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JURISDICTIONAL STATEMENT

Appellant filed a complaint with the Missouri Public Service Commission under § 386.390, RSMo, and 4 CSR 240-2.117, as directed by the Court of Appeals, Western District. The complaint 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 Section 393.1050 was repealed by the later passage of the Renewable Energy Standard, §§ 393.1020–393.1030, RSMo, with which it is in irreconcilable conflict.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 Commission denied the complaint on November 26, 2013 (L.F. 236; A1).

Appeal is by writ of review under §§ 386.510 and 386.540, RSMo, as amended in 2011, the exclusive procedure for judicial review of Commission orders and decisions. The Supreme Court has appellate jurisdiction under Art. V, § 3 of the Constitution of Missouri, as the validity of a statute is in issue. The appeal “shall go directly to the court or district having jurisdiction,” Art. V, § 11

STATEMENT OF FACTS

On February 4, 2008, the Missouri Secretary of State approved for circulation an initiative petition to establish by statute a “Renewable Energy Standard” or RES.¹ The Secretary certified the official ballot title on February 25 (L.F. 78).

Proposition C, as it became known, would require “electrical corporations” as defined by § 386.020(15), RSMo 2000, to achieve increasing percentages of their sales with electricity from renewable energy sources: two percent of sales in the years 2011–2013; five percent from 2014–2017; ten percent from 2018–2020; and fifteen percent in each calendar year beginning in 2021. Proposition C is now codified as §§ 393.1020–393.1030, RSMo.

Proposition C included two provisions dealing specifically with solar energy:

- (a) At least two percent of each of the above targets had to be met with solar energy, § 393.1030.1, RSMo (A17); and
- (b) “Each electric utility shall make available to its retail customers a standard rebate offer of at least two dollars per installed watt for new or expanded solar electric systems sited on customers’ premises, up to a maximum of twenty-five kilowatts per system, that become operational after 2009.” § 393.1030.3. (This subsection was amended in 2013 so that the rebate will be phased out by July 1, 2020. (A19–A20))

On May 4, 2008, the Secretary of State issued the Box Receipt required by § 116.100, RSMo, for delivery of petitions containing a number of signatures that proved

¹ http://www.sos.mo.gov/elections/2008petitions/08init_pet.asp#2008028

sufficient to qualify the proposition for the ballot (L.F. 79).

On May 16, 2008, the last day of the legislative session, the Missouri General Assembly enacted SB 1181 with an effective date of August 28, 2008 (L.F. II, 240; A5). Among its numerous provisions, the very last was added on May 15 as “Section 1,” which became § 393.1050, RSMo (A23). It 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.”

At the general election of November 4, 2008, the Missouri electorate passed the Renewable Energy Standard (A16). It became effective immediately. Constitution of Missouri, Article III, § 52(b).

The RES tasks the Public Service Commission with prescribing by rule a renewable energy portfolio standard that will meet the specified energy targets, including the 2% solar energy requirement or “solar carve-out.” § 393.1030.1 (A17). The PSC also “shall make whatever rules are necessary to enforce the renewable energy standard,”

which must include provisions to prevent an average retail rate increase greater than 1%, penalties for non-compliance, provisions for an annual report to be filed by each utility, and provisions for cost recovery by the utilities. § 393.1030.2 (A17–8). The Commission’s rules became effective on September 30, 2010, and appear at 4 CSR 240-20.100.

Empire District Electric Company is the only electrical corporation that satisfies, or claims to satisfy, the criteria in § 393.1050 for exemption from solar requirements. Empire has taken no steps to comply with those requirements (L.F. 240; A5). In its final order the Commission found: “The terms of Proposition C, the RES statute, do not exempt any electric utility from the solar energy requirements of that statute” (L.F. 240; A5).

The Complaint

A different set of plaintiffs first brought the issue in this case to the Cole County Circuit Court in a petition for declaratory judgment. That court dismissed, and 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” and required the appellants to exhaust an administrative remedy through the Commission’s complaint procedure.

