

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel. MISSOURI
COALITION FOR THE ENVIRONMENT,
et al.

Appellants,

vs.

JOINT COMMITTEE ON
ADMINISTRATIVE RULES, et al.,

Respondents.

Case No. SC95546

**BRIEF OF RESPONDENT
PUBLIC SERVICE COMMISSION
IN RESPONSE TO APPELLANTS' BRIEF**

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JURISDICTIONAL STATEMENT

This case is before the Court on appeal of the Circuit Court of Cole County's judgment dismissing the underlying cause of action as moot. The notice of appeal invoked this Court's original jurisdiction under Article V, Section 3 of the Missouri Constitution because the appeal involves the validity of a statute.

STATEMENT OF FACTS

The first version of the renewable energy standards rule at issue in this case became effective on September 30, 2010. (L.F. 24). In the final order of rulemaking for the first version of the rule, the Commission included two subsections known as the geographic sourcing provisions. (L.F. 23). The geographic sourcing provisions would have disallowed the counting of renewable energy credits¹ (RECs) that represented renewable energy that was produced and consumed outside of Missouri to satisfy the renewable portfolio standard. (L.F. 23). The geographic sourcing provisions were subsequently disapproved by the Joint Committee on Administrative Rules (JCAR).² (L.F. 23). Although the final order of rulemaking submitted to the Secretary of State

¹ A renewable energy credit (REC) is a certificate that represents that one megawatt of power has been produced using a renewable energy source. RECs can be purchased separately from the actual electricity represented by the REC.

² In addition to JCAR, the suit named the individual members of JCAR. For ease of reference, the Commission has omitted the names of the individual members in its statement of facts.

contained the disapproved geographic sourcing provision subsections, the Secretary of the Commission by letter informed the Secretary of State of JCAR's action and stated that the disapproved subsections were not being submitted for publication. (L.F. 24). The chair of JCAR also informed the Secretary of State of its action in disapproving the geographic sourcing provisions. (L.F. 24). The rule was published in the *Code of State Regulations* with the former geographic sourcing subsections labeled as "Reserved." (L.F. 24). The legislature approved JCAR's action by concurrent resolution. (L.F. 25). The Governor allowed the concurrent resolution to become law without his signature. (L.F. 25). The Commission issued an order in January of 2011 stating that it did not intend to attempt to revive the geographic sourcing provisions that had been disapproved by JCAR. (App Br 7). The 2010 version of the rule was affirmed on appeal to the Court of Appeals for the Western District of Missouri in *State ex rel. Mo. Energy Development Ass'n v. Pub. Serv. Comm'n*, 386 S.W.3d 165 (Mo. Ct. App. W.D. 2012).

Appellants initiated the underlying suit in 2014. (L.F. 2). Cross-motions for summary judgment were filed. (L.F. 8). The trial court originally entered judgment granting the Commission's motion for summary judgment. (L.F. 8). Appellants appealed the original judgment directly to this Court. (L.F. 9).³ On November 17, 2016 this Court dismissed the appeal without prejudice and remanded the case to the trial court on a motion by JCAR and the Governor because the original judgment was not final as to all parties. (L.F. 11).

³ SC95100

While the underlying case was pending, the Commission conducted a rulemaking procedure to adopt a new renewable energy standards rule. (App Br 5). The new renewable energy standards rule was submitted to JCAR without the geographic sourcing provisions being adopted by the Commission. JCAR approved the new version of the rule and it was submitted to the Secretary of State for publication in the *Code of State Regulations*. (PSC Appendix 31). The new renewable energy standards rule retained the same numbering as the former rule, with the former geographic sourcing subsections labeled as “Reserved.” (App Br 6). The new renewable energy standards rule became effective on November 30, 2015. (App Br 9).

While the case was on remand, the Commission filed a motion to dismiss the case as moot because of the adoption of a new renewable energy standards rule to replace the first version of the rule that had become effective in 2010. (L.F. 11). On January 11, 2016, the trial court granted the Commission’s motion to dismiss the case as moot and entered a final judgment as to all parties. (L.F. 12). This appeal followed. (L.F. 12).

Summary of Argument

This brief addresses only issues raised by the Appellants in Point III that bear directly on the Public Service Commission’s actions or its rulemaking authority. Issues raised in Appellants’ Points I and II regarding the actions or authority of the Joint Committee on Administrative Rules, the Secretary of State, or the Governor are not addressed here.

