

MR. ROBERTSON: I don't think I -- I don't know if I even looked at Wikipedia. I usually skip those references.

COMMISSIONER DAVIS: Mr. Robertson, are you familiar with the North American Electric Reliability Counsel, or NERC?

MR. ROBERTSON: Yes.

COMMISSIONER DAVIS: Have you ever looked at NERC's registry criteria for small generators?

MR. ROBERTSON: I don't think I have.

COMMISSIONER DAVIS: Would it surprise you to learn that both NERC and FERC, being the Federal Energy Regulatory Commission, used the term "gross nameplate rating" to refer to individual generating units and gross aggregate nameplate rating to refer to generating plants and facilities?

MR. ROBERTSON: Would it surprise me?

COMMISSIONER DAVIS: Uh-huh.

MR. ROBERTSON: I'm sorry, what was the

question?

COMMISSIONER DAVIS: Does that surprise you at all?

MR. ROBERTSON: No.

COMMISSIONER DAVIS: You didn't -- so when you were crafting this statute, did you look at other authoritative sources for any of these definitions, or did you just kind of write them or?

MR. ROBERTSON: No, I generally took my language from examples.

COMMISSIONER DAVIS: Do you remember what example you took this language from?

MR. ROBERTSON: No.

COMMISSIONER DAVIS: So that brings up another rule of statutory construction. Are you familiar with the Borrowed Statute Doctrine?

MR. ROBERTSON: If you borrow a statute from another state, you generally apply the interpretation used in that state.

COMMISSIONER DAVIS: Right. But you can't remember what statute you borrowed this from, can you?

MR. ROBERTSON: I don't know if I did borrow it from a statute.

COMMISSIONER DAVIS: Well, you just said you used examples from other states, so I was just assuming that

maybe you had.

Do you have any other source to say that the definition of the term "nameplate rating" has an uncertain meaning besides you just standing here and telling us that it's your opinion that the meaning is uncertain?

MR. ROBERTSON: I'm sure I can find more.

COMMISSIONER DAVIS: But you don't have anything here today?

MR. ROBERTSON: It's not really an uncertainty. It's a question of two choices of a definition of a technical term.

COMMISSIONER DAVIS: Okay. Two choices of a technical term. But when you cited State ex rel. Slinker versus Greeby [phonetic] in your initial comments, I mean -- I mean, my reading of that case says that for you to get to that public policy test, you've got to meet that uncertain meaning threshold, do you not?

MR. ROBERTSON: Yes.

COMMISSIONER DAVIS: I think it was Ms. Hernandez and maybe Mr. Mitten -- either Mr. Mitten or Ms. Tatro both cited Section 1.090 of the Missouri Revised Statutes. Did you take a look at that section?

MR. ROBERTSON: No.

COMMISSIONER DAVIS: Okay. Well, I'm going to read it to you. It says, Words and phrases shall be taken in

their plain or ordinary meaning and usual sense. But technical words and phrases having a peculiar and appropriate and meaning in law shall be understood according to their technical import.

Do you agree that that's Section 1.090 to the best of your knowledge?

MR. ROBERTSON: I accept that, yes.

COMMISSIONER DAVIS: Would you agree that the way that Ameren Missouri, Empire, and the PSC Staff are using the term "nameplate rating" and applying Proposition C is the more ordinary and usual sense of how the term is used?

MR. ROBERTSON: No.

COMMISSIONER DAVIS: Okay. Mr. Robertson, do you recall when DNR's rule on this issue became effective?

MR. ROBERTSON: I think it was earlier this year.

COMMISSIONER DAVIS: January 30th, 2011. Does that sound correct?

MR. ROBERTSON: That sounds right.

COMMISSIONER DAVIS: And you didn't object in any of those proceedings to the definition for "nameplate rating" that they were using, did you?

MR. ROBERTSON: No, I don't believe I did.

COMMISSIONER DAVIS: Okay. Any other rules of statutory construction that support your case, Mr. Robertson?

MR. ROBERTSON: I think it's cited the very basic rule. When you've got an uncertainty between two possible meanings of a term, you use the one that best matches the intent of the statute. You look at what it's meant to accomplish and the consequences of the proposed interpretation.

COMMISSIONER DAVIS: Do you think there's any real uncertainty about the definition of nameplate rating or do you think it was your own uncertainty about nameplate rating?

MR. ROBERTSON: There are two definitions, as to the uncertainty of which one applies.

COMMISSIONER DAVIS: We've seen the EEI definition that has been put forth by the parties. We've seen -- oh, do you have any textbook definition that states your interpretation, the second interpretation that you're seeking this Commission to adopt?

MR. ROBERTSON: I'm not sure what a textbook --

COMMISSIONER DAVIS: Well, do you have any treatise, any dictionary citation, any EEI handbook, anything else out there that says this is what "nameplate rating" means? And it means my definition here, see this, Commissioners, see, I win. I'm telling you that there's ambiguity?

MR. ROBERTSON: Well, it has to be based on the language of this statute. I thought I had cited enough samples to prove my case.

COMMISSIONER DAVIS: But do your examples prove your case?

MR. ROBERTSON: That it's common usage to refer to it as aggregate as well as individual nameplate? Yes.

COMMISSIONER DAVIS: All right. Judge, I'll go. I've got more questions about REC banking, but I'll defer -- I've gone on long enough. Thank you.

JUDGE WOODRUFF: Okay. Anything else from the Commissioners? All right. Then thank you, Mr. Robertson.

We'll move on, then, to DNR.

MS. MANGELSDORF: Good afternoon, may it please the Commission.

The energy policy implications of the Commission's actions are a significant factor in the Missouri Department of Natural Resources participation in Public Service Commission cases. Those policy implications are significant in the matter before the Commission today.

In passing Proposition C, Missouri voters communicated their interest in more renewable energy than had been previously developed in Missouri by 2008. This year's the first year for Renewable Energy Standard compliance

plans. However, the results are not likely what Missouri voters would expect. One question for the Commission to consider is whether these plans reflect the growth and renewable energy that Missourians across the state voted for.

First, with respect to hydroelectric generation, the purpose of a Renewable Energy Standard, or RES, law is to encourage the increased use of renewable energy resources to generate power above and beyond the status quo. Renew Missouri's arguments regarding the use of existing hydroelectric generation to meet Missouri's RES standards have merits in a policy prospective.

The ability of the utilities to comply with a significant part of the renewable energy requirements of the RES through these previously existing facilities is inconsistent with the purpose of the Renewable Energy Standard law. This unintentional result poses a difficult policy situation for which the Missouri Department of Natural Resources recommends additional examination to clarify how to apply the standard to hydropower.

The Department of Natural Resources is not asking the Commission to deny this part of the utilities' compliance plans now as it complies with the existing Public Service Commission and Department of Natural Resources rules. However, opening a docket to examining ways to resolve this conflict may be one appropriate step to take.

Now with respect to unused renewable energy credits, the only reference in the RES law attributing any three-year period to a renewable energy credit is Section 393.1030.2, which provides that an unused credit may exist for up to three years from the date of its creation. Nowhere else in the RES law is there any guidance provided for determining when a renewable energy credit, or REC, is created or at what point it becomes unused. However, a logical reading of the law tells us that the only way a REC can go unused is for it not to be used to meet the portfolio savings requirement of the current or past year to which the portfolio savings requirement applies.

In other words, a REC has no meaning or significance under Proposition C in Missouri until at least the time the statute went into effect. And the REC could not be used to meet the portfolio requirement until the requirement applied to Missouri electric utilities. Thus, RECs could not have gone unused prior to 2011 because the first utility compliance plans were not due until 2011. This is further evidenced by the fact that some utilities were selling RECs to other utilities outside of the state in years prior to the portfolio requirement in 2011.

In addition, the Commission's rules regarding the three-year life of a REC is worded differently than the statute. The rule states that a REC expires three years from

the date the electricity associated with that REC is generated. Even though this wording fails to specifically apply three-year life to unused RECs, it does not produce a different result in terms of the creation and use of the RECs for the utility compliance plans that are before the Commission for approval.

First, the compliance plan of which occurs in the 2011 calendar year, the two percent RES requirement applies to the total electric retail sales that are estimated to occur during the 2011 calendar year. Therefore, the RECs to be used to meet the RES requirement should only be attached to the electricity generated in 2011. If a utility has RECs at the end of the calendar year for 2011 that were not used to meet its 2011 RES two percent requirement, those RECs become unused per the statute and may exist for up to three years from the date of its creation in 2011.

For these reasons, the Missouri Department of Natural Resources recommends that the Commission not allow the RECs dating back to January, 2008 to be used in the first RES plans. The Department suggests that the Commission instruct the utilities to revise their compliance plans to include only RECs that will be created and/or acquired during the calendar year for 2011.

Thank you. And I'd be happy to answer any questions.

JUDGE WOODRUFF: Okay. Chairman Gunn.

CHAIRMAN GUNN: Yeah, I just -- so I -- I understand what you're saying. So -- so you're saying that the 10.32 says that an unused credit may exist for up to two years -- three years from the date of its creation?

MS. MANGELSDORF: Correct.

CHAIRMAN GUNN: But it doesn't become unused until the compliance plan is filed in 2011?

MS. MANGELSDORF: Right.

CHAIRMAN GUNN: So it's a looking-forward provision, it's not a looking-back provision?

MS. MANGELSDORF: That's correct.

CHAIRMAN GUNN: So in their -- the request right now is to use RECs that were created in January -- this is kind of worrying me a bit. So is it the utility's contention, in your opinion, that RECs were created in January of 2008, but they were created -- if they were created, were they created under a different scheme?

Because they could not have been created under this statute, because this statute didn't become effective until later in 2011.

MS. MANGELSDORF: Well, I can't really speak to what -- where the utilities -- where their interpretation came from, but with respect to the Department, it's the Department's position that these RECs didn't have any value

in Missouri until 2011 when these compliance plans --

CHAIRMAN GUNN: So let me -- let me -- and let me be clearer in my question.

MS. MANGELSDORF: Sure.

CHAIRMAN GUNN: So did RECs actually exist prior to 2008?

MS. MANGELSDORF: No.

CHAIRMAN GUNN: Because they weren't subject to statutory creation until 2008 when the -- when the RES was passed?

MS. MANGELSDORF: That's correct. They weren't subject to creation until 2008, but even after the creation of the statute, they still didn't have any value in Missouri until they could be used. And they aren't used until the compliance plans become due, which is in 2011.

CHAIRMAN GUNN: Now, let me ask you a little bit about this. Because I probably -- I'm probably on board with the fact that before the RES standard takes effect, that the credits don't -- don't count.

We had a case today, you know, that basically says, you know, you can't start collecting something under a tariff until the tariff had actually been filed and takes effect. But to say that the RECs don't become -- the renewable energy says they have, from the time that the -- they have from the time that the law goes into effect until

2011 to satisfy a certain percentage, correct, of renewable energy? They have to be at a certain point in 2011.

MS. MANGELSDORF: Correct.

CHAIRMAN GUNN: But the requirement began when the law took effect in 2008.

MS. MANGELSDORF: Well, but they had the three-year period in order to come up with how they were going to comply in 2011. But as far as the reading of the statute, it was when it was created. And in addition, there's the regulation that says when it was generated and it's created when -- it was created when it was generated, and you couldn't use those RECs in any plan until 2011. So it couldn't have been created until 2011 because prior to 2011, RECs had no -- like I said, they had no value in Missouri. They couldn't be used for anything, so.

CHAIRMAN GUNN: But they actually did have some value, because as you're developing your plan to -- to -- I mean, what you're saying is that RECs had zero value until the day that the compliance plans were due.

