

**IN THE SUPREME COURT OF MISSOURI**

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Earth Island Institute  
d/b/a Renew Missouri,  
Appellant,

v.

Public Service Commission of the  
State of Missouri and  
The Empire District Electric Company,  
Respondents.

Case No. SC93944

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**BRIEF OF RESPONDENT  
PUBLIC SERVICE COMMISSION  
IN RESPONSE TO APPELLANT'S BRIEF**

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## JURISDICTIONAL STATEMENT

Article V, Section 3 of the Missouri Constitution vests “exclusive appellate jurisdiction in all cases involving the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state” with the Supreme Court of Missouri. Renew Missouri’s appeal of the Public Service Commission of the State of Missouri’s (Commission) order in EC-2013-0377 involves the validity of a Missouri statute, namely Section 393.1050, RSMo.

Generally, Section 386.510, RSMo. is the operative statute under which appellate review of Commission orders is brought. Section 386.510 directs the Commission to forward the challenged order to the “appellate court with the territorial jurisdiction over the county where the hearing was held or in which the commission has its principal office for the purpose of having the reasonableness or lawfulness of the original order or decision...determined.”

This case represents a unique circumstance in that the validity of a state statute is being challenged, but the vehicle for that challenge is an order of the Commission. If this case is viewed as primarily a challenge to a Commission order then the more appropriate court to seek judicial review under Section 386.510 in the first instance would be the Western District Court of Appeals. However, if the case is viewed purely as a legal challenge to the validity of Section 393.1050 - without consideration of the Commission’s order - then this Court is the appropriate court for review.

## Factual Background

The Respondent Commission is the state agency responsible for the regulation of investor-owned utilities in Missouri. Respondent Empire District Electric Company (Empire) is an electrical corporation and public utility regulated by the Commission. Appellant Earth Island Institute d/b/a Renew Missouri is a not-for-profit corporation organized under the laws of California. (LF 9). Renew Missouri is a registered fictitious name of Earth Island Institute under Section 417.200, RSMo. (LF 9). Earth Island Institute has a Certificate of Authority for a Foreign Nonprofit from the Missouri Secretary of State. (LF 9). Renew Missouri is a project of the Earth Island Institute. (LF 9). The appellant is referred to as Renew Missouri in this brief.

The challenged statute, Section 393.1050, RSMo, was Truly Agreed to and Finally Passed by the Missouri Legislature on May 16, 2008. It was signed into law by Governor Matt Blunt on July 10, 2008 and became effective on August 28, 2008.

Section 393.1050 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 mandates 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. (Emphasis added.)

Proponents of a renewable energy standard circulated five different versions of the proposed renewable energy standard. One of five proposed versions of the renewable energy standard (Proposition C or Section 393.1030) was certified for the November 4, 2008 general election ballot (LF 18). Proposition C was enacted into law on November 4, 2008 (LF 18).

On March 15, 2010, James Evans, Kelly Cardin, and Power Source Solar filed a declaratory judgment action against Empire and the Commission. That lawsuit challenged the validity of Section 393.1050, alleging:

- The General Assembly lacked authority to amend Proposition C;
- Section 393.1050 is irreconcilably in conflict with Proposition C; and,
- Section 393.1050 only applied to Empire and was an unconstitutional special law.

The trial court granted Empire's and the Commission's motions to dismiss finding that the Commission had primary jurisdiction over the case. The trial court's decision was appealed to the Western District Court of Appeals in *Evans v. Empire Dist. Elec. Co.*, 346 S.W.3d 313 (Mo. App. W.D. 2011.) In *Evans*, the Western District Court of Appeals affirmed the judgment of the trial court.

In *Evans* the court provided the following analysis on the proper role of the Commission in interpreting and harmonizing Section 393.1050 with Proposition C:

The PSC has been given the statutory authority to interpret statutes pursuant to the administration of their charge; the PSC's interpretation is afforded great weight by Missouri courts. (internal citations omitted.) Appellants are correct that the Commission has no authority to declare a statute invalid or interpret a statute in such a way that is contrary to the plain terms of the statute. (internal citations omitted.)...[W]hen 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...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. Contrary to the Appellants' assertion, relief may be found in the first instance before the PSC. 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.

On January 30, 2013, Renew Missouri and other plaintiffs who are not a part of this appeal filed a formal complaint with the Commission alleging, "Empire must still be held

to the terms of the RES because the [*sic*] Section 393.1050 was unlawfully passed or, if initially valid, was repealed.” (LF 17) The complaint sets forth the same arguments as the dismissed declaratory judgment in *Evans*.