POINTS RELIED ON

- I. The trial court’s judgment dismissing the underlying action as moot must be affirmed because a change in circumstances has occurred such that there is no effective remedy available to the Appellants in that the Public Service Commission has adopted a new renewable energy standards rule that replaces the 2010 version of the rule upon which Appellants’ claims of error were based.**

Statute

Section 536.021, RSMo (2000) (Cum. Supp. 2013)

Cases

Humane Society of the U.S. v. State, 405 S.W.3d 532 (Mo.banc 2013)

State ex rel. Reed v. Reardon, 41 S.W.3d 470 (Mo.banc 2001)

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State ex rel. Chastain v. City of Kansas City, 968 S.W.2d 232 (Mo. Ct. App. W.D. 1998)

Regulation

4 C.S.R. 240-20.100

II. The trial court’s judgment dismissing the underlying action as moot must be affirmed because there is no live constitutional issue in this case in that Section 393.1030 does not mandate that the geographic sourcing provisions sought by the Appellants be included as part of a utility’s compliance with the renewable portfolio standard and the Commission has not made any attempt to revive the geographic sourcing provisions as part of its 2015 renewable energy standards rule.

Statutes

Section 386.125, RSMo (2000)

Section 386.250, RSMo (2000)

Section 393.1030, RSMo (2000) (Cum. Supp. 2013)

Section 536.021, RSMo (2000) (Cum. Supp. 2013)

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State ex rel. Mo. Growers Ass’n v. State Tax Comm’n, 998 S.W.2d 786 (Mo.banc 1999)

ARGUMENT

- I. The trial court's judgment dismissing the underlying action as moot must be affirmed because a change in circumstances has occurred such that there is no effective remedy available to the Appellants in that the Public Service Commission has adopted a new renewable energy standards rule that replaces the 2010 version of the rule upon which Appellants' claims of error are based. (Not responsive to any of Appellants' Points Relied On).**

An appellate court reviews a trial court's judgment sustaining a motion to dismiss *de novo*. *Conway v. CitiMortgage, Inc.*, 438 S.W.3d 410, 413 (Mo.banc 2014). The mootness of a controversy is a threshold question in any appellate review. *State ex rel. Reed v. Reardon*, 41 S.W.3d 470, 473 (Mo.banc 2001). Mootness affects the justiciability of the case. *Id.* An actual, live controversy that is subject to some available relief is a necessary prerequisite to appellate jurisdiction. *Id.* A case that was not moot at its inception can become moot if there is an intervening event that makes granting any practical relief impossible and if the event would make any opinion issued in the case only hypothetical. *Id.* The appellate court may consider matters outside of the record in making the mootness determination. *Id.* A change to a law or statute can render a case moot by removing the possibility of granting any practical relief predicated on the prior rule or statute. *Humane Society of the U.S. v. State*, 405 S.W.3d 532, 539 (Mo.banc 2013).

The version of the rule underlying Appellants' claims became effective on September 30, 2010. (L.F. 24). The final order of rulemaking adopted by the Commission in 2010 had the two geographic sourcing provisions in subsection 2(A) and 2(B)2 at issue. (L.F. 24). After JCAR disapproved those two subsections of the rule, the Commission transmitted the final order of rulemaking to the Secretary of State. (L.F. 24). Both the Commission and the chair of JCAR informed the Secretary of State that the disapproved subsections should not be published in the *Code of State Regulations*. (L.F. 24). The two subsections were published as "Reserved" and the actual text was never published in the *Code of State Regulations*.

The 2010 rule remained in effect without the geographic sourcing provisions until the Commission rescinded the 2010 rule and adopted a new renewable energy standards rule. (L.F. 25). The new renewable energy standards rule took effect on November 30, 2015. (L.F. 25). The new renewable energy standards rule retains the "Reserved" designation, but the actual text of the geographic sourcing provisions is not included anywhere in the language in the rule, nor does the final order of rulemaking show any intent by the Commission to adopt geographic sourcing provisions as part of the rule. (L.F. 24). The Commission's retention of the "Reserved" designation merely acknowledges that this litigation was still pending when the new rule was adopted. (L.F. 24).