Appellant Earth Island Institute, d/b/a Renew Missouri, together with other parties interested in the enforcement of the RES, filed a complaint in the PSC against Empire District (L.F. 9) under § 386.390.1, RSMo, which allows any corporation or person to set forth a violation of law by a public utility. The case was consolidated with a similar

complaint against Ameren Missouri (L.F. 32). Counts I and II of both complaints were eventually dismissed (L.F. 237), and only count III of the Empire complaint remains for review. In that count of their pleading, complainants sought an order from the Commission finding that Empire was in violation of the RES through its reliance on an invalid statute, alleging that § 393.1050 was invalid on three theories set forth in paragraph 42 of the complaint (L.F. 17–18):

- a. The General Assembly lacked authority to amend Proposition C while it was pending but before it had been voted on;
- b. § 393.1050 was in irreconcilable conflict with Proposition C, and Proposition C as the later-enacted law repealed it by implication; and
- c. There was no rational basis for exempting Empire, but no other electrical corporation, from the solar requirements, so § 393.1050 was an unconstitutional special law. Mo. Const. Art. III, § 40(28) and 40(30).

Complainants filed a Motion for Summary Determination under PSC rule 4 CSR 240-2.117 (L.F. I, 36) accompanied by a legal memorandum (L.F. I, 44) and exhibits (L.F. I, 64). Empire did not file a motion for summary disposition but only a “Motion to Dismiss Complaint” (L.F. I, 127). PSC Staff filed its Response to Dispositive Motions agreeing with Empire (L.F. II, 146). After hearing oral argument, the Commission issued its Order on November 26, 2013, denying Renew Missouri’s motion for summary determination and granting Empire’s motion to dismiss (L.F. II, 236; A1) and finding that there were no facts in dispute (L.F. 237; A2).

Within 30 days, on December 18, 2013, Renew Missouri filed a timely application for rehearing under § 386.500, RSMo (L.F. 250). The PSC denied the application on January 3, 2014 (L.F. 259), and Renew Missouri timely filed its notice of appeal on January 24 pursuant to § 386.510, RSMo (L.F. 271).

POINTS RELIED ON

I

The Commission erred in denying Renew Missouri’s claim in Count III, paragraph 42.a of the complaint because (this ruling being reviewable under §§ 386.510 and 386.540, RSMo, and Article V, § 11 of the Constitution of Missouri) the passage of § 393.1050, RSMo, violated the right reserved to the people by Article III, Section 49 of the Constitution of Missouri to enact legislation independently of the legislature, in that the legislature enacted § 393.1050 after the signatures for Proposition C had been submitted to the Secretary of State but before Proposition C had been passed, and § 393.1050 purported to create an exception to the initiative’s application of its solar energy requirements to all electric utilities, thereby changing the question that would be submitted to the voters.

State ex rel. Drain v. Becker, 240 S.W. 229 (Mo. banc 1922)

In re Initiative Petition No. 347, State Question 639, 813 P.2d 1019 (Okla. 1991)

Oklahoma Tax Commission v. Smith, 610 P.2d 794 (Okla. 1980)

Mo. Constitution, Article III, § 49

II

The Commission erred in denying Renew Missouri’s claim in Count III, paragraph 42.b of the complaint because (this ruling being reviewable under §§ 386.510 and 386.540, RSMo, and Article V, § 11 of the Constitution of Missouri) Proposition C repealed § 393.1050, RSMo, in that § 393.1050 created an exception in favor of Empire to any solar energy rebate or mandate, and this was in irreconcilable conflict with Proposition C, which applied its solar rebate and energy requirement to all electric utilities without exception, and Proposition C as the later-enacted statute impliedly repealed § 393.1050.

