

FILED

JAN 27 2014



Missouri Public Service Commission

Missouri Public Service Commission

Judge or Division: <i>RLJ Woodruff</i> Public Service Commission	Case Number: EG-2013-0377	<i>10:00AM MYA</i>	
Plaintiff/Petitioner: Earth Island Institute d/b/a Renew Missouri	Appellate Number:		
vs.	Court Reporter:	<input type="checkbox"/> Sound Recording Equipment	Number of Days of Trial:
	Reporter's Telephone:		
Defendant/Respondent: The Empire District Electric Company	Date of Judgment/Sentence: November 26, 2013 (Attach a copy)	Date Post Trial Motion Filed: December 18, 2013	
	Date Ruled Upon: January 3, 2014	Date Notice Filed:	

(Date File Stamp)

Notice of Appeal

Supreme Court of Missouri Court of Appeals: Western Eastern Southern

Notice is given that Earth Island Institute d/b/a Renew Missouri, et al. appeals from the judgment/decree entered in this action on January 3, 2014 (date).

Complete if Appeal is to Supreme Court of Missouri

Jurisdiction of the Supreme Court is based on the fact that this appeal involves:

(Check appropriate box)

- The validity of a treaty or statute of the United States
- The title to any state office in Missouri
- The punishment imposed is death
- The construction of the revenue laws of Missouri
- The validity of a statute or provision of the Constitution of Missouri

If the basis of jurisdiction is validity of a United States treaty or statute, the validity of a Missouri statute or Constitutional provision or construction of Missouri revenue laws, a concise explanation, together with suggestions, if desired, is required. This may be filed as part of or with this notice of appeal or, in the alternative, may be filed within ten days after the notice of appeal is filed by filing it directly with the Clerk of the Supreme Court. See Rule 81.08(b) and (c) and Rule 30.01(f) and (g).

Appellant's Attorney/Bar Number Henry Robertson 29502	Respondent's Attorney(s)/Bar Number(s) L. Russ Mitten 27881 Paul A. Boudreau 33155
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Appellant's Name Earth Island Institute d/b/a Renew Missouri	Respondent's Name The Empire District Electric Company
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Brief Description of Case This case involves the Empire District Electric Company's purported exemption (by virtue of §393.1050, RSMo) from the solar requirements of Missouri's Renewable Energy Standard (§§393-1020-1030, RSMo). Complainants in Case No. EC-2013-0377 appeal the Public Service Commission's January 3, 2014 Order Denying Application for Rehearing with respect to Empire.	
Date of Appeal Bond	Amount of Bond
<input type="checkbox"/> Bond Attached	
Signature of Attorney or Appellant <i>Henry B. Robertson</i>	Date January 24, 2014

Notice to Appellant's Attorney

Local rules may require supplemental documents to be filed. Please refer to the applicable rule for the district in which the appeal is being filed and forward supplements as required.

Certificate of Service

I certify that on January 24, 2014 (date), I served a copy of the notice of appeal on the following parties, at the following address(es), by the method of service indicated.

(See the attached Certificate of Service for list of parties to the case, served by first class mail on January 24, 2014.)

Henry B. Robertson
Appellant or Attorney for Appellant

Directions to Clerk

Serve a copy of the notice of appeal in a manner as prescribed by Rule 43.01 on the attorneys of record of all parties to the judgment other than those taking the appeal and on all other parties who do not have an attorney. (A copy of the notice of appeal is to be sent to the Attorney General when the appeal involves a felony.) Transmit a copy of the notice of appeal to the clerk of the Supreme Court/Court of Appeals. If a party does not have an attorney, mail the notice to the party at his/her last known address. Clerk shall then fill in the memorandum below. (See Rules 81.08(d) and 30.01 (h) and (i).) Forward the docket fee to the Department of Revenue as required by statute.

Memorandum of the Clerk

I have this day served a copy of this notice by regular mail registered mail certified mail
 facsimile transmission to each of the following persons at the address stated below. If served by facsimile, include the time and date of transmission and the telephone number to which the document was transmitted.