The new renewable energy standards rule was adopted under the normal rulemaking provisions of Section 536.021, RSMo (2000) (Cum. Supp. 2013). The new rule was reviewed and approved by JCAR. No part of the rule was disapproved by JCAR,

and the Secretary of State published the rule as it was submitted to it by the Commission. The final order of rulemaking for the 2010 rule is irrelevant to the current rule. The new rule replaces the old rule and it does not have any language about geographic sourcing provisions in it. (L.F. 25). This change in in circumstances means that there is no relief available to the Appellants in this case. All of the relief requested by the Appellants relates to the 2010 rule, which does not exist. The Appellants' original petition in this case sought relief from the final order of rulemaking published in 2010. That relief is no longer available, and what Appellants are asking this Court to do in this is appeal is to order the modification of the 2015 rule adopted by the Commission by inserting the JCAR disapproved, unpublished language from the 2010 rule into the new rule. The circumstances surrounding the removal of the geographic sourcing subsections from the 2010 did not exist with the promulgation of the new rule in 2015. This Court should decline to review the new rule, as requested by the Appellants. As a practical matter, there is no effective relief possible and the trial court's dismissal of the case as moot should be affirmed on this point.

A moot case should generally be dismissed. *State ex rel. Reed*, 41 S.W.3d at 473. There are two discretionary exceptions to the mootness doctrine. *Friends of the San Luis, Inc. v. Archdiocese of St. Louis*, 312 S.W.3d 476, 484 (Mo. Ct. App. E.D. 2010). The first exception is when the case has been argued and submitted. *Id.* The reviewing court may also exercise its discretion to decide an otherwise moot controversy if the matter presents a legal issue that is of public importance and would otherwise evade review. *Id.* The public interest exception is a narrow one. *State ex rel. Chastain v. City of Kansas City*,

968 S.W.2d 232, 237 (Mo. Ct. App. W.D. 1998). “If an interest of public importance in a moot case is likely to be present in a future live controversy practically capable of appellate review, then the ‘public interest’ exception does not apply.” *Id.* The exception should not be used if the issues sought to be litigated could be resolved by other parties in a live controversy. *Bernhardt v. McCarthy*, 467 S.W.3d 348, 352 (Mo. Ct. App. W.D. 2015).

The first exception to the mootness doctrine does not apply here because the case has not been argued or submitted. As to the second exception, there is no reason for the Court to exercise its discretion to decide this moot case under the public interest exception. A new rule has replaced the old rule, and the actions of JCAR and the Secretary of State in 2010 have no bearing on the rule that was adopted in 2015, which does not contain any geographic sourcing provisions. (L.F. 45). The Commission in 2015 merely retained the numbering of the previous rule at the request of the Appellants. (App Br 9). Questions about the actions of JCAR and the Secretary of State could be resolved in a future live controversy involving a rule that is still in effect. Those questions need not be resolved in a moot case based on a rule that is no longer in effect.

This case is moot because there has been a material change in circumstances. In 2015, the Commission adopted a new renewable energy standards rule to replace the 2010 rule that is the subject of Appellants’ complaint. (L.F. 46). No relief granted by this Court would have any practical effect, because the 2015 renewable energy standards rule has never contained geographic sourcing provisions. The Commission did not approve geographic sourcing provisions in 2015 and these provisions cannot be inserted into the

rule as a result of this case. The trial court's judgment dismissing the underlying case as moot should be affirmed on this point. Alternatively, the appeal should be dismissed as moot.

II. The trial court's judgment dismissing the underlying action as moot must be affirmed because there is no live constitutional issue in this case in that Section 393.1030 does not mandate that the geographic sourcing provisions sought by the Appellants be included as part of a utility's compliance with the renewable portfolio standard and the Commission has not made any attempt to revive the geographic sourcing provisions as part of its 2015 renewable energy standards rule. (Responds to Point III of Appellants' Points Relied On).

On appeal, the trial court's judgment sustaining a motion to dismiss is reviewed *de novo*. *Conway*, 438 S.W.3d at 413.

The parameters of Missouri's renewable portfolio standard are set out in Sections 393.1030.1 and 393.1030.2, RSMo (2000) (Cum. Supp. 2013). The statutory language does not mandate or require the use of geographic sourcing provisions. *Id.* The Commission's authority to adopt a renewable energy standards rule is found in Section 393.1030.6, RSMo (2000) (Cum. Supp. 2013). This provision was amended in 2013 and the amended statutory language explicitly provides that the Commission's rulemaking authority under this section is subject to Chapter 536, including Section 536.028 if

applicable.⁴ *Id.* The Commission is required to follow Chapter 536 rulemaking procedures under its jurisdictional statute as well. Section 386.250.6, RSMo (2000). Section 386.125, RSMo (2000) (Cum. Supp. 2013), which was effective before the amendment to Section 393.1030, also requires the Commission’s rules to be reviewed by JCAR.