MS. MANGELSDORF: I guess they couldn't be used. They couldn't be used in Missouri until 2011.

CHAIRMAN GUNN: I understand. But if they couldn't be used until 2011, then you're not giving any accumulation period for those RECs. You're saying that all of that work done prior in 2008, if someone -- if someone --

let's say someone flipped a switch on a wind turbine on November 5th, 2008, all right, and started generating renewable energy, that -- those renewable energy RECs aren't -- don't do anything, and they're just kind of off into the wind. But it's only in 2011 when the plans are due that those RECs have value.

Doesn't there have to be some sort of accumulation period that people can gather the RECs for the 2011 plan? Now, assuming -- I actually agree with you that before 2008, before November 4th, 2008, they're not worth anything because there hasn't been a requirement. But from the period of 2000 -- November 5th or, you know -- I don't even remember what the effective date of it was -- but on the minute one of the effective date in 2011, if we don't allow them to accumulate those RECs, then -- because you're allowing them to be accumulated, right? But then you're just saying that the portion that doesn't -- you're taking away a huge section of potential renewable energy that has been generated.

MS. MANGELSDORF: Like I said, it's the Department's position that they -- that they couldn't be created until they're able to be used. And they weren't able to be used until January of 2011. So it's a perspective that's going forward. And 2011 is when they were first able to be used.

CHAIRMAN GUNN: I understand that. I just don't -- and again, I agree -- I think I a hundred percent agree that prior to November 5th -- or the day after it becomes effective, that those renewable energy credits didn't have any -- any worth or weren't needed because they weren't statutorily created. But I don't -- I don't know how you cannot allow an accumulation period to -- because then are you saying that -- so even though -- if you have a three-year -- so if you have a three-year period, so those in 2011, if it was -- if the due date for the compliance date in 2014, none of that -- if there's a gap between there, none of the -- none of those renewable energy credits count?

MS. MANGELSDORF: Can you rephrase?

CHAIRMAN GUNN: Yeah, I apologize. I'm all over the map on this thing. So -- so the -- any unused credits, if they were generated in 2010, those were all gone in 2014?

MS. MANGELSDORF: They can be used three -- the life of the REC is for three years after it's been created.

CHAIRMAN GUNN: Right. So in 2010, if it was done on January 1 of 2010, on January 2, 2014, they're gone?

MS. MANGELSDORF: Correct.

CHAIRMAN GUNN: Okay. And I understand -- I understand not carrying them over. I

understand if it was done on November 1st of 2008, they shouldn't be allowed to be used for the 2011 compliance period because there wasn't -- there wasn't a statutory creation for a REC.

All right. Thank you very much.

JUDGE WOODRUFF: Commissioner Davis.

COMMISSIONER DAVIS: All right. Ms. Mangelsdorf, do you understand that people -- that utilities in this state have been -- and other people, too, probably -- have been buying and selling RECs in this state for years, long before the passage of Proposition C?

MS. MANGELSDORF: Correct.

COMMISSIONER DAVIS: You understand that. Okay. That's good.

You said some statements that I just don't think are correct. And let me give you an example. Talking about other parts of the statute. 393.1030, subsection 2, the first sentence. The Commission, in consultation with the Department and within one year of November 4th, 2008, shall select a program for tracking and verifying the trading of renewable energy credits.

To me, that says, hey, you got to get this system for trading RECs, selling RECs up and going so people can use it. I mean, so if -- if the intention would have been to say don't start this until January 1, don't you think

Mr. Robertson would have wrote January 1, 2011?

MS. MANGELSDORF: Well, it doesn't say -- for purposes of when a REC is created, it doesn't say in 2008, either.

COMMISSIONER DAVIS: That's -- that's correct. I mean, it doesn't. I mean, so if it's not prohibited, can't you use it?

MS. MANGELSDORF: Well, it's the Department's position that it's -- it wasn't created until 2011.

COMMISSIONER DAVIS: Okay.

MS. MANGELSDORF: Because it couldn't be used until 2011. So it couldn't be created. Again, you said that RECs --

COMMISSIONER DAVIS: So there's, like, so, like, there are -- there are RECs -- you're saying a REC is not a REC. There are, like, 2011 RECs, and then there are anything pre-2011. Is that what you're saying?

MS. MANGELSDORF: I'm saying that RECs couldn't be used in Missouri until 2011. So they couldn't be created until they were able to be used.

COMMISSIONER DAVIS: But is there anything in this statute that -- that's -- I mean, the statute was effective November 8, 2008. Is there anything that says that -- is there any prohibition in the statute that says that the RECs couldn't be created prior to November -- or

January 1st, 2011?

MS. MANGELSDORF: No, there's nothing that explicitly states that, but there's nothing that explicitly states that they were created in 2008, either. Additionally, the compliance plans weren't due until 2011, which is when the RECs were to be used.

COMMISSIONER DAVIS: But the statute does say that we have to get our program up and running -- or at least selected within a year of the passage of Prop C, correct?

MS. MANGELSDORF: Correct. It does say that a program shall be selected.

COMMISSIONER DAVIS: Okay. Now, I don't want to -- I don't want to take away Ms. Hernandez's thunder here, but let me just summarize Ms. Hernandez's argument for you. Point number one: The statute specifically provides that utilities can use RECs to comply with the RES standards in whole or in part.

Do you agree with that statement, Ms. Mangelsdorf?

MS. MANGELSDORF: I'm sorry, where are you reading this from?

COMMISSIONER DAVIS: I'm just reading this from my notes.

MS. MANGELSDORF: Oh, okay. I'm sorry.

COMMISSIONER DAVIS: Would you agree with me

that the statute specifically provides that the utilities can use RECs, renewable energy credits, to comply with the Renewable Energy Standards in whole or in part?

MS. MANGELSDORF: Correct.

COMMISSIONER DAVIS: Okay. Do you agree that the statutes and our rules allow the utilities to bank RECs and those RECs can be banked for up to three years from the date the electricity was generated?

MS. MANGELSDORF: Generated or -- which is -- generated -- yes, generated, and then I think additionally in the statute it says created.

COMMISSIONER DAVIS: Right. Created. Okay.

MS. MANGELSDORF: Okay.

COMMISSIONER DAVIS: And you would agree that Renew Missouri knew what they were doing when they were crafting this law, wouldn't you?

MS. MANGELSDORF: I --

COMMISSIONER DAVIS: Maybe that's debatable --

MS. MANGELSDORF: I can't speak to what they --

COMMISSIONER DAVIS: -- but would you agree with me that they put some very specific dates in this statute?

MS. MANGELSDORF: They did put dates in, yes,

correct.

COMMISSIONER DAVIS: They put some very specific dates in this statute. You know, they said you've got to meet two percent by 2011, you've got to have this, you know, program selected by November -- or by one year from November 8th, 2008. You know. And further, in Section 393.1030.2, you know, they expressly listed a number of prohibitions on RECs, did they not?

MS. MANGELSDORF: What do you mean by "number of prohibitions?"

COMMISSIONER DAVIS: Well, they said you can't use RECs with grain pricing programs, you can't use RECs with other state mandates, they said you can't bank them for more than three years. So I mean, you've got a specific list of exclusions there, don't you?

MS. MANGELSDORF: Yes.

COMMISSIONER DAVIS: But they don't say to exclude RECs that were generated before January 1, 2011, did they?

MS. MANGELSDORF: No, they didn't explicitly state that. But again, it's the Department's position that they didn't exist back in 2008.

COMMISSIONER DAVIS: Okay. All right. Thank you, Ms. Mangelsdorf. I don't have any further questions.

JUDGE WOODRUFF: Commissioner Jarrett?

COMMISSIONER JARRETT: I don't have any questions. Thank you very much.

JUDGE WOODRUFF: Commissioner Kenney?

COMMISSIONER KENNEY: I do. I want to talk back first about your first proposal with respect to the rules regarding the hydro facilities. Is DNR prepared, then, based on what you're saying, to open up its rulemaking and look at these rules as well?

MS. MANGELSDORF: I think that is a possibility, yes.

COMMISSIONER KENNEY: Hum, okay. All right. Let me go back to this REC issue because I'm confused. You're saying the RECs don't exist until the first compliance period.

MS. MANGELSDORF: Correct.

COMMISSIONER KENNEY: All right. I think I would agree with you. You said they didn't exist until the effective date of the statute. But, I mean, the RECs have a definition under the statute. There's a statutory definition of whatever a renewable energy credit is, correct?

MS. MANGELSDORF: Correct.

COMMISSIONER KENNEY: And that definition came into being upon the effective date of the statute, correct?

MS. MANGELSDORF: The definition, yes.

COMMISSIONER KENNEY: So the REC has a legal

definition, where the phrase "renewable energy credit" has a legal meaning and a legal definition as of the date of the effective date of the statute?

MS. MANGELSDORF: Yes.

COMMISSIONER KENNEY: They can't be used for compliance until a future point, but they exist legally on the date that the statute is effective. Would you agree with me?

MS. MANGELSDORF: No, it's the Department's position that they -- they came into being when they were generated, and they couldn't be -- and once they were -- when -- they were generated when they were created and they couldn't be created until they could actually be used. And they were used for purposes of the compliance plan, which didn't begin until 2011. Prior to that, a REC in Missouri couldn't be used for any other purpose. And so --

COMMISSIONER KENNEY: Well, was there a REC in Missouri prior to 2011 under your definition? You're saying they didn't exist.

MS. MANGELSDORF: No.

COMMISSIONER KENNEY: So there's no such thing as a REC until 2011?

MS. MANGELSDORF: That's correct.

COMMISSIONER KENNEY: Despite the fact that there's an effective date in the statute that defines what a

REC actually is?

MS. MANGELSDORF: Correct.

COMMISSIONER KENNEY: I don't -- okay. Well, if we take that theory to its logical conclusion, then what you're saying is for the first compliance period, there are no RECs until 2011.

MS. MANGELSDORF: That's correct.

COMMISSIONER KENNEY: So any RECs to be used for the 2011 compliance period would had to have been generated in 2011?

MS. MANGELSDORF: Correct.

COMMISSIONER KENNEY: All right. I'm not sure I actually agree with that position because I don't understand it. I mean, it seems if you're conceding that the date of the statute is effective when RECs are created or RECs have a legal definition and a legal significance, but then on the other hand, you're saying they're not created until 2011. It just says seems -- those are two positions that are not logically consistent, so -- but I understand what your argument is now. Okay. Thank you.

JUDGE WOODRUFF: Chairman Gunn.

CHAIRMAN GUNN: Yeah, you're essentially saying that there's a -- this is a -- this is unique because this is the first compliance period. So you're taking a snapshot on the day that the compliance report is due, in

which all those RECs are now -- and I think I understand now why -- why you're taking the position. It's because you want to make sure that on that -- in that 2011, that there is actually a percentage of renewable energy being generated.

MS. MANGELSDORF: That's correct.

CHAIRMAN GUNN: So you want to make sure that somebody can't -- can't -- let's just for a second assume that the Keokuk stuff is in. Okay? So I think what you're trying to say is that to make sure in 2010, they hit -- they hit whatever percentage they're supposed to be in, and then in 2011, they shut down Keokuk and they still want to get credit for generating certain amount of renewable energy. I think that's what -- I think conceptually that's where you-guys are.

MS. MANGELSDORF: Uh-huh.

CHAIRMAN GUNN: But doesn't that lend itself to the argument that if -- because you're taking the snapshot, that if -- if -- if Kansas City Power & Light went to a hundred percent wind, okay, and then on the day that the stuff was due, you know, the wind towers got struck by lightning and were out of service, that Kansas City Power & Light would have zero ability to have any renewable energy on that day because those particular generating facilities were out? I mean, doesn't that snapshot, which I guess now, I think I understand why the position is being come from, but

it -- it lends itself to some illogical conclusions.