St. Joseph Board of Public Schools v. Gaylord, 86 Mo. 401 (1885)

Reed v. Brown, 706 S.W.2d 866 (Mo. banc 1986)

State ex rel. Francis v. McElwain, 140 S.W.3d 36 (Mo. banc 2004)

State v. Coor, 740 S.W.2d 350, 356 (Mo.App. SD 1987)

Sections 393.1020–393.1030, RSMo

III

The Commission erred in denying Renew Missouri’s claim in Count III, paragraph 42.c of the complaint because (this ruling being reviewable under §§ 386.510 and 386.540, RSMo, and Article V, § 11 of the Constitution of Missouri) § 393.1050, RSMo, is a special law forbidden by Article III, § 40(28) and 40(30) of the Constitution, in that § 393.1050 created a class that closed on a specified date and could not thereafter be joined by any other utility, was therefore on its face and presumptively a special law, and is not justified by any rational basis or substantial justification why Empire alone should be excused from the specific solar energy requirements of the Renewable Energy Standard.

City of Springfield v. Sprint Spectrum, L.P., 203 S.W.3d 177 (Mo. banc 2006).

City of Blue Springs v. Rice, 853 S.W.2d 918 (Mo. banc 1993)

Laclede Power & Light Co. v. City of St. Louis, 353 Mo. 67, 182 S.W.2d 70 (Mo. banc 1944)

Constitution of Missouri, Article III, § 40(28) and 40(30)

ARGUMENT

I

The Commission erred in denying Renew Missouri’s claim in Count III, paragraph 42.a of the complaint because (this ruling being reviewable under §§ 386.510 and 386.540, RSMo, and Article V, § 11 of the Constitution of Missouri) the passage of § 393.1050, RSMo, violated the right reserved to the people by Article III, Section 49 of the Constitution of Missouri to enact legislation independently of the legislature, in that the legislature enacted § 393.1050 after the signatures for Proposition C had been submitted to the Secretary of State but before Proposition C had been passed, and § 393.1050 purported to create an exception to the initiative’s application of its solar energy requirements to all electric utilities, thereby changing the question that would be submitted to the voters.

The legislature cannot repeal or modify an initiative or referendum until after it is passed, not while it is in the process of enactment. *State ex rel. Drain v. Becker*, 240 S.W. 229, 232 (Mo. Banc 1922); *State ex rel. Barton v. Human*, 514 S.W.2d 100, 101 (Mo.App. 1974); 82 C.J.S. Statutes, § 143, p. 188. The effect of such an amendment “is to ignore or attempt to hold for naught the action of the people” in the exercise of their constitutional right to enact or repeal laws independently of the legislature. *Drain*, loc. cit.; Mo. Constitution, Art. III, § 49.

In *Drain* the legislature passed a law realigning the judicial circuits. Referendum petitions were filed with the Secretary of State seeking to repeal the law. In a special

session, the legislature then amended the law, retaining most of its features except the transfer of counties to other circuits. 240 S.W. at 230.

Initiative petitions proceed on a strict timeline. The official ballot title for Proposition C was certified by the Secretary of State on Feb. 25, 2008 (L.F. 78). The petition cannot be circulated without that ballot title. § 116.180, RSMo. The signed petitions must be filed with the Secretary of State at least six months before the election. Mo. Const., Art. III, § 50. In the case of Proposition C, the Secretary of State received the petitions on May 4, 2008 (L.F. 79), exactly six months before the November 4 election. By this time at the latest, Proposition C had passed the point of no return on the road to enactment.

Section 393.1050 passed as part of Senate Bill 1181 on May 16, 2008 (A23). See Senate Journal for 2008, p. 1729; House Journal, p. 1992. The Courts take judicial notice of the laws of the state, including the proceedings by which they were enacted. *Sperry v. State Tax Commission*, 695 S.W.2d 464, 469 (Mo. banc 1985). They take notice of legislative journals, § 490.160, RSMo, and of the certified records of the Secretary of State, §490.180, RSMo. They take notice of election results. *State ex inf. McKittrick v. Graves*, 346 Mo. 990, 144 S.W.2d 91, 94 (Mo. banc 1940).