I have also transmitted a copy of the notice of appeal to the clerk of the

Docket fee in the amount of \$ _____ has been received by this clerk which will be disbursed as required by statute.

A copy of an order granting leave to appeal as indigent.

Date

Clerk

LIST OF ISSUES

§ 386.510, RSMo requires a notice of appeal to include, among other things, “a concise statement of the issues being appealed...” Accordingly, Complainant/Appellants Renew Missouri submits the following list of issues for review by the Missouri Supreme Court:

1. Whether § 393.1050, RSMo attempted to amend a ballot initiative that was then in the process of enactment, thus infringing on the people’s authority to enact laws by initiative, Mo. Constitution, Art. III, § 49.
2. Whether section 393.1050 is an invalid special law contrary to the Missouri Constitution, Article III, § 40 (28) and (30), because there is no substantial justification for the special treatment accorded to Empire but to no other electric utility under that law.
3. Whether section 393.1050 was repealed by the later passage of the Renewable Energy Standard, §§ 393.1020–393.1035, RSMo.
4. Whether sections 393.1030 and 1050 are in irreconcilable conflict with one another regarding the scope of the solar carve-out and solar rebate provisions found in section 393.1030.
5. Whether the inclusion of the “notwithstanding” phrase means that section 393.1050 is a special act that carved out an exception to the general act of section 393.1030 (See Commission’s November 26, 2013 Order, p. 9).
6. Whether a “notwithstanding” phrase such as the one found in section 393.1050 can create an exception to a law that has not been enacted yet but is awaiting enactment by initiative petition.

7. Whether the solar carve-out and solar rebate provisions of section 393.1030 would have imposed an “extra compliance burden” on Empire relative to Missouri’s other Investor-Owned Utilities (See Commission’s November 26, 2013 Order, p. 10).

8. Whether the Legislature has the authority to make a “rational modification” to a law that has not yet been enactment by initiative petition, regardless of whether such an extra compliance burden exists (Commission’s November 26, 2013 Order, p. 10).

List of Parties to the Commission Proceeding

§ 386.510, RSMo requires a notice of appeal to include, among other things, “a full and complete list of the parties to the commission proceeding...” Accordingly,

Complainant/Appellant submits the following list of parties to Case No. EC-2013-0377:

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JURISDICTIONAL STATEMENT

On this appeal from a complaint proceeding before the Public Service Commission, the issues include whether Section 393.1050, RSMo, which purports to exempt respondent Empire District Electric Co. from the solar energy requirements of the Renewable Energy Standard, Sections 393.1020–393.1035, RSMo, (1) was enacted by the legislature to amend an initiative while the initiative was in process of enactment and therefore infringed upon the people’s power to enact legislation by initiative under Article III, Section 49 of the Missouri Constitution; and (2) is a special law contrary to the Missouri Constitution, Article III, § 40 (28) and (30), because there is no substantial justification for the special treatment accorded to Empire but to no other electric utility; hence the validity of a statute is in issue.

SUGGESTIONS IN SUPPORT OF JURISDICTIONAL STATEMENT

Complainant/Appellant Renew Missouri files these suggestions in support of the jurisdictional statement filed herewith pursuant to Rule of Civil Procedure 81.08(b).

Appellate jurisdiction lies exclusively in the Supreme Court under Article V, Section 3 of the Missouri Constitution because the validity of a statute of this state is in issue. Because such an appeal is unusual coming from the Public Service Commission, Renew Missouri thinks it best to elaborate.

On May 16, 2008, the Missouri General Assembly enacted SB 1181 with an effective date of August 28, 2008. Among its numerous provisions is § 393.1050, RSMo, which reads:

“Notwithstanding any other provision of law, any electrical corporation as defined by subdivision 15 of section 386.020, RSMo, which, by January 20, 2009, achieves an amount of eligible renewable energy technology nameplate capacity equal to or greater than fifteen percent of such corporation’s total owned fossil-fired generating capacity, shall be exempt thereafter from a requirement to pay any installation subsidy, fee, or rebate to its customers that install their own solar electric energy system and shall be exempt from meeting any mandated solar renewable energy standard requirements. Any disputes or denial of exemptions under this section may be reviewable by the circuit court of Cole County as prescribed by law.”