If Kansas City Power & Light converted their entire generating fleet to all wind, we would certainly say they were in compliance with the Renewable Energy Standard. But if within that one particular frame of time those were out of service for whatever reason, then they wouldn't be able to -- they wouldn't be complying. And I don't think that's the intent of this -- of the statute at all.

MS. MANGELSDORF: Well, there's also the option to purchase RECs in the event something happened.

CHAIRMAN GUNN: But that-- but you're -- but then what you're requiring them to do is to go out and purchase RECs to cover a hundred percent of their compliance costs because there is a short period of time in which they're not generating.

I think I understand why you're taking the position. I think that lends itself to some really kind of illogical conclusions. It kind of -- it really -- but it -- but let me clarify, it would be the Department's position that this is not a problem in ongoing years because this is only an issue because it's the first compliance period?

MS. MANGELSDORF: That's correct.

CHAIRMAN GUNN: Okay. Thank you. I don't have anything else.

JUDGE WOODRUFF: All right. Thank you,

Ms. Mangelsdorf.

MS. MANGELSDORF: Thank you.

JUDGE WOODRUFF: And we've been going for almost two hours. We'll take a short break.

(A break was held.)

JUDGE WOODRUFF: All right. We're back on the web and we're back from our break. And we'll move on, then, to Ameren Missouri.

MS. TATRO: Good afternoon. With your permission, I would like to refocus us on what the purpose of today's hearing is. We're not here to amend the Commission's regulations or interpretations of the RES statute. We're not here to amend DNR's regulations. We're not here to amend the statute itself.

We're here because Ameren Missouri and the other utilities have filed their compliance plan with how we plan to comply with the RES statutes as exists -- the statute and the rules as they currently exist. Your Staff has examined our compliance plan and found that it meets the requirements of the statute in every rule. We agree.

Now, Renew Missouri makes several arguments, but they don't address the question of whether or not Ameren Missouri's plan is in compliance with the statute and rules as they currently exist. The argument is about how Renew Missouri would interpret portions of the statute if it were

left to them. But it was not. It is left to you and you've issued your rulemaking. And Ameren Missouri would contend we are currently in full compliance with that rulemaking.

I'd like to start by talking about the nameplate rating issue, which has been discussed at length. So I won't spend a lot of time on that, but Renew Missouri's argument is basically that nameplate rating has two possible meanings. The generator nameplate rating and some kind of aggregate nameplate rating. And they state that in the reply on page 4, they say there are unambiguously two ways to use this term.

Now, Ameren Missouri disagrees that there's two ways to use this term. We think the term nameplate rating is very specific. We provide a definition from EEI, which specifically talks about it being per generator. Attached to our comment, to our response to Renew Missouri, is a picture of a nameplate, in case you've never seen one before. I certainly hadn't. Clearly, it's attached to the generator that's what the definitions mean. And I think the discussion between Commissioner Davis and Mr. Robertson made that very clear and I won't repeat that here.

The second point I would make is that if the statute intended to be an aggregate, it would have added the word "aggregate," and it does not. So the definition before you that you have adopted is the correct definition. So when

DNR tells you they believe it would be appropriate to reopen a rulemaking and reexamine that, Ameren Missouri would submit that the result of that rulemaking would be the same, because the meaning of "nameplate rating" is per generator, not per plant, or even as Mr. Robertson hinted at one point in time, across all hydro facilities that a utility might have. It means per generator.

Now, the Missouri Department of Natural Resources, which is the entity designated by the statute, to decide just whether or not to certify a resource as renewable also has a definition. And their definition is very similar to yours, but it very clearly states that each and every generating unit is what you look at for the nameplate. If the Missouri Department of Natural Resources decides to reopen their rulemaking, then we'll make that argument there as well, but it doesn't change the language of the statute. Doesn't matter what the drafters meant to put in there, what matters is the language contained within the statute.

Now, again, I want to point out, the purpose of the compliance plan, which is why we're here today, is not to decide how to interpret or reinterpret the statute. It's to decide if we've complied with the statute and rules as they currently exist. And I submit that we have.

Mr. Robertson talks about voter intent. He says you shouldn't use his intent, you should use the intent

of the voter. But he can't tell you what that is. There isn't evidence in the record indicating what that might be other than his opinion. So I submit you should use purely the language that's in the statute, which clearly talks about nameplate rating which is per generator.

DNR also talked about -- in her arguments about hydro, DNR told you about the purpose of the RES statute is to increase the renewable base in Missouri. Again, this goes back to what's the intent. I don't know the voter intent. I submit you don't know the voter intent. I think the purpose of the RES statute in Missouri is to insure that two percent of my utility's generation comes from renewable resources in 2011. That another percentage, five percent, ten percent, 15 percent. That's the intent of the rule. The intent of the rule doesn't say "new." Nowhere in the statute does it say it has to be a new resource. If that was the intention, clearly it could have been put into the statute and it was not.

Let's turn to the issue of REC banking. Again, I believe that Renew Missouri and the Department of Natural Resources are asking you to rewrite the statute by inserting additional language into the statute and the regulations. First, I would ask that you look at the specific language of the statute and your rules that you adopted that explicitly allow for RECs to be banked.

The statute says a REC can exist for three years from the date of correction -- not correction, creation. Your regulations say a REC expires three years from the date the electricity associated with the REC is generated. Now, these definitions do create a starting point for banking. The date before which RECs cannot be carried forward for compliance for 2011 so RECs that were generated in 2006 or 2007 can't be used. So the statute has a natural start date.

The Department of Natural Resources took that argument a step further by saying that they didn't exist prior to the statute --actually, prior to the first year of 2011. But I heard a couple Commissioners accept the premise that RECs didn't exist prior to the time voters approved the statute. I would respectfully submit that is not correct.

Those of you who have been on the Commission for a few years may remember that Ameren Missouri has a tariff where we purchase RECs on behalf of our customers. We call it the Pure Power Tariff. It has been the subject of at least two proceedings in two different rate cases here at the Commission. And that has existed since 2007. So RECs have existed. They're not a creation of this statute.

What the statute did is adopt them as a mechanism to comply with the law. But it didn't create RECs. RECs have existed for years. There's the Greeny [phonetic]

certification, there's all different types of things under the DOE to make sure that they're compliant, that they're actually coming from renewable energy, that they were actually generated. So they existed prior to 2008 and certainly prior to 2011.

Now, they had value because they could have been sold to a utility, and of course if that had been done, that revenue would go back to our customers. So they certainly had value to our customers. So I don't accept the premise that it didn't have value at any time prior to 2008.

Second of all, the Department of Natural Resources' argument makes you believe -- you would have to presume that they couldn't be used -- that the fact they couldn't be used for compliance is the only thing that gives them value. And of course, I don't think that is correct because we were using them -- Ameren Missouri was using them for other purposes prior to that point in time.

Now, Commissioners, your regulations and DNRs' regulations contain the correct interpretation on both of these issues. Ameren Missouri's RES compliance plan has to comply with the statute and these rules, and I submit that we do that.

There isn't an alternate definition that should be adopted. The definitions which were adopted were correct. Renew Missouri didn't suggest these different

definitions during your rulemaking, they didn't suggest these different definitions during the Department of Natural Resources' rulemaking. I submit to you it's possible for you to open a rulemaking to change your rule but there's no reason to do so because the rules that you currently have are correct. You should accept the company's filing in this case and you should close the case.

The last thing that I want to address is a question I heard raised at agenda, which was if a Commission believes there's a deficiency, what do you do next? I think this Commission certainly could issue, at most it would be an advisory document, an advisory opinion that says this is how we think the regulations are inconsistent with the compliance plan that you filed, but I believe it is premature for you to make any final findings regarding our 2011 RES compliance.

The utility has all of 2011 to comply and that hasn't gone past yet. In fact, the utility has through, I think it's March of next year, for the last ten percent, so there's no way for this Commission to make a final finding until that report is filed, which is April 15th of next year. This is supported by your own regulations. At Part 8, it says the utility can be subject for penalties for, quote, failure to meet the targets. And we haven't failed to meet the targets yet because the target's not due until the end of the year. So there isn't an action that can be taken at this

point in time.

Second of all, I would point out that the rules are very specific about the process that must be undertaken. Part 3, sub J says, It provides that RECs are retired during the calendar year which compliance is being achieved. The utility doesn't fail to meet the target until that year and three months is past. And then sub 8, part A says, Any allegation of a failure to comply with the RES requirements shall -- and your language is "shall" -- be filed as a complaint under the statutes and regulations governed in complaints, which hasn't been done in this case. It is merely deficiencies, I believe is the word, in the regulations allegedly noted by the Department of Natural Resources and by Renew Missouri. But at this point in time, any further action on your part would be premature.

JUDGE WOODRUFF: All right. Questions from the Commissioners.

CHAIRMAN GUNN: Just real quick. So it's your contention that this is really an interim report, it's not really a full and final compliance report and that we can't really take any action or shouldn't take any action until full compliance report for 2011 is filed?

MS. TATRO: I think that's right. The statute talks about an annual report that's required, which I believe would be the compliance report that's due, and they're both

due on April 15th, but will be due for us on April 15th of 2012 for 2011. That is the point in time that would be appropriate, if we didn't comply, to take the next step.

This compliance plan is a creation of the regulations. I submit so that you could get a feel for how the utility plans on complying. But it is not an appropriate time for you to say you're out of compliance, because that can't happen until the end of the year.

CHAIRMAN GUNN: So what were you using RECs before for the company prior to November 5th, 2008?

MS. TATRO: For our Pure Power Program.

CHAIRMAN GUNN: Which was a volunteer program?

MS. TATRO: Absolutely.

CHAIRMAN GUNN: Not required by any statute or anything of the like?

MS. TATRO: No, but approved by tariff.

CHAIRMAN GUNN: Right, but I mean, there was no -- there was no statute -- the legislature didn't tell you you needed to do it?

MS. TATRO: No, it did not. I don't know that that would be necessary for the REC to be created clearly --

CHAIRMAN GUNN: But it wasn't created -- it wasn't created -- if the legal definition in the statute -- was there a legal definition of a REC in Missouri law or tariff?

MS. TATRO: Tariffs have full force and effect of law and there's a definition of REC in our tariff.

CHAIRMAN GUNN: Is it different than the tariff in the statute?

MS. TATRO: I don't have it in front of me. I don't believe it's substantially different.

CHAIRMAN GUNN: But if it's different at all, then the statutory -- the statutory definition of REC -- either way, the statutory definition of REC would trump the tariff definition when it came to RES compliance.

MS. TATRO: If they're inconsistent.

CHAIRMAN GUNN: Well, they wouldn't even have to be inconsistent. For purposes of RES compliance, because the statute sets up the RES, for purposes of RES compliance, the statutory definition of -- of a REC is the statutory definition for RES compliance.

MS. TATRO: I agree with that. I misunderstood your question. I agree with that.

CHAIRMAN GUNN: Thank you. I don't have anything else.

JUDGE WOODRUFF: Any other questions? Commissioner Kenney?

COMMISSIONER KENNEY: Thank you. Let me put aside for a moment the definition of a qualifying hydro facility that's contained in the statute.

MS. TATRO: Okay.

COMMISSIONER KENNEY: Put that aside for a second. Do you concede that what they were trying to effect, and I mean Renew Missouri and the folks that drafted the statute, wasn't to allow Keokuk and Osage to qualify? And this is a matter of policy and not a matter of the legal definitions.