Proposition C passed on November 4, 2008 and became effective that same day (A16). Mo. Const. Art. III, § 51. The RES applies to all electric utilities as defined in § 386.020 (§ 393.1025(3) and §393.1030.1, RSMo)(A16–17). The Legislature’s attempt to amend it to exempt one utility from certain requirements of the RES was ineffective

because the RES was still in the process of passage when § 393.1050 was enacted. The PSC nevertheless claims to have harmonized the two conflicting statutes.

Standard of Review

This Court reviews orders of the PSC using a two-part test. First, the court determines whether the order was lawful, i.e. did the PSC have the statutory authority to act as it did? The order is presumed valid. The interpretation of a statute by the agency charged with its administration is entitled to great weight. Nonetheless, the Court exercises independent judgment and must correct errors of law. *State ex rel. Sprint Missouri v. PSC*, 165 S.W.3d 160, 164 (Mo. Banc 2005).

Second, if the order was lawful the Court then determines whether it was reasonable, i.e. whether it was supported by substantial and competent evidence on the whole record; was arbitrary, capricious or unreasonable; or whether the PSC abused its discretion. *Id.*

Lawfulness

The Court of Appeals, Western District, in *Evans v. Empire District Electric*, 346 S.W.3d 313, 319 (Mo. App. WD 2011), 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 their 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. 346 S.W.3d at 318.

The Court of Appeals acknowledged that the PSC has no authority to declare a statute invalid. 346 S.W.3d at 318. “However, when the PSC is confronted with a new or amended statute, it must take that statute and interpret its meaning and application to the facts at hand.” *Id.* “The PSC has the power to determine if the provisions of Proposition C are in irreconcilable conflict or can in fact be harmonized with the provisions of section 393.1050.” 346 S.W.3d at 319.

The PSC having done that, the reviewing court must correct any errors of law, owing no deference to the PSC’s legal determinations. *Sprint Missouri v. PSC*, 165 S.W.3d at 164. The Commission decides the cases that come within its regulatory purview. In doing so, it necessarily interprets the applicable statutes. “The courts may then determine whether the commission has proceeded properly and reached correct legal conclusions.” *Sonken-Galamba Corp. v. Missouri Pacific Railroad Co.*, 225 Mo.App. 1066, 40 S.W.2d 524, 529 (WD 1931).

The PSC’s action in reviewing the case was therefore lawful. Its legal conclusions, however, were not.

§ 393.1050 was an unlawful attempt to amend a pending initiative.

The PSC correctly found that § 393.1050 was passed and became effective before the RES, and that the RES statute exempts no utility from the solar requirements (L.F. 240; A5). It found as a fact that “Empire has relied on Section 393.1050, RSMo (Supp. 2012) to claim exemption from both the solar carve out and the solar rebate provisions of the RES statute” (L.F. 241; A6).

The PSC’s legal conclusion was that an initiative should be treated differently from a referendum. The latter is “an appeal to the people of an act of the legislature” and should therefore be left untouched by the legislature. On the other hand, “there is no reason to preclude the legislature from acting on other, related aspects of an issue that are subject to a pending initiative so long as it does not interfere with the pending initiative” (L.F. 243; A8). Empire had made this argument in its Motion to Dismiss without a shred of legal authority to support it (L.F. I, 134–5).

State ex rel. Drain v. Becker, 240 S.W. 229, 232 (Mo. Banc 1922), spoke of the initiative and referendum, but on its facts it concerned a referendum. It is true that most of the cases on this point, and all of the Missouri cases, arose under the referendum. But the rule has been applied to initiatives because the reasoning is the same: the legislature cannot “change the question” pending in an initiative before the electorate gets to vote on it. *In re Initiative Petition No. 347, State Question 639*, 813 P.2d 1019, 1029 (Okla. 1991); *Oklahoma Tax Commission v. Smith*, 610 P.2d 794, 806–7 (Okla. 1980). *Smith* expressly agrees with this Court’s ruling in *Drain*. 610 P.2d at 806.