However, on November 4, 2008, the voters passed Proposition C, the Renewable Energy Standard (“RES”), now codified as §§ 393.1020–393.1035, RSMo. It applies to all PSC-regulated electric utilities, without reference to the proviso in § 393.1050. See § 393.1025(3) and § 393.1030.1 and 393.1030.3.

This case originated as a declaratory judgment action in Cole County circuit court against the Empire District Electric Co., the only utility that claims to be exempt from the solar requirements of the RES by virtue of § 393.1050. The petition alleged that § 393.1050, RSMo is invalid for three reasons:

1. Section 393.1050 attempted to amend a ballot initiative that was then in the process of enactment, thus infringing on the people’s authority to enact laws by initiative, Mo. Constitution, Art. III, § 49.
2. Section 393.1050 was repealed by the later passage of the Renewable Energy Standard, §§ 393.1020–393.1035, RSMo, with which it is in irreconcilable conflict.
3. Section 393.1050 is an invalid special law contrary to the Missouri Constitution, Article III, § 40 (28) and (30), because there is no substantial justification for the special treatment accorded to Empire but to no other electric utility under that law.

The Hon. Paul C. Wilson, then circuit judge, dismissed the complaint on the ground that the Public Service Commission had primary jurisdiction.

The Court of Appeals, Western District, affirmed in *Evans v. Empire District Electric*, 346 S.W.3d 313, 319 (Mo. App. WD 2011). The Court of Appeals held that the Commission had “primary statutory authority over the cause” (which Renew Missouri

interprets to mean the entire cause) and required appellants to exhaust an administrative remedy through the Commission's complaint procedure. The Court found that there were "factual issues as to whether Empire meets the renewable energy standards specified in that section, and whether Appellants would otherwise be entitled to the benefits they claim from Empire under Proposition C," which factual issues were for the PSC to decide; and further that the second claim (repeal by implication) was a matter of statutory interpretation falling within the PSC's authority over utilities. 346 S.W.3d at 318–9.

Appellant (which was not a party in *Evans*) filed this complaint with the Commission in obedience to the decision of the Court of Appeals. This complaint was originally docketed as EC-2013-0378 but was consolidated with EC-2013-0377, *Earth Island Institute et al. v. Union Electric Co.* Complainant is appealing only Count III of the complaint against Empire District Electric, comprising the three claims listed above, which the PSC resolved against Renew Missouri.

The remedy having been exhausted, appeal must take the route of §§ 386.510 and 386.540, RSMo, as amended in 2011, the exclusive procedure for judicial review of Commission orders and decisions. Those statutes do not contemplate a direct appeal to the Supreme Court. However, the Supreme Court clearly has appellate jurisdiction under Art. V, § 3, as the validity of a statute is in issue. The appeal "shall go directly to the court or district having jurisdiction," Art. V, § 11.

If the constitutional directive is not clear enough, § 386.540.3 provides: "The general laws relating to appeals to the supreme court and the court of appeals in this state shall, so far as applicable and not in conflict with the provisions of this chapter, apply to

appeals taken under the provisions of this chapter.” The provisions of Article V of the Constitution are applicable and override any contrary provision of Chapter 386.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on January 24, 2014, I served by first-class mail, postage prepaid, a copy of the notice of appeal, motion for rehearing, list of issues, list of parties, and jurisdictional statement with suggestions on each of the following parties by their attorneys.

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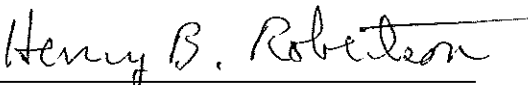
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