MS. TATRO: I think what they were trying to accomplish is two percent of renewable energy by 2011, and those other percentages that are in the statute. The fact that Ameren Missouri was already producing that amount and more of power -- of its energy through renewable resources, I don't know why that's a bad thing. I don't know why that means we're not complying with the RES. So I kind of disagree a little bit with your comment.

COMMISSIONER KENNEY: All right. Well, let me ask you a different question. If the purpose or goal of the statute, and I'm not saying that it is, but just assume with me for a second it is, assume that one of the goals of the statute is to generate newly built facilities within the borders of the state of Missouri for economic development purposes. Assuming that premise is true, do -- does Keokuk -- does the existence of Keokuk and Osage further that hypothetical purpose?

MS. TATRO: Well, it wouldn't be new because

Keokuk has existed since 1913.

COMMISSIONER KENNEY: Yeah.

MS. TATRO: Did you say it has to be within the boundaries of Missouri? It's not within Missouri.

COMMISSIONER KENNEY: Okay. So it wouldn't fulfill --

MS. TATRO: It doesn't meet your hypothetical.

COMMISSIONER KENNEY: It wouldn't fulfill an economic development goal?

MS. TATRO: It still helps people be employed. I suppose that's an economic goal.

COMMISSIONER KENNEY: It doesn't create any new jobs.

MS. TATRO: Right.

COMMISSIONER KENNEY: Okay.

MS. TATRO: Of course, without saying, you understand I don't accept your hypothetical.

COMMISSIONER KENNEY: You don't have to accept it. It's a hypothetical. By definition, it doesn't exist, but thank you. I have no other questions.

JUDGE WOODRUFF: Anyone else? Commissioner Jarrett.

COMMISSIONER JARRETT: If the Commission were to accept Renew Missouri's and DNR's positions here, how would that effect Ameren's ratepayers?

MS. TATRO: Well, the easy answer to that is it's going to increase costs. Right now, Keokuk produces, I think it's 900,000 RECs a year for us, so it allows us to not expend additional monies on renewable resources, keeps the rates lower for our customers. If we have to go purchase RECs or go build something additional, above and beyond what we're already doing, then there's some increased costs.

And Commissioner, I would submit to you that my company has taken a very thoughtful step. We're not just purchasing RECs, we're building a facility called -- we call it the Fred Weber facility, which takes methane, converts it into electricity. We have solar panels on the top of our building. I think a couple of the Commissioners and Chairman have visited that. So we are doing some investment, but we're trying to do it in a balanced manner that doesn't just throw costs onto our customers but allows us to comply with the RES statute in a measured way that makes sense.

COMMISSIONER JARRETT: Thank you. I have no further questions.

JUDGE WOODRUFF: Commissioner Davis?

COMMISSIONER DAVIS: All right. So from reading your pleadings, Ms. Tatro, I mean, at first I thought that -- at first I thought from reading your pleadings you were saying that your RES plan that you were required to file on April 15th was -- it complies with the Commission rules,

correct?

MS. TATRO: Yes.

COMMISSIONER DAVIS: I mean, so is -- is that your -- is that your primary argument or is your argument that there's really nothing before the Commission until April 15th of next year?

MS. TATRO: Well, I don't believe the Commission can take any final action before April 15th of next year. I think this compliance plan, which is all we're required to file --

COMMISSIONER DAVIS: Uh-huh.

MS. TATRO: -- we may end up complying in a different manner.

COMMISSIONER DAVIS: Right.

MS. TATRO: The rule doesn't say that you can't.

COMMISSIONER DAVIS: Right.

MS. TATRO: So it's just to give you some guidance and assurance --

COMMISSIONER DAVIS: And you're saying that your compliance plan meets all of our compliance plan filing requirements?

MS. TATRO: I believe that's true as well, yes.

COMMISSIONER DAVIS: You believe that's true?

MS. TATRO: Yes.

COMMISSIONER DAVIS: Does anybody else out there dispute that? Does DNR or does Renew Missouri dispute that Ameren's RES plan filing meets the PSC's filing requirements? Mr. Robertson?

MR. ROBERTSON: Well, again, it's here I'm raising these deficiencies as a matter of statutory interpretation. And which I'm probably not the kind of deficiency that's usually contemplated and may never need to happen again. But I would think the utilities would need to know if they need to comply with their deficiencies created by their misinterpretation of the statute.

COMMISSIONER DAVIS: So it's a misinterpretation of the statute, not a misinterpretation of the regulation?

MR. ROBERTSON: Well, the statute and regulations are not exactly the same, but both, I would say.

COMMISSIONER DAVIS: You'd say both. Okay. So you're saying that their -- their RES plan filing of April 15th is not compliant with the Commission rules?

MR. ROBERTSON: Yes.

COMMISSIONER DAVIS: Yes. Ms. Mangelsdorf.

MS. MANGELSDORF: I don't think the Department would dispute that it complies.

COMMISSIONER DAVIS: Okay. All right. Let's

see, Ms. Tatro. Now, Ms. Tatro, would you say because the statutory definition for RECs is what it is, that it's not limited to RECs that were created after November 8th, 2008? You'd say the statute allows you to -- is broadly written so that it can include RECs that were created from January 1st through November 8th, 2008?

MS. TATRO: I do.

COMMISSIONER DAVIS: Okay. And --

MS. TATRO: Because the statute doesn't have a start date, it just says three years. So the first compliance year's 2011.

COMMISSIONER DAVIS: Right. But there are lots of other dates written into the statute.

MS. TATRO: There are.

COMMISSIONER DAVIS: And so they could have done that?

MS. TATRO: They could have.

COMMISSIONER DAVIS: They could have said that?

MS. TATRO: Yes.

COMMISSIONER DAVIS: Just like they said you have to get your REC program selected by a year from November 8, 2008.

MS. TATRO: Correct.

COMMISSIONER DAVIS: I don't think I have any

other questions, Ms. Tatro.

JUDGE WOODRUFF: Okay. Thank you, Ms. Tatro. We'll move, then, on to Empire.

MR. MITTEN: If it pleases the Commission. I'm not going to burden the record with a lot of argument regarding the meaning of nameplate rating as it's used in Section 393.1025. But I would like to state that I believe Renew Missouri's argument on this point is a classic bait and switch. First of all, it baits the Commission by telling you that Empire is not complying with the definition of a qualifying hydro facility in the Renewable Energy Standard. And then it switches you over by saying that the evidence of that is the use of the phrase "nameplate capacity" in Section 393.1050. Section 393.1050 is not part of the Renewable Energy Standard, and it really has no relevance at all to the meaning of "nameplate rating" as is used in the Renewable Energy Standard statutes. Other than that, I think all of the points that I intended to make have already been made. And like I said, I don't want to burden the record.

I'd like to next turn to Renew Missouri's argument regarding the lawfulness of Section 393.1050. I second Ms. Tatro's argument that we need to focus on what this proceeding is about. And this proceeding is about the Renewable Energy Standard compliance plan that was submitted by Empire for year 2011.

As part of that compliance plan, Empire relied on the exemption from the solar requirements of the Renewable Energy Standard that are included in Section 393.1050. And it did so for a very simple reason. That statute is a lawful statute that's on the books in Missouri and it will remain lawful unless and until a court of competent jurisdiction declares it to be unlawful.

From a practical standpoint, if the Commission tomorrow issued an administrative decision saying that it found the statute to be unlawful, there is no way that an appeal could be processed and decided by the end of 2011. So again, that statutory exemption would exist for the entirety of 2011 and the compliance plan that covers that period.

Another point: If a court determined the statute to be unlawful, it's far from certain that that determination would be retroactive in effect. So even if a court was able to reach a decision by the end of 2011, there's no guarantee that that decision is going to be retroactive to the beginning of the year. Therefore, for at least 2011, Empire is entitled to rely on the lawfulness of the exemption that is provided by Section 393.1050.

Now, we stated in our pleading that we believe this is not the correct forum for the Commission to consider Renew Missouri's arguments regarding the lawfulness of 393.1050. And we said that for a simple reason. When the

Court of Appeals reviewed the lawsuit that was filed challenging the validity of that statute, it said that anybody who wants to challenge that statute must first exhaust its administrative remedies, and it said that it can do that by filing a complaint that is consistent with statutes and the Commission's rules.

We believe that anyone who wants to challenge the validity of that statute ought to be forced to do just that. And I say that for a very simple reason. A complainant has the burden of proof and the burden of persuasion in any complaint case. And if anyone wants to contest the validity of a statute, they ought to be required to file a complaint and bear those burdens. Neither of those burdens is necessarily applied to Renew Missouri in the arguments that it's making in this proceeding.

The other reason that I think that Renew Missouri ought to be forced to raise this issue in a complaint case is the arguments that it's making in this case casts a cloud over the compliance plan that Empire has filed for 2011. There's no need for that cloud to exist. Again, as long -- unless and until Section 393.1050 is declared to be unlawful by a court of competent jurisdiction, Empire is entitled to claim the exemptions from the solar energy provisions in the Renewable Energy Standard.

That's why Empire believes that the Commission

simply ought to take no action on the plans that have been submitted. If any party believes that when we file our compliance report in April of 2012, we have failed to comply with the Renewable Energy Standard, the law again is very clear.

Any party so believing can file a complaint with the Commission and have that complaint adjudicated, and if the Commission finds either on its own motion based upon its review of the compliance report or based upon its adjudication of that complaint case, that Empire has not complied with the Renewable Energy Standard, then the Commission can order its general counsel to go to circuit court and seek the penalties that it provided in the Renewable Energy Standard statutes.

That's the process that should be followed in this case, and I'll be happy to answer any questions that the Commissioners have.

JUDGE WOODRUFF: Chairman Gunn.

CHAIRMAN GUNN: Just to clarify, do the Court of Appeals say that -- that was the only way to exhaust administrative remedies, or just suggested that that was the way -- or a way to exhaust? I'm not saying I disagree with you.

MR. MITTEN: No, it didn't mandate that they file a complaint, but it did say that that was the revenue --

or the remedy that was available to them.

CHAIRMAN GUNN: So if we -- if we, in accepting your compliance -- I agree with you, we're not -- we shouldn't be opining on whether a statute is Constitutional or not. It's not our job, and I think the courts would make it very clear if we tried to do that, that they would be the final determination on that.

But in order to get to that point, if we just said that you complied, that Empire complied with that portion of the statute, in its compliance plan, we find the statute to be, you know, in full force and effect, would that have the same effect as them filing a complaint? Because the Commission had -- had ruled on it. I guess there's an extra complication where we are only applying the plan -- we're only approving the plan and not the actual compliance?

MR. MITTEN: At this point, all you're doing is, I guess, listening to Mr. Robertson's arguments about the plan itself. The rules are really unclear as to whether or not you have to approve the plan. It does say that Staff has to review the plan and Staff has to file a report based on its review, but it doesn't say the Commission has to approve the plan.

CHAIRMAN GUNN: Because theoretically, you can file a plan which says we're going to -- we're going to comply a hundred percent by purchasing RECs. You could file

that plan, you filed it on the date, and we would -- but that doesn't -- if you -- that doesn't -- wouldn't mean that you're in compliance with the RES until you actually showed on April 15th or whatever of 2012 that you actually did all that to comply with what the RES standard was.

MR. MITTEN: That's correct, Commissioner Gunn. And I think as Ms. Tatro pointed out a few minutes ago, if we filed a plan that said we intend to comply a hundred percent with RECs, but by the time we filed the compliance report, we only used RECs for 95 percent, as long as we comply with the requirements of the Renewable Energy Standard, then you have to -- to judge that report on the compliance with the standard, not on compliance with the plan.