The courts hold that the intent of an initiative must be gleaned from the language of the ballot measure itself, since the voters could not otherwise know the intent of the drafters. *Tichenor v. Missouri State Lottery Commission*, 742 S.W.2d 170, 173 (Mo banc 1988). Customers of Empire District Electric who read Proposition C might reasonably have concluded that they would be entitled to the rebate it promised to customers who installed solar panels on their roofs. They may also have thought that the 2% solar carve-out would result in business and jobs for local solar energy installers who helped Empire

meet the requirement of 2% solar energy as part of the Renewable Energy Standard. If the Empire exemption of § 393.1050 was in effect, these promises became lies.

What *Drain* says of the legislative power reserved by the people applies equally to the initiative and referendum. 240 S.W. at 231–2:

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

True, the legislature can amend or repeal an initiative-passed law, but when the people vote on it, it should be what it appears to be.

An additional reason for rejecting the PSC’s legal conclusion is that no such sharp distinction exists between the referendum and initiative, with a referendum passing judgment on a law previously enacted by the legislature while an initiative is independent of the legislature. An initiative can also partake of the character of a referendum, repealing an existing law at the same time it enacts a new one. Proposition C did just this: it repealed a “Green Power Initiative” enacted in 2007 (A24), codified as the previous versions of §§ 393.1020–1035, and replaced its “good faith effort” standard (§ 393.1025.1, A25) with a mandate. Therefore the Commission’s argument fails on its own terms.

Finally there is the PSC’s conclusion that the legislature may act on “other, related aspects of an issue that are subject to a pending initiative so long as it does not interfere

with the pending initiative” (L.F. 243; A8). As a general rule, this is unexceptionable; the legislature certainly was free to enact laws on any aspect of utility regulation not comprehended within Proposition C. But § 393.1050 was by its very terms an attempt to enact a bill on the subject of the RES. It says that any utility with a certain percentage of renewable generation “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.” Proposition C could not more obviously have been the target unless it had been named. This was interference with the pending initiative.

The Renewable Energy Standard applies to “all electric utilities,” including Empire. § 393.1030.1, RSMo (A17). Section 393.1050 purports to create an exception. It therefore violates the constitutional rule announced by *Drain v. Becker* against amendment of an initiative in the process of enactment.

II

The Commission erred in denying Renew Missouri’s claim in Count III, paragraph 42.b of the complaint because (this ruling being reviewable under §§ 386.510 and 386.540, RSMo, and Article V, § 11 of the Constitution of Missouri) Proposition C repealed § 393.1050, RSMo, in that § 393.1050 created an exception in favor of Empire to any solar energy rebate or mandate, and this was in irreconcilable conflict with Proposition C, which applied its solar rebate and energy requirement to all electric utilities without exception, and Proposition C as the later-enacted statute impliedly repealed § 393.1050.

The Renewable Energy Standard applies to all electrical corporations, including Empire. §§ 393.1025(3) and 393.1030.1, RSMo (A16–7). Section 393.1050 purports to create an exception that, as applied, turned out to exempt Empire, and only Empire, “from meeting any mandated solar renewable energy standard requirements.” The two statutes cannot coexist; they are in inescapable conflict. Either all facets of the RES apply to all regulated utilities, including Empire, or Empire has a partial exemption.

The Commission found: “The terms of Proposition C, the RES statute, do not exempt any electric utility from the solar energy requirements of that statute” (L.F. 240; A5). But the PSC concluded that § 393.1050 was saved by its initial clause, “Notwithstanding any other provision of law.” The Commission reasoned that “the inclusion of the ‘notwithstanding’ phrase means section 393.1050 is a special act that carved out an exception to the general act of 393.1030 rather than impliedly repealing the

general act.” The PSC went on to find that § 393.1050 was a “rational modification” of the RES to avoid placing an “extra compliance burden” on a utility that was already meeting the overall 15% renewable energy standard (L.F. 244–5; A9–10).