A rule must be published in the *Code of State Regulations* to become effective. Section 536.021.5, RSMo (2000) (Cum. Supp. 2013). When a statute gives an agency discretion over a rule it has the authority to adopt, the agency cannot be compelled to adopt a specific rule. *State ex rel. Mo. Growers Ass’n v. State Tax Comm’n*, 998 S.W.2d 786, 789 (Mo.banc 1999). In *Mo. Growers Ass’n*, the State Tax Commission proposed a rule setting new tax assessment values for agricultural and horticultural land. *Id.* at 787. The legislature adopted a joint resolution rejecting the proposed assessment. *Id.* at 788. The plaintiffs then brought suit alleging that the State Tax Commission “should be compelled to file the proposed rule as a final rulemaking order despite the general assembly’s rejection of the rule, and that the legislative oversight process by which the general assembly rejected the rule was unconstitutional.” *Id.* The trial court ruled in favor

⁴ Section 536.028 requires that administrative rules be subject to review by JCAR. The statute only becomes effective if certain situations arise. Relevant to this case, the statute is triggered if a court with appropriate jurisdiction declares that Section 536.024 or Executive Order 97-97 is unconstitutional or invalid. Section 536.028.13(4), RSMo (2000).

of the plaintiffs, and issued a writ of mandamus ordering the State Tax Commission (STC) to file its order of final rulemaking with the Secretary of State. *Id.* at 789.

This Court reversed, finding that the trial court erred in granting the requested mandamus relief, even in light of intervening legislative action:

Even if the [concurrent resolution] were the immediate cause of the rule's demise, the STC still had the discretion to withdraw the rule or decline to file a final rulemaking order in the event that the legislature had not disapproved the rule. Regardless of the general assembly's role in the process, the STC never had a ministerial duty to perfect its proposed rule.

Mo. Growers Ass'n, 998 S.W.2d at 789. As the agency with the discretion over the specific rule to be adopted, there was no ministerial duty to publish the rule favored by the plaintiffs and mandamus was an inappropriate remedy. *Id.*

The Appellants in this case want the same result that was denied to the plaintiffs in *Mo. Growers Ass'n*. Appellants are asking the Court to compel the Secretary of State to publish a rule which has geographic sourcing provisions that the Commission has disavowed several times. First, the Commission informed the Secretary of State that it was not submitting the geographic sourcing provisions for publication. (L.F. 45). Then the Commission issued an order stating it did not intend to attempt to revive the geographic sourcing provisions. (L.F. 46). Finally, the Commission underwent a new Chapter 536 rulemaking procedure that replaced the first version of the rule that was adopted in 2010 with a new rule that became effective in 2015. (L.F. 48). While the new rule retained the numbering of the old rules, including the "Reserved" subsections of the

original rule at the request of the Appellants, the Commission did not include any language regarding geographic sourcing in the new rule. (L.F. 24). The Commission has clearly indicated that it does not intend to include geographic sourcing provisions in its renewable energy standards rule. What type of renewable energy standards rule to adopt is a matter within the Commission's discretion. Appellants are not entitled to compel the Commission to adopt any particular rule, and this Court should decline to grant the relief requested.

The geographic sourcing provisions that Appellants seek to insert into the 2015 renewable energy standards rule have never been published in the *Code of State Regulations*. Because the provisions were never published in the *Code*, they were never enforceable against the electric utilities that must abide by the rules. The Commission has on multiple occasions disavowed any intention to revive those provisions and to enforce them against utilities. The rule adopted in 2015 went through the statutory rulemaking process, including review by JCAR and publication by the Secretary of State. Any alleged defect that occurred in 2010 could not be cured by this appeal. This Court should reject Appellants' request to insert language into a rule that the Commission has clearly indicated it does not intend to enforce.

The trial court's judgment dismissing the underlying case as moot should be affirmed on this point. Alternatively, the appeal should be dismissed as moot.

CONCLUSION

For the above reasons, the Commission respectfully requests that the trial court’s judgment dismissing the underlying cause of action as moot be affirmed. The Commission requests such other relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the foregoing Respondent’s Brief of the Public Service Commission of the State of Missouri complies with the limitations contained in Rule 84.06(c) and that:

1. The signature block above contains the information required by Rule 55.03;
2. The brief complies with limitations contained in Rule 84.04(b);
3. The brief contains 3,192 words, as determined by the word count feature of Microsoft Word.

I further certify that copies of the foregoing have been served by means of electronic filing to the following counsel of record this 1st day of July, 2016 to:

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