CHAIRMAN GUNN: And it's impossible for you to comply with the plan until January -- or until December 31st of 2011, because there's still requirements that may need to be fulfilled for the rest of 2011.

MR. MITTEN: Certainly.

CHAIRMAN GUNN: So I guess that's -- so even if we were to -- even if we were to say that -- even if we were to find that we didn't think that the solar rebate applied to Empire, Empire would still have the opportunity by April 15th of 2012 to comply with an RES otherwise. So there would be -- I'm trying to get the idea of a final -- of what

a final order or final adjudication could be. Because we could theoretically say that a Solar Rebate Statute doesn't apply to Empire because it was repealed by implication. But does that give them the ability, then, to go to court and say they've exhausted their administrative remedies because you would not be out of compliance for the RES, which is where the penalties kick in, until December 31st of 2011?

MR. MITTEN: Commissioner Gunn, I think that if in this proceeding, the Commission issued an Order saying that they believed that 393.1050 was repealed by the adoption of the Renewable Energy Standard, we could then exhaust our administrative remedies here by asking for reconsideration of that decision, and then we could take that Order on appeal to the circuit court. But unless and until a court of competent jurisdiction declares that statute to be unlawful, we believe we're entitled to the exemption.

CHAIRMAN GUNN: You could do that. I agree with that. You could do that. But could Renew Missouri? Because Renew Missouri would be saying that -- that -- because you would still have an opportunity to comply with the RES standard outside of the solar -- outside of the solar rebate carve-out. You could, theoretically, if the Solar Rebate Statute -- we said -- you could -- you could still voluntarily do it or comply with it. So would they have -- would they have a -- what I'm trying to see is even if we

granted Renew Missouri what they asked for, would that still give them an appealable order to go to the Court of Appeals and make a decision?

MR. MITTEN: I'm not sure I fully understand the question. If you give Missouri -- or Renew Missouri what they're asking for, you would determine that 393.1050 was repealed by the adoption of the Renewable Energy Standard. That's exactly what they've asked you to do in this case.

CHAIRMAN GUNN: But how would that -- how would that impact Empire's compliance with the Renewable Energy Standard?

MR. MITTEN: For 2011, I don't think it would impact.

CHAIRMAN GUNN: And that's my point. So even if we were to say that, it wouldn't impact what you're doing. So they may not even have a -- because we're talking about the compliance plan, we're not talking about compliance. They may not even have an appealable order -- an order to appeal to go up. I'm not -- I agree that you would, because you could say, hey, this thing -- this thing actually applies.

I guess what I'm trying to figure out, and this is the bottom line, is: Is this entire proceeding a little bit of a much ado about nothing? We're talking about the compliance plan. We're not talking about actual

compliance. And if what Renew Missouri is asking for, which I understand why they would want it so they could move forward and do some things in the court that they're trying to get final adjudication on, but if -- I'm not even sure that they would be able to do that.

MR. MITTEN: I couldn't agree with you more that this is much ado about nothing. Because as I mentioned a moment ago, the Commission's rules I don't even think contemplate your approving the compliance plan. They simply contemplate that those plans would be filed and they'll be reviewed by Staff and that Staff will issue a report. The proof of the pudding, if you will, is when we submit our compliance report and you determine whether or not we have, in fact, complied with the Renewable Energy Standard for the period discovered.

CHAIRMAN GUNN: And I'll take you back to Ameren's question. So let's say Ameren says, yeah, we're going to use Keokuk, but then in 2011, they don't. I mean, just because they say they're planning on it and they don't ultimately do it, I mean, what happens today or what comes out of this hearing doesn't impact on the ultimate compliance by the company?

MR. MITTEN: And I agree with you. As -- again, as Ms. Tatro pointed out, the actual method of compliance that is reflected in the compliance report could

be very different than the plan for compliance that has been submitted earlier this year.

CHAIRMAN GUNN: And really the purpose of what we're doing -- of filing these plans is to make sure that there is some planning on behalf of the utilities in order to comply.

MR. MITTEN: I agree.

CHAIRMAN GUNN: And make sure that you're preparing for a compliance. But in 2012, we may have a very serious hearing where we determine if someone's in compliance or not because that would then -- could potentially lead to penalties that we would impose based on noncompliance with the RES statute.

MR. MITTEN: I agree. I think that's when/if you're going to hold a hearing, the hearing ought to be held. Not now. That's why we were surprised with the filing by Mr. Robertson and by all the hubbub that has been made over the plans that were filed in April of this year.

CHAIRMAN GUNN: Okay. Thank you. I don't have anything else.

JUDGE WOODRUFF: Commissioner Davis?

COMMISSIONER DAVIS: I don't think I have anything. Thank you, Mr. Mitten.

COMMISSIONER JARRETT: I don't, either. Thank you, Mr. Mitten.

JUDGE WOODRUFF: Thank you, Mr. Mitten. Move on, then, to KCP&L and GMO.

MR. FISCHER: Thank you, Judge. May it please the Commission. I'm representing Kansas Power & Light Company and KCP&L Greater Missouri Operations today.

A lot of what I had to say has already been delved into, and I don't want to burden the record too much. We followed the regulations and filed our compliance plan on April 15th. The Staff reviewed it. They found no deficiencies in that plan. They noted that the -- the one percent cap of costs were way below that.

Renew Missouri has only raised one issue, really, related to KCP&L and GMO's filings and that's the REC banking issue. I concur with what Wendy Tatro and Mr. Mitten said, but more importantly, perhaps I concur with what the Staff's analysis on that issue is. They agree that the utilities can use RECs that go back three years to comply with the statute, and we totally agree with that analysis.

And rather than going through that in any great detail, since you've already done that, I'll just take your questions on it.

CHAIRMAN GUNN: That's not really what the statute says, though, is it? I mean, the statute doesn't say you can go back three years. It says that an unused credit is good for three years. So it's really forward-looking

rather than --

MR. FISCHER: That --

CHAIRMAN GUNN: I don't say that you couldn't use that, but the statute itself is a forward-looking provision rather than a backward-looking one.

MR. FISCHER: Oh, I think I agree with you. I think I was probably too slippery with my language there, that RECs that existed that had not been used can be used for 2011.

CHAIRMAN GUNN: And that -- that -- that question isn't really addressed in the statute, is it? I mean, it says that RECs can be used, and it says that unused RECs are good for three years looking forward, but it really isn't clear as to whether or not RECs that existed prior to November 5th, 2008, can be used for compliance for the RES standard. I don't know that it says anywhere in a statute of regulation. I could be wrong, but I don't know that it's very clear.

MR. FISCHER: Well, it says in Section 3933.1032.2, that an unused credit may exist for up to three years from the date of its creation.

CHAIRMAN GUNN: Correct, which is forward looking, because you don't know whether it's unused until you need to be in compliance, right?

MR. FISCHER: Well, it existed as -- could

have existed many years ago. It could have existed three years ago. And if it existed three years ago and you didn't use it, it can be used in 2011.

CHAIRMAN GUNN: I don't disagree with you.

MR. FISCHER: And then it goes forward to say a credit may be used only once.

CHAIRMAN GUNN: But here's -- but here's -- and I agree with everything you're saying. My question is, is that the legal definition of REC -- there is a legal definition of REC under the statute? All right? That statute did not come into play until November 4th, 2008. So I don't know that it says anywhere in the statute in our regulation that whether RECs -- and I'm not saying I know the answer to the question. But it's not very clear that RECs that existed under some other legal framework prior to November 5th, 2008, can be transferable and used in compliance because I don't know how they were created, what they were created for.

MR. FISCHER: Well, I think I may disagree slightly with you that RECs were only created by the creation of this statute.

CHAIRMAN GUNN: That's not what I said.

MR. FISCHER: Because there's been a REC market for many years.

CHAIRMAN GUNN: Absolutely. Absolutely. But

there is legal definition in this -- in this statute that says that RECs, as we define them, can be used for compliance with the statute. That's generally what the statute says, right? It says we're defining RECs, and we are allowing RECs to be used for compliance. All I'm saying is that it doesn't say in the statute that RECs that -- that may have existed prior to the enactment of the statute may be used for compliance in 2011. Doesn't say that anywhere.

MR. FISCHER: I think it is easily implied.

CHAIRMAN GUNN: But it doesn't say it.

MR. FISCHER: No, it doesn't say explicitly. It says that the unused REC --

CHAIRMAN GUNN: Look, I don't think we want to go down the path of implying things into the statute. We've done that, we've tried it. We got our rear ends kicked at JACAR because some of us did it one way that some people didn't like and some people did. I'm looking at statutory language, and there is nothing in the statutory language that says -- that says -- I didn't say implied -- that says -- that RECs that existed before 2008 may be used for compliance with a RES statute in 2011.

MR. FISCHER: It says that an unused credit, a REC credit, may exist for up to three years from the date of its creation. KCP&L, for example, has been treating RECs for going back to 2001, 2002.

CHAIRMAN GUNN: Sure they have. And who defined that REC?

MR. FISCHER: And RECs --

CHAIRMAN GUNN: Who defined what that REC was?

MR. FISCHER: The REC markets have been out there, and I'm not sure if there's a --.

CHAIRMAN GUNN: Absolutely. Agree a hundred percent. This statute has its own definition of REC, correct?

MR. FISCHER: It does, and it's consistent with --

(Court reporter interrupted to ask for them to speak one at a time.)

CHAIRMAN GUNN: That may very well be true, that a legal, a REC trading market existed prior to 2008 and that a REC definition existed prior to 2008. This statute defines what a REC is. Correct?

MR. FISCHER: Yes.

CHAIRMAN GUNN: I'm not saying that you're wrong.

MR. FISCHER: And the definition is in subsection 4 of the definitions section.

CHAIRMAN GUNN: Correct. I'm not saying -- listen. I want to be clear. I'm not saying you're wrong. I'm saying it is not explicit in the statute.

MR. FISCHER: Obviously we have a disagreement, so it's not as clear as it should be, as it could be. But we think -- our position, I think, is the one that is the most -- the most arguable, the Staff agrees, that --

CHAIRMAN GUNN: I will tell you that we just got smacked by the Western District Court of Appeals because we allowed an accumulation period to happen in -- before a tariff became effective. All right? We were going to allow a fuel adjustment clause because what the Court said is that the tariff becomes effective. That's what starts the clock. All right? So to say that all these other schemes that had no relationship to an RES standard out there, those somehow now can be incorporated by reference into the RES standard, when there is a specific legal definition in the statute, I don't know it is the most -- that is the most arguable.

To say that on -- that on 2008, that every one of these folks can be in compliance with 2008 just with RECs that were created before an RES was even contemplated, because what you're saying is that if in 1970, there was a REC, okay, and that was created, and that was held on to a -- to a -- by a utility, because somebody put up a solar panel somewhere.

Then in 2011, that can be used for compliance, even though the solar panel no longer exists and it's no

longer -- or it's no longer generating electricity. But because it does not become unused until 2011, that that REC still could be used for compliance of a Renewable Energy Standard that was enacted in 2008?

MR. FISCHER: Well, the definition, I think, Commissioner, is what you need to look at. It's a tradeable certificate of proof that one megawatt hour of electricity has been generated from renewable energy sources.

Now, that's not just under the statute. It doesn't say just under the statute. That goes back to the REC market as a whole. It goes back to the fact that, in my case, my client has been accumulating RECs since it's been generating at Spearville, before 2011. But we haven't had to use those RECs to comply with the RES statute until 2011. And we could have sold those RECs, and they would have been a value to our customers. We kept them so that we could comply with RES statute. And it's totally consistent with the national REC market to view it that way. It's not that only RECs are being created by the statute. I just don't -- I just can't reject that.