Standard of Review

Judicial review of PSC orders is two-pronged: the court determines whether the order is lawful, and, if so, whether it is reasonable. *AG Processing v. PSC*, 120 S.W.3d 732, 734–5 (Mo. banc 2003).

Lawfulness

The Commission acted lawfully in proceeding with this case for the reasons given in Argument I. The Court of Appeals in *Evans v. Empire* found with respect to this count of the complaint that “such a claim is based on a general rule of statutory construction that statutes are to be harmonized if possible,” 346 S.W.3d at 318. “Construction of the statutory scheme by the PSC, in accordance with their judgment as to the intent of the Legislature, is the process that is envisioned for the administrative system in Missouri.” 346 S.W.3d at 319.

Reasonableness: the “notwithstanding” clause

When two statutes are repugnant in any of their provisions, the later act, even if it lacks a specific repealing clause, repeals the earlier act to the extent of the inconsistency. *State ex rel. Francis v. McElwain*, 140 S.W.3d 36, 38 (Mo. banc 2004). Repeals by implication are not favored, and if by any fair interpretation both statutes can stand, then both will be given effect. *In the Matter of Nocita*, 914 S.W.2d 358, 359 (Mo. Banc 1996).

The PSC’s extension of the “notwithstanding” clause forward in time could be used to immunize any statute from ever being repealed. But one session of the legislature cannot bind future sessions. *State ex rel. City of Springfield v. Smith*, 344 Mo. 150, 125 S.W.2d 883, 885 (Mo. banc 1939); *Dorsey v. U.S.*, —U.S.—, 132 S.Ct. 2321, 2331, 183 L.Ed.2d 250 (2012). By the same token it cannot bind the electorate when the voters pass a later law by initiative, which has the same effect as a statute passed by the legislature. *Labor’s Educational and Political Club v. Danforth*, 561 S.W.2d 339, 343 (Mo. banc 1977). The legislature can and does repeal statutes with notwithstanding clauses. See, e.g., *Mallams v. Mallams*, 861 S.W.2d 822, 823 (Mo.App. WD 1993).

A notwithstanding clause cannot have the prospective application envisioned by the PSC. In *St. Joseph Board of Public Schools v. Gaylord*, 86 Mo. 401 (1885), the Court dealt with a statute that claimed to have this effect more explicitly: “But no law hereafter passed shall be construed as changing, altering or repealing the whole, or any part of this act, unless this act be expressly mentioned in such law.” 86 Mo. at 405–6. The Court held:

“The general assembly of 1859 could not determine how or by what language alone the special law of 1860 should be amended, altered or repealed. The assertion in that respect was not binding upon any subsequent session of that body. The latter might amend, alter or repeal the law by the use of any language that was pertinent and thought to be best. The will of any subsequent general assembly, in that respect, was supreme.” 86 Mo. at 406.

The “notwithstanding” clause in § 393.1050 was a vain expedient to limit the effect of a law not yet enacted.

Reasonableness: general and specific laws

A “special” or specific law may survive as an exception to a later-enacted general law, but the question is one of legislative intent, and the general law may repeal the special law by implication. *Reed v. Brown*, 706 S.W.2d 866, 868 (Mo. banc 1986). The PSC tried to harmonize § 393.1050 with the RES by treating it as an exception. But where the later, general law contains no exception, it must be read as establishing a uniform rule. *Reed*, 706 S.W.2d at 868. That rule is that the solar requirements of the RES apply to all electric utilities, including Empire.

In *Reed* this Court held that a 1955 law for resolving tie votes in city council elections was impliedly repealed by a provision in the Comprehensive Election Act of 1977 which contained no qualifying language that allowed the earlier law to control. The conflict was irreconcilable; the statutes could not be harmonized. 706 S.W.2d at 869–70.

When one statute deals with a subject in a general, comprehensive way and another deals with a part of the subject in a more minute and definite way, they will be harmonized provided they are not in conflict but evidence one consistent legislative policy. *O’Flaherty v. State Tax Commission*, 680 S.W.2d 153, 155 (Mo. banc 1984); *State v. Coor*, 740 S.W.2d 350, 356 (Mo.App. SD 1987). There is no consistent policy in excepting Empire under one statute (393.1050) but not the other (the RES).

It is also inaccurate to describe § 393.1050 as independent, specific legislation. On its face, its only purpose was to amend a future renewable energy standard. Since it does

nothing but create an exception to another law, it has no existence of its own. The PSC's musing about a rational basis for § 393.1050 is irrelevant; it was either repealed or it was not. Because the Empire exemption was, by design, in irreconcilable conflict with the RES, Proposition C repealed it.

III

The Commission erred in denying Renew Missouri's claim in Count III, paragraph 42.c of the complaint because (this ruling being reviewable under §§ 386.510 and 386.540, RSMo, and Article V, § 11 of the Constitution of Missouri) § 393.1050, RSMo, is a special law forbidden by Article III, § 40(28) and 40(30) of the Constitution, in that § 393.1050 created a class that closed on a specified date and could not thereafter be joined by any other utility, was therefore on its face and presumptively a special law, and is not justified by any rational basis or substantial justification why Empire alone should be excused from the specific solar energy requirements of the Renewable Energy Standard.

Article III, section 40 of the Missouri Constitution provides:

“The general assembly shall not pass any local or special law:...

“(28) granting to any corporation, association or individual any special or exclusive right, privilege or immunity, or to any corporation, association or individual the right to lay down a railroad track;...

“(30) where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject.”

Empire is the only utility that claims to be free of solar obligations thanks to Section 393.1050 (L.F. 240; A5). This is by design. The statute created a privilege for an electric utility that achieved a renewable energy capacity equal to 15% of the utility's fossil-fuel capacity by the apparently arbitrary date of Jan. 20, 2009, a classification that only Empire fit.

The PSC found that this was “an open-ended classification available to any electrical corporation making the effort to comply,” and that it had a rational basis as “a reasonable effort to ease the burden the solar carve out and solar rebate provisions would otherwise impose on an electric utility that had already met the initiative’s overall portfolio standards” (L.F. 246; A11).

Standard of Review

The standard is the same as for Points I and II. The PSC’s conduct of the case was lawful, being authorized by statute, but not reasonable. The constitutional validity of a law challenged as special is a legal issue reviewed de novo. *City of Sullivan v. Sites*, 329 S.W.3d 691, 693 (Mo. banc 2010).

Presumptions and burden of proof

The test for a special law depends on whether the classification within the law is open-ended or closed. If it is closed, the law is presumed to be special, and the burden is on the defender of the law to demonstrate a substantial justification. If it is open-ended, a rational basis test is applied, and the challenger of the law must show that it is arbitrary and without a rational relation to a legislative purpose. *City of St. Louis v. State*, 382 S.W.3d 905, 914–5 (Mo. banc 2012). A closed-ended classification is based on

immutable characteristics of historical fact, geography or constitutional status. A classification that is ostensibly general may be drawn so narrowly that it includes only one entity though theoretically it could include others; in that case it will be judged special. *Id.*

A general law relates to persons or things as a class; a special law relates to particular persons or things even when its criterion appears naturally related to all members of the whole class. If a statutory classification that fits only one entity is nevertheless open-ended, so that it could include other entities that later fall within its terms, it is considered a general law; but if it is fixed, so that its membership is closed, it is special. *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177, 184 (Mo. banc 2006).

§ 393.1050 is a special law.