CHAIRMAN GUNN: You believe that the three years look back?

MR. FISCHER: If it's -- it looks back in the sense that if it's been unused and they've been accumulating for three years, you've had them for three years, they have

not been used, and then of course, they'll also exist in the future. When we look forward to 2015, we'll look back to 2012 to determine whether things, and that's a forward aspect of that.

CHAIRMAN GUNN: So in 2000 -- if a -- if you accumulated a REC in 2004, is that able to be used for compliance?

MR. FISCHER: If it has not been used, I don't know why it couldn't.

CHAIRMAN GUNN: So then my 1970 example is perfectly appropriate for you to use that?

MR. FISCHER: I don't think RECs -- as far as I know, RECs didn't exist that far. But I do know back in 2001, there were some. We were trading them.

CHAIRMAN GUNN: So in 2001, you were trading them, somebody put a solar panel on it. The solar panel now doesn't exist, but the -- but the -- but REC was unused, so a 2001 REC on a non -- that was generated by something that doesn't -- is -- can be used?

MR. FISCHER: Well, you have to go then to the section that says an unused credit may exist for up to three years from the date of its creation.

CHAIRMAN GUNN: So you are saying it's a three-year lookback?

MR. FISCHER: There is a three -- yeah, in

that sense, there is.

CHAIRMAN GUNN: From what date?

MR. FISCHER: From three years from the time we need to comply with the statute, so January 1st of 2008.

CHAIRMAN GUNN: So why wouldn't it be January 1, 2011?

MR. FISCHER: Well, that's the other end of the three years, true.

CHAIRMAN GUNN: But that's my question. So does the three-year lookback go from the date you have to be in compliance or the date of the enaction of the statute?

MR. FISCHER: I would say it goes back to the January date.

CHAIRMAN GUNN: Which January? In 2008 or 2011?

MR. FISCHER: Well, we have to be -- we begin compliance --

CHAIRMAN GUNN: In 2012.

MR. FISCHER: Of 2012, but you go back three years from the date its -- it was created.

CHAIRMAN GUNN: So let me --

MR. FISCHER: An unused credit may exist for up to three years from the date of its creation. Now, we're using them in 2011. So I think it goes back to 2008 if they've been unused, if they were created at that time.

CHAIRMAN GUNN: So a REC created in 2007 is not eligible?

MR. FISCHER: I think that's correct.

CHAIRMAN GUNN: Okay. Thank you.

MR. FISCHER: Thank you.

JUDGE WOODRUFF: Commissioner Davis.

COMMISSIONER DAVIS: All right. So let's just -- let's just recap that, Mr. Fischer. So a compliance begins January 1, 2011.

MR. FISCHER: Yes.

COMMISSIONER DAVIS: Okay.

MR. FISCHER: And you have a year to be in compliance for this first year.

COMMISSIONER DAVIS: Right. So a renewable energy credit may exist for up to three years from the date of its creation?

MR. FISCHER: That's correct, under this statute.

COMMISSIONER DAVIS: That's -- that's a statutory definition. So if it's created on January 1, 2008, then you can use it for up to three years from the date of its creation, so you'd have to come in and talk to -- to our REC tracking and verifying program on January 1, 2011. You'd have to contact them and say, hey, we want to retire this REC today because if we don't, it's worthless tomorrow. Is

that --

MR. FISCHER: For purposes of the RES standard and compliance. It certainly has values in other ways, but.

COMMISSIONER DAVIS: Right, right.

MR. FISCHER: But I think --

COMMISSIONER DAVIS: You can sell it -- you can sell it, you can still sell it somewhere else, but for purposes of compliance, if you were going to choose to use that REC to comply, you'd have to redeem it or do whatever you're going to do with it on January 1st, 2011, if it was created on January 1st, 2008?

MR. FISCHER: And it can't be used again once you've used it.

COMMISSIONER DAVIS: And you it can't be used again, and it couldn't have been used prior to that?

MR. FISCHER: Correct.

COMMISSIONER DAVIS: And it can't be used before that, or transferred or sold or anything else.

Earlier, Chairman Gunn was inquiring of you, and I think he was making reference to the KCP&L GMO, formerly known as Aquila, their case that was remanded back to us last year that, in essence, said that we couldn't -- that this Commission could not have a collection period that began before the tariff was filed and operational. Do you think that's a fair reading of the Court's opinion in GMO?

MR. FISCHER: I haven't read your decision today.

COMMISSIONER DAVIS: I'm just talking about what do you think the appellate court said in that GMO case? What's your -- what's your analysis of that?

MR. FISCHER: And I wasn't -- I didn't argue that case. I haven't studied it as much as I should.

COMMISSIONER DAVIS: Okay. Okay. That's fine.

MR. FISCHER: But I'd like to read your interpretation of it before I go too far down this road, but I think I don't accept that the analogy is a good one because that accumulation period didn't exist under anything else other than the tariff. That was defined. That became effective on a certain effective date, and I understand that the Court said because it only became effective on the effective date, you can't go back and start accumulating the cost before that time. That's my understanding of what it said.

COMMISSIONER DAVIS: Uh-huh.

MR. FISCHER: If that's what --

CHAIRMAN GUNN: I think that's right.

MR. FISCHER: And so unlike that here, we have a REC that is defined, that is consistent with what we understood to be RECs generally before the statute ever

existed, that said if you've got RECs that haven't been used for purposes of this compliance for up to three years, you can use it going back -- you can look back to those that existed for three years that haven't been used for purposes of compliance with the RES standard. And you can use those RECs for that purpose.

COMMISSIONER DAVIS: Right. All right. Do you know much about statutory construction?

MR. FISCHER: Very little, but I'll try.

COMMISSIONER DAVIS: This sort of gets back to what Commissioner Jarrett was talking about earlier, that where there is a penalty involved, you know, the statutes are going to be narrowly construed in favor of the defendant; or conversely, you know, maybe it's the doctrine of linety, which basically says the -- you know, the accused person, and it could be tax, it could be, you know, it's been extended, you know, far beyond criminal defendants, that you know, the -- the accused gets the -- gets the benefit of the doubt. I mean, do you subscribe to that theory as well?

MR. FISCHER: Yes.

COMMISSIONER DAVIS: Okay. There you go. All right. I don't have any further questions, Judge.

JUDGE WOODRUFF: All right. Thank you, Mr. Fischer.

MR. FISCHER: Thank you.

JUDGE WOODRUFF: We'll move on to Staff.

MS. HERNANDEZ: I don't know if it's the benefit or the detriment going last, but a lot of the things that I was planning to say have already been said. So I'll try not to belabor on certain points that have already been made very well.

But I do think it's important to keep in mind how many bites of the apple, if you will, that Renew Missouri has had at this rule to -- to, I guess, get the result that they think was intended. If you look at all these opportunities, they had, one, an opportunity while they were drafting the statute itself to get the correct wording in it. They had an opportunity then during the Commission's rulemaking, they participated in the rulemaking. There was no comment there.

They could have asked for rehearing on the rulemaking, which they did not do. So you can even argue there that the -- the ability to argue the rule or its meaning is lost. They could have added or participated more in the DNR's rulemaking, added that more specific language there and they failed to could that. They could have brought forward the issues of nameplate rating and renewable energy credit banking in a circuit court case appeal, which has been done with over its exemption issue. That wasn't done.

I think you can see from this that there is a

pattern there. Now that this statute and rule are actually in operation, Renew Missouri is not liking the way that it's being applied and is now taking its bite at the apple.

Going to a point that I think was made by Commissioner Jarrett, maybe others, what did the voters intend when this statute was passed? I think you can look at the -- what the ballot read. If you read what's on the ballot -- and I think you can take judicial notice of that, because it should be a public document somewhere -- back on November 4th, 2008, you won't find anywhere a ten-megawatt limitation. There's no number in that ballot initiative.

It only says that you are voting for utilities to start using a certain percentage of renewable resources. It doesn't even say "new renewable resources." So if you look at that and see if I was voting on that, what would that mean, it doesn't say "new" and it doesn't limit the capacity that a renewable resource could have. So I'll lend that to you to look at.

I also can't stand here today and support some of the comments that were made by the Department of Natural Resources just because they participated in the rulemaking. And their comments today are contrary to what they filed in the rulemaking. That, again, is a public document, and I would urge you to take judicial notice of their comments in that docket, which for the purpose of nameplate rating, if I

can just read this for you, they offer -- these are comments from March 23rd, 2009, in that docket.

They offer its recommendations on interpretation of the language with respect to two specific issues. First, nameplate rating: The statutory ten megawatt upper limit on nameplate rating should apply to generating units, not to aggregate capacity of the hydroelectric facility. As a consequence, power generated from the generating units of most run-of-river hydroelectric facilities should be, and I'll highlight that, should be eligible renewable resources, barring other undue adverse air, land, or water impacts. This is true for existing run-of-river facilities, such as Ameren UE's Keokuk facility and new run-of-river facilities proposed for the Mississippi and Missouri Rivers.

And I'll -- they also filed comments, there's no prima fascia reason to assume that a hydroelectric facility with aggregate nameplate capacity is environmentally harmful. So to me, what they're saying today is kind of a flip from what they supported in the rulemaking. I don't understand why that's being made today, but I'll lend that to you.

Also, if they open their rulemaking docket, they would have to have a technical expert support that the nameplate rating means something than the plate that's

actually on an individual generator. The statute that the Staff cited in its brief and also some of the case law say if there is an understood, technical definition to a phrase, you are supposed to use that technical definition. Going from that logical line of thinking, they would have to have an expert that would comment that this means something different, it's meant to be in the capacity as an aggregate.

Speaking a little bit to the renewable energy credit banking issue, there's been a lot said, so again, I don't want to go into all of that, but I think the idea of accumulating three years of renewable energy credits for use during the first compliance plan was discussed many times in the rulemaking. That's in the Staff's brief. You can see how the rule didn't change that much from the beginning to the end. I think there was 16 different revisions, so there were plenty of opportunities for someone to comment to raise a concern with these year issues.

You can also see that this was discussed, I think in a line of questioning by Commissioner Gunn at that time, now chairman, in the April 6, 2010, public hearing on this. And Staff specifically stated in that public hearing that these RECs would accumulate for three years and would be used in the 2011 compliance plan year.

I think while Renew Missouri now argues that a utility cannot use 2008 RECs to meet its 2011 compliance

plan, no party to the RES rulemaking, including Renew Missouri, suggested changes to that language. And again, they had plenty of opportunities with -- I believe it's 16 different versions in over a span of great time that this rule was debated.

They knew, I think as Commissioner Davis pointed out, maybe some of the other Commissioners, they knew how to put specificity in the statute. You could have put that specificity in the rule as well. But even looking at the statute, they included specific dates for specific things. They could have done the same thing if they had intended there to be a specific date for when you can start using a REC.

For the solar exemption issue, the Staff, again, you have our brief before you. We discussed the Evans case in bringing a complaint before the Commission. I do agree with some statements made that there is a different burden of proof in a complaint case, different from what you have before you. And I think that's an important point to keep in mind in terms of what Renew Missouri would need to show and prove. And also, you might have interveners that are not here today that might have issues or want to participate that have not been active in this docket.

But looking at 393.1050 in its plain language, it states notwithstanding. Any other provision of law, after

meeting certain requirements, any electric utility, so not just Empire, any electric utility, shall be exempt from meeting any mandated solar renewable energy standard requirement. And you look at the history of Proposition C. It was passed by voter initiative that was discussed very well by Mr. Robertson, and it repealed the green power initiative of 2007.