Laws that close the membership in a class on or before the effective date of the law are special. *State ex rel. Harris v. Herrmann*, 75 Mo. 340, 352–3 (1882); *State ex rel. City of Blue Springs v. Rice*, 853 S.W.2d 918, 921 (Mo. banc 1993); *Sprint Spectrum*, 203 S.W.3d at 184–6. The focus is not on the size of the class but on the nature of the factors used in defining the class. *Sprint* at 186.

Blue Springs and *Sprint Spectrum* were both decided under Article III, § 40(30) of the Constitution. The same reasoning applies to corporate privileges and immunities under Article III, § 40(28). In *Laclede Power & Light Co. v. City of St. Louis*, 353 Mo. 67, 182 S.W.2d 70 (Mo. banc 1944), the Court struck down under both clauses an

ordinance imposing a license tax on electric utilities but exempting those utilities (of which there was only one) that had previously paid a franchise tax on their gross receipts.

Whoever drafted § 393.1050 was clever enough to put the date in the near future. The class is disguised as open-ended, but it closed on January 20, 2009, about two and one-half months after Proposition C passed. The PSC wrote that the exemption was “available to any electrical corporation making the effort to comply,” (L.F. 246), but that is a mere conclusion unsupported by any evidence in the record. It therefore fails the reasonableness test for review of the Commission’s orders. *Sprint Missouri v. PSC*, 165 S.W.3d at 164.

Could another utility have built enough wind turbines and solar panels, or closed power purchase agreements on enough wind turbines and solar panels, to meet the standard of 15% of its generating capacity in such a short time? The answer is unknown and perhaps unknowable. It would not change the fact that the classification is closed and therefore presumptively special. If another utility had met the 15% standard on January 21, 2009, it would have been arbitrarily excluded from the class.

The classification is without substantial justification or rational basis.

Since § 393.1050 creates an exception to an otherwise general law, it is facially special under § 40(30), and the burden falls on Empire to offer a rationale for why it is entitled to the exemption. *State ex rel. Public Defender Commission v. County Court of Greene County*, 667 S.W.2d 409, 412–3 (Mo. banc 1984). Under § 40(28) as well, no utility can be excluded from the privilege created by § 393.1050 unless some reason exists that is related to the object to be accomplished by the privilege. *Planned Industrial*

Expansion Authority v. Southwestern Bell Telephone Co. 612 S.W.2d 772, 777 (Mo. banc 1984).

Empire’s argument, adopted by the Commission, was that the legislature gave a well-deserved break to a utility that already met the overall renewable energy goal and saved it from “a more onerous compliance burden” than utilities that had not met that standard (L.F. 139–40, 246; A10–11). There is no legislative history to support this argument. Essentially, Empire contends that the solar requirements of the RES—that 2% of the standard be met with solar energy and that a rebate be paid in support of this standard—are of lesser importance than the overall renewable energy goal. But they are every bit as much requirements of the law. They give solar energy a status not shared by other forms of renewable energy. Every utility is expected to provide solar energy but not necessarily wind, hydropower or energy crops.

Empire’s argument that it will have an undue compliance burden is ludicrous. Since Empire claims to meet the overall goal, it is not more onerous for it to satisfy the solar provisions alone. According to Empire, any burden greater than nothing is onerous. This is not a substantial or rational justification.

CONCLUSION

WHEREFORE Appellant prays the Court to reverse the decision of the Commission and correct its legal errors by declaring that § 393.1050, RSMo, was an unconstitutional amendment of an initiative made while it was in the process of enactment; that it was repealed by Proposition C; and that it is an unconstitutional special law; or to remand the case to the PSC for further proceedings; and for such other relief as the Court deems just and proper.

CERTIFICATION

This brief complies with the limitations of Rule 84.06(b), containing 6,848 words and 697 lines all-inclusive.

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Certificate of Service

Counsel for Appellant has made service of this brief and the appendix on all other counsel of record by way of electronic filing on this 25th day of April, 2014.

/s/ Henry B. Robertson