So if you look through VAMS, the annotated Missouri statutes, you'll see the particular sections that were repealed. You'll see that 1045 and 1050 were not repealed because they were passed in 2008. So the Proposition C repealed certain things that existed. These two provisions came later. But if you read 1050 and Proposition C together, I would lend you the argument that you won't find inconsistencies between the two. 1050 talks about any solar initiative. It doesn't speak of Proposition C specifically, so it could apply to other things. What those things are, I won't speculate on that. But my readings of it, it says any solar initiative or program, which could mean many things.

I guess in summary, Renew Missouri could have drafted this voter initiative in a way that would cure what they call loopholes now. Now that the utilities are starting to see this statute and rule, they've identified issues that they don't like and they're calling them loopholes. There

are plenty of times, like I stated earlier, for concerns to be raised and they weren't done, and I think that has to lend some argument as to -- as to why and what the -- what the {real purpose of that doing so is here. Even forgiving -- forgiving some drafting errors, they had 16 different versions of the rule before the Commission to comment on, and they failed to even raise one concern in that docket.

So I would respectfully request that the Commission deny the relief that's sought by Renew Missouri and accept the Staff's recommendations in all four of the utilities' compliance plans.

JUDGE WOODRUFF: Okay. Chairman Gunn.

CHAIRMAN GUNN: Do we even have the authority at this point?

MS. HERNANDEZ: I'm sorry, the authority?

CHAIRMAN GUNN: To grant them the relief. I mean, what they're asking for us to do is for them to -- us to recognize deficiencies and require them to modify their plans based on those deficiencies.

MS. HERNANDEZ: I will agree with Ameren's comments that this is a plan, and that maybe some others have made that comment. But this is only a plan. And until they file the compliance report April 15th of next year, there can be changes to -- to how they intend to meet those requirements. I would think it's not harmful to bring up

what someone thinks as a deficiency, but in that way, utilities can act on that, try to change it if they would agree. But whether we can force a change at this point, I'm not for sure.

CHAIRMAN GUNN: I mean, one of the things that I always complained about the IRP was that it was basically a check box, before the revision. But it was basically a check box. So as long as you complied with all the -- you could take all the boxes off, then you complied with the plan and then you moved along. Because it was basically they were filing requirements. And we didn't really have any input in how to change that or not.

Here, the way that we've revised it in order to -- to give us a little bit more authority. Here, it's really a two-tiered process, isn't it? I mean, really the first tier is the plan, and we just make sure that they have a plan. And then if we either have disagreements over whether or not how they have complied or whether they are in compliance, there is a second proceeding that will -- there is a second filing and potentially subsequent proceeding in order to determine that they have substantively complied with not the plan, but with the statute. Correct?

MS. HERNANDEZ: That's my reading of it as well.

CHAIRMAN GUNN: And whether they -- there is

no requirement that they even comply with their own plan, right?

MS. HERNANDEZ: Right. They could change their mind. They could find something more economically feasible. One of those sources could go down and they need to switch to something else. They could change.

CHAIRMAN GUNN: So even if we said -- even if we found for them, it would merely be advisory. I mean, even -- because we couldn't order them to change the plan because they have technically complied with the filing requirements under our -- under our rules. And I understand what Mr. Robertson's saying, but -- but if they've checked all the boxes that they have to under the -- under the regulations, they've complied.

Then the next -- the next step is to determine whether they've complied with the -- with the RES requirements. So I don't know how we have the authority to order them to change the -- I mean, I guess we have the authority to order them to change the plans, so -- because -- but I don't -- but I don't -- that changing of the plans doesn't still then require them to follow those plans if there are other ways to comply with the RES statute. The plan in and of itself doesn't require them to do anything. The statute is what -- is what the requirement is, correct?

MS. HERNANDEZ: That's correct.

CHAIRMAN GUNN: It looks like Mr. Dottheim is jumping.

MR. DOTTHEIM: I apologize. I was involved with the -- the rulemaking and then I basically been out of the loop. But I've been sitting in and been aware of the proceedings, so I've been trying to catch up a little bit.

If I might interject myself and the other parties who are -- and the Commissioners who are much more on top of this than I have been of late, I think we may be encountering an anomaly this first time out with -- with the rules. I think the rules provide for the first report on actual RES compliance being April 15th, 2012. And the filing of the compliance plan being April 15th. And what happened was with the promulgation of the rule, the first April 15th that rolled around was April 15th, 2011.

CHAIRMAN GUNN: 2011.

MR. DOTTHEIM: So what happened then was -- and the utilities can respond to this, that in following the rules maybe to the letter, the utilities, although the RES compliance report wasn't due, the first one, until April 15th, 2012, the first compliance plan was due April 15th, 2011. So the compliance plan was filed, but there was no compliance report. So what is due April 15th, 2012, is both a compliance report and a compliance plan.

CHAIRMAN GUNN: So are you saying the

compliance plan is how they intend?

MR. DOTTHEIM: Well, when you look -- I think when you look at the provisions of -- of -- of the rule, the references in particular, for the most part, to the compliance plan and the compliance report are in the same sections. And I don't know that it was ever truly intended for there to be a separate filing of the compliance plan and the compliance report.

CHAIRMAN GUNN: So essentially, because this is the first -- because this is the first report, there's nothing to -- there is nothing to report on because they're not required to be in compliance until 2012, so this is, again, much ado about nothing where we have this idea of how the utilities are going to get there, but there's nothing other than just informational purposes.

MR. DOTTHEIM: Yes, because -- because the actual requirement, the actual requirement by statute is -- falls due in 2012 because calendar year 2011 is up.

CHAIRMAN GUNN: Right.

MR. DOTTHEIM: And so --

CHAIRMAN GUNN: And they have a year and three months in order to comply?

MR. DOTTHEIM: Yes.

CHAIRMAN GUNN: So --

MR. DOTTHEIM: But the Commissioners may well

have identified what to them is a weakness in the rule as they've previously identified what to them, I think, were weaknesses in the Chapter 22 rule is, okay, now you've got Chapter 22 filings. If you find deficiencies, what do you do once you find deficiencies? So the RES rule, there's a requirement for an RES report and a compliance plan filing on April 15th. All right. The statute provides for penalties. If the RES requirement is not met, what happens if there are deficiencies in the compliance plan, what does the rule provide for? So -- but the anomaly of what I think was going in the direction of being described as a two-step process, that's only --

CHAIRMAN GUNN: For the first report?

MR. DOTTHEIM: Occurred for this first one because of when the rule went into effect. And that starting with 2012, the report, the RES report and the compliance plan will be filed together on April 15th.

CHAIRMAN GUNN: So we will only evaluate one once a year --

MR. DOTTHEIM: Yes.

CHAIRMAN GUNN: -- moving forward?

MR. DOTTHEIM: Yes.

CHAIRMAN GUNN: That we will evaluate compliance?

MR. DOTTHEIM: Yes.

CHAIRMAN GUNN: And then we will -- and if there's not a compliance, we have the penalty phase --

MR. DOTTHEIM: Yes.

CHAIRMAN GUNN: -- if you will?

MR. DOTTHEIM: You will have a report and a compliance plan. You will not have two filing -- you may have two filings, but they will be on the same day for each company.

CHAIRMAN GUNN: And they're describing essentially the same thing?

MR. DOTTHEIM: Yes.

CHAIRMAN GUNN: That was never contemplated to have the Commission be informed of what you were planning on doing a year from now and take action on it?

MR. DOTTHEIM: Yes, because you were in the compliance time frame for -- for -- for whatever time period it is. Now, the companies -- counsel for the companies may have different views of that.

I see there is also some technical people here from the companies. Mr. Taylor is here for the Staff. I'm not sure what the Commissioners, you know, fully contemplated. Mr. Robertson is here, of course he may have a view on that. The industrials are here. Mr. Mills -- I was out for a moment or two. I don't know if Mr. Mills made a statement or not. So there may be some other views on this.

But I don't know if that's helped or not, and I hope my memory is -- is -- is correct. Because it's been a little fuzzy on all of this.

CHAIRMAN GUNN: At the end of the day, it is -- it is your contention, and I'm assuming this seems to be consistent with what Ms. Hernandez said, is that -- is that the Commission should take action on non-compliance. That's the key. The key is not micromanaging the plans or trying to get someone to change the plans. Because the plans, regardless of when they're evaluated, are not what requires you -- is not what sets out the requirement for RES compliance. It's the statute, and then the report tells you whether they complied with the statute. And it's at that point that the Commission does its evaluation and has its authority to do penalties or take action against -- against anyone that's not in compliance. But the plan itself is informative.

MR. DOTTHEIM: Well, and that -- well, that's not to say that the Commissioners may -- may be concerned --

CHAIRMAN GUNN: Sure.

MR. DOTTHEIM: -- about compliance and may want to take certain action or may want to hold some hearings or investigation or what have you. But that's for -- for the Commissioners. On a going-forward basis, the Commissioners may want to amend the -- the rule as the Commissioners see

actually how it operates.

CHAIRMAN GUNN: Thank you, Mr. Dottheim. I appreciate it very much.

MR. DOTTHEIM: Certainly.

JUDGE WOODRUFF: Any other questions for Staff?

COMMISSIONER DAVIS: Are you done?

CHAIRMAN GUNN: Yes.

COMMISSIONER DAVIS: First of all, Ms. Hernandez, I just want to say again, I think you did a really good job with your response to -- to Renew Missouri's. I thought it was very thorough, and I think you -- you brought up an excellent point about the fair ballot language.

I have looked at that awhile back and had actually forgotten about it. Mr. Robertson, did you -- were you involved with getting the fair ballot language approved at the Secretary of State's office?

MR. ROBERTSON: No, that is not my job. That is the Secretary of State's job with the Attorney General and they might have delegated it to someone here at Staff to at least assist on it.

COMMISSIONER DAVIS: So you weren't involved in any of that?

MR. ROBERTSON: No, I was not.

COMMISSIONER DAVIS: Do you know if -- if

Renew Missouri was involved in any of that?

MR. ROBERTSON: I'm sure they weren't, and I don't --

COMMISSIONER DAVIS: You're sure they weren't? Are you sure they were?

MR. ROBERTSON: I have no reason to believe they were.

COMMISSIONER DAVIS: You have no reason to believe they were.

MR. ROBERTSON: You can't interpret the whole statute on the basis of a summary ballot language.

COMMISSIONER DAVIS: Okay. But let me get back to Ms. Mangelsdorf here.

Ms. Mangelsdorf, you said earlier that you didn't -- you didn't think -- let me just rephrase that.

Do you think those people who were voting for Prop C would have looked at Keokuk and Osage Beach, particularly in light of reading the ballot language, and said, no, those plants don't count? Do you think that's what they -- that's what they intended?

MS. MANGELSDORF: I can't speak for what they thought.

COMMISSIONER DAVIS: Well, you were opining what they were thinking about earlier, weren't you?

MS. MANGELSDORF: I can speak for what the

Department's position is.

COMMISSIONER DAVIS: Ah. And what is the Department's position?

MS. MANGELSDORF: With regard to which aspect?

COMMISSIONER DAVIS: With respect to -- I believe it would be with Keokuk and with Osage Beach and the counting of them, I think it was -- it's my recollection of your earlier representation that you thought it was to incent new generation, correct?

MS. MANGELSDORF: Correct, but I think that they could also -- those two facilities could be used as well. I think it's a dual purpose --

COMMISSIONER DAVIS: Okay.

MS. MANGELSDORF: -- to use both the past facilities as well as encourage new generation. Because I think --

COMMISSIONER DAVIS: Has DNR changed its position?

MS. MANGELSDORF: Has it changed its position with respect to?

COMMISSIONER DAVIS: Well, I mean, with respect to -- I mean, you heard Ms. Hernandez's reading some of DNR's comments. I mean, it would appear that there was inconsistency between the comments that she read and your position here today. How do you respond to that?

MS. MANGELSDORF: Well, I think the Department used the information that they had at the time. In addition, I believe that they wanted to be consistent with the Commission's rules as well, so they used that information. And I think in light of how the statute and the regulations have been implemented as of now, we've had an opportunity to see how it's been implemented and believe that Renew's arguments have some merit and that we want to make sure that the intent of the voters is followed and that we do have the -- and to see if we do have the correct interpretation.

COMMISSIONER DAVIS: Okay. Let me go back and inquire of Mr. Robertson one more time. Mr. Robertson, is Keokuk a renewable generating facility?

MR. ROBERTSON: No.

COMMISSIONER DAVIS: And why not?

MR. ROBERTSON: It does not meet the statutory definition of hydropower.

COMMISSIONER DAVIS: Does not meet the statutory definition of hydropower.

So I'm just going to say this, Mr. Robertson. I mean, when I read, like on page 6 of your initial comments where it talks about the renewable energy standard, RES, grandfathers in existing renewable assets -- generating assets. I mean, do you think that's an accurate statement?

MR. ROBERTSON: Yes.

COMMISSIONER DAVIS: So -- and it's accurate because neither Keokuk or Osage Beach are renewable; is that correct?

MR. ROBERTSON: They're not renewable energy resources within the statutory definition.

COMMISSIONER DAVIS: That's right. Because they're more than -- so -- and even if I were to go out to the Mississippi River and to string out a -- a number of what I would consider to be low-hit hydro turbines, where there was no new impoundment of water, if I were to -- to exceed ten megawatts in aggregate, those wouldn't count either, would they?

MR. ROBERTSON: If you're talking about the free-flow power kind of thing, I'm not sure how would you define it, at what point would you aggregate. I mean, that's something I wasn't -- don't think I was aware of and considered back in 2007 and 2008.

COMMISSIONER DAVIS: Well, I mean, I've actually met with some people who have gotten patents on the issue, so it's definitely out there.

I don't have any further questions, Judge.

JUDGE WOODRUFF: All right. Then we'll move to Public Counsel.

MR. MILLS: I understand it's running late, so I'll try to be really brief.

One of the questions that's come up, and I think it's a fairly legitimate question, is why exactly we're here. What are we trying to address in this proceeding? And it's, in part, at least because the Commission's rules require a plan to be filed. And the plan is necessarily looking forward. So I think the plan that we're looking at now is the plan for compliance for the period ending at the end of 2011.

I'm not sure I completely understood what Mr. Dottheim said, but I think the plan that is filed next year concurrently with the 2011 report will be a compliance plan for 2012. And I think a forward-looking plan is required for at least one reason, and that is to make sure that the utilities are actually doing something. And you know, whether or not it makes any sense, at least they're doing something, and I guess that's a good thing.

But I think it serves another purpose as well. And that is that it gives other entities the opportunity to comment on whether or not the utility's plan for future compliance makes sense, or if that plan carried out would not actually result in compliance. And I think so it's -- it's an opportunity for the Staff -- in fact, it's a requirement for the Staff to comment on it. It's an opportunity for other entities such as Renew Missouri to comment on it, and I think it's an opportunity for the Commission itself to

comment on it.

So for example, if Ameren were to have come in for its compliance plan and said, we believe that we can generate RECs at Callaway and we're planning to comply with the RES with our RECs that we generate at Callaway, and all the Commissioners found that laughable, I think it would be incumbent on the Commission to say, No, don't go down that path. You still have time to correct yourself between now and when your compliance is complete, so you should do so.

So I think to say that it's simply a plan and there's really no opportunity for anybody to comment on it, I think that's short-sided. I think if that's all the Commission's looking at, it would be a waste of everyone's time. So I think it's twofold. It's to make sure the utilities are doing something, and to give other entities, including the Commission, the opportunity to say that's a really bad idea, fix it while you still have time. Otherwise, it's going to cost ratepayers a lot of money if we get to the end, and it doesn't do any good in retrospect to simply penalize you for not having complied when we all knew you weren't going to comply based on your plan.

I've got more to say, but you look like you have questions.

COMMISSIONER DAVIS: No, it's to avoid unfair surprise --

MR. MILLS: Exactly.

COMMISSIONER DAVIS: -- and unfair -- and maybe not unfair consequences, but certainly consequences that utility --

MR. MILLS: Yeah.

COMMISSIONER DAVIS: It's an opportunity for us to say we collectively agree that we have a real problem with what you've proposed and go --

MR. MILLS: You should know that before you get to the end of the compliance period.

COMMISSIONER DAVIS: Caveat emptor, your plan may get you penalized down the road.

MR. MILLS: Exactly.

The second issue that -- I'm going to talk about three issues. The first one is why are we here, the second one is about nameplate capacity, and the third is about REC banking. I'm not going to get into the question of whether or not there is a repeal by implication. I simply don't know the law on that well enough to really advise you well enough.

With respect to the question of nameplate capacity, I think clearly it has to be based on the nameplate. And I think in the Commission's rules, the Commission inserted the word "generator." That makes it clear that -- well, let me back up.

I think because it's based on a nameplate and the nameplate applies to a particular generator in the first instance, I think it's an unusual reading of the phrase to apply it to something beyond the particular generator to which the nameplate is attached. Can't be done.

If someone were to ask me today what's the nameplate capacity of Keokuk, I would, without hesitation, say it's about a hundred and three megawatts, and I would accumulate them. But I think absent some indication in the statute that it's necessarily meant to be the aggregate capacity, I think the normal phrase -- the normal meaning of the phrase is the capacity listed on the nameplate. And that's simply what the words mean.

I think that there is, perhaps, some -- some reason to think that there may have been an intent to look at it in the aggregate. Because as Mr. Robertson pointed out today, when you're talking about no new diversion or impoundment, that is necessarily talking about a facility as a whole rather than individual generating units within a facility, because you wouldn't, I don't believe, have separate diversions or separate impoundments for each generator. But nonetheless, I think based on the way the phrase is normally used, I think it applies to each generator.

With respect to REC banking, I think it's

clear that the statute contemplates that utilities, at least in a general sense, should be allowed to bank RECs and use them for a period of time of three years. So I think it's consistent with the intent of the statute that RECs generated on and after January 1st, 2008, should be applicable to the compliance here beginning January 1, 2011.

And Commissioner Gunn had a -- a lively discussion about whether or not the definitions specifically state that RECs created before the effective date of the statute can be used in the statute. And he's quite correct that it doesn't explicitly say that. But I don't know that that's really particularly important.

For example, and I'm just looking at the -- at the definitions in Chapter 386. 386 defines "sewer system" as pipes, pumps, canals, lagoons, et cetera, et cetera, et cetera. It doesn't anywhere explicitly say that it means pipes placed into service or pipes manufactured after the effective date of the statute.

And I think if you -- the Commission's Chapter 386 has something like five dozen rules, and I think you will find no explicit explanation in any of them that they apply retroactively, but they necessarily do.

I mean, if you look at a statute, any statute, for example, if the puppy mill statute had created a definition of a kennel, a kennel manufactured before the date

of the statute that meets the definition is a kennel. I don't think -- the statute doesn't create a kennel anymore than it creates a REC. RECs existed, the statute simply recognizes what can be done with them, even though they existed before the statute existed.

And finally, I think with all due respect, I think Commissioner Gunn got off a little bit on the wrong track with the recent Western District decision in the GMO PGA case. And I did argue that case. And I briefed that case. And the Court accepted my argument and my brief, and that was based on the filed rate doctrine, which essentially says you can't charge customers for something that's not in your tariffs because customers have a right to know in advance what they're going to be paying for and how they're going to be billed. And that's really not a doctrine that's applicable to the statutory construction.

I don't really think that that has anything to do with the question of whether or not the statute that became effective in November of 2008 actually creates RECs or whether RECs that existed before that date can or can't be used for the statute. So I -- I think that's an inapplicable case that really has little or nothing to do with the issue before the Commission.

And that's all I have. Thank you.

JUDGE WOODRUFF: Questions?

COMMISSIONER DAVIS: So to sum it all up, Mr. Mills, common sense.

MR. MILLS: Yeah.

COMMISSIONER DAVIS: Okay. Thank you.

MR. MILLS: I'm all about common sense.

JUDGE WOODRUFF: Thank you. For MIEC.

MR. DOWNEY: For the record, Edward Downey on behalf of the Missouri Industrial Energy Consumers.

We're involved in this simply because we saw the prayer for relief that Renew Missouri filed in this matter, and we saw all the things that it was asking for. We oppose each and every one of those. And it's not often I stand before you and I'm on the same side as the Staff and the utilities, but I am in this matter. In fact, our one filing in this matter incorporates what Ameren had filed at the time. It also references the Staff's report on the compliance plan for Ameren. We support that.

I can tell you I've since read all the filings since we did make our one filing. We support everything that the utilities and the Staff have said. And I don't really have anything to add to their arguments that they presented today.

JUDGE WOODRUFF: Thank you. Any questions?

COMMISSIONER DAVIS: No. Thank you, Mr. Downey.

JUDGE WOODRUFF: Thank you, Mr. Downey.

Well, I indicated at the beginning that I would give Renew Missouri the final word, so Mr. Robertson, do you have anything to add?

MR. ROBERTSON: I'll limit myself to two points, if I may.

I think the utilities would be wise to know as soon as possible whether they're going to be in compliance, whether they are actually in compliance right now this year rather than wait until late next year to be told maybe, oh, you weren't in compliance in 2011 and we're going to impose penalties.

What the statute says is that there should be provisions for an annual report to be filed by each electric utility in a format sufficient to document its progress in meeting the targets. Now, documenting their progress could be prospective as well as retrospective. And we have this docket, these compliance plans that are required by the rule with deficiencies to be identified.

I know that the Commission opened this as an EO docket, which as I understand it means it results in an Order, and something's got to issue it rather than saying oh, you filed your plans. Thank you. That's -- we're done.

Empire, I think we can confidently say, will not be looking to comply with the solar requirements of the

statute. They consider themselves to be exempt, and if that's not true, you should let them know as soon as possible.

And finally, the REC baking, you know, I agree with what DNR said regarding the significance of the term "use." If you looked at what it says, the statute says, a credit may be used only once to comply with the RES. It says, an electric utility may not use a credit derived from a green pricing program. To use a REC is to use it to comply with the standard. Complying with the standard means that renewable electricity shall constitute the following portions of each electric utility sales, and that is according to the years -- the compliant years in the statute. So that's what it means to use a REC under this statute, is to use it to comply beginning this year, 2011.

RECs existed before 2011. There were things you could do with them. You could sell them on the market, but there was -- you could not use them to comply with a standard that did not then exist. And that's all I have.

JUDGE WOODRUFF: All right. Thank you, Mr. Robertson. Well, thank you all for being here this afternoon, and soon becoming this evening. And with that, we are adjourned.

(End of Proceedings.)

CERTIFICATE OF REPORTER

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) ss:
COUNTY OF GASCONADE)

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I N D E X

RENEW MISSOURI'S EVIDENCE

DEPARTMENT OF NATURAL RESOURCES' EVIDENCE

AMEREN MISSOURI'S EVIDENCE

EMPIRE'S EVIDENCE

KCP&L and GMO'S EVIDENCE

STAFF'S EVIDENCE

OFFICE OF THE PUBLIC COUNSEL'S EVIDENCE

MIEC'S EVIDENCE