On December 26, 2013, the Commission issued an “Order Denying Motion for Summary Determination of Renew Missouri and Granting Motions to Dismiss of Ameren Missouri and Empire.” (LF 236) In that Order the Commission found against Renew Missouri’s arguments that Section 393.1050 is invalid (LF 242). On January 24, 2014 Renew Missouri filed a Notice of Appeal challenging the validity of Section 393.1050 (LF 271).

Section 393.1030 was amended in 2013 to entirely phase-out the solar rebate subsidy that originally existed in Proposition C by 2020.<sup>1</sup>

### **POINTS RELIED ON**

(In response to Renew Missouri’s Point Relied I)

- I. The Commission’s Order in Docket Number EC-2013-0377 was lawful and reasonable in determining that Section 393.1050 is valid because there is no legal prohibition against the state legislature passing laws of the same subject matter or affecting an initiative in that an initiative is an independent means of passing legislation, unlike a referendum.**

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<sup>1</sup> All references to Section 393.1030 or Proposition C refer to 393.1030 as approved by voters in 2008. Subsequently, Section 393.1030 has been amended twice, See S.B. 795, 95<sup>th</sup> Leg., 2<sup>nd</sup> Reg. Sess. (Mo. 2010), H.B. 142, 97<sup>th</sup> Leg., 1<sup>st</sup> Reg. Sess. (Mo. 2013).

Cases

*State ex rel. St. Louis Regional Health Care Corp. v. Wamser*, 735 S.W.2d 741 (Mo. App. E.D. 1987).

*Drain v. Becker*, 240 S.W. 229 (Mo.banc 1922)

Statutes

Section 393.1050, RSMo (2000) (West 2014)

Section 393.1030, RSMo (2000) (Supp. 2008)

Other Authority

Mo. Const. Art. 3, Section 49

(In response to Renew Missouri's Point Relied II)

**II. The Commission's Order in Docket Number EC-2013-0377 was lawful in determining that Section 393.1050 is not in irreconcilable conflict with Section 393.1030 because Section 393.1050 contains the proviso "Notwithstanding any other provision of law" in that this proviso has the effect under Missouri Supreme Court precedent of harmonizing Section 393.1030 and Section 393.1050.**

Cases

*State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630 (Mo.banc 2007).

*Berdella v. Pender*, 821 S.W.2d 846 (Mo.banc 1991).

Statutes

Section 393.1030, RSMo (2000) (Supp. 2008)

Section 393.1050, RSMo (2000) (West 2014)

(In response to Renew Missouri's Point Relied III)

**III. The Commission's Order in Docket Number EC-2013-0377 was lawful in determining that Section 393.1050 was not a special law because Section 393.1050 involved open-ended characteristics that did not limit the statute's applicability to a single entity in that any utility could avail itself of the Section 393.1050 exemption if it took actions to reach a certain renewable energy goal.**

Cases

*City of St. Louis v. State*, 382 S.W.3d 905 (Mo.banc 2012).

*Jefferson Cnty. Fire Protection Dist.'s Ass'n v. Blunt*, 205 S.W.3d 866 (Mo.banc 2006)

Statutes

Section 393.1050, RSMo (2000) (West 2014)

Section 393.1030, RSMo (2000) (Supp. 2008)

Section 393.1030, RSMo (2000) (West 2014)

**Standard of Review**

The authority of the courts on judicial review of Commission orders is set out in Section 386.510. The Supreme Court of Missouri has described the statutory parameters of judicial review of Commission orders as follows:

The court has no authority to direct the Commission what order to make or to grant the authority sought by the application. The court cannot modify the decree or entirely displace it with one of its own or attempt to tell the Commission what its action should be. Except when the Commission has

excluded evidence that it should have received the cause may be remanded with directions to hear such evidence and to make an order as provided by section 5234. *State ex rel. Detroit-Chicago Motor Bus Co. v. Pub. Serv. Comm'n*, 324 Mo. 270, 23 S.W.2d 115 [1929]. The Legislature did not intend that the reviewing court should put itself in the place of the Commission, try the matter as an administrative body, weigh the evidence and substitute its judgment on the merits as that of the Commission. The sole matter for the court's attention is whether the order complained of is reasonable and lawful, and if it appears that the order is both reasonable and lawful, it must be affirmed; if it be found to be unreasonable or unlawful, it must be set aside. *State ex rel. Kansas City Power & Light Co. v. Public Service Commission*, 335 Mo. 1248, 76 S.W.2d 343 [1934].

*State ex rel. Chicago Rock Island & Pacific R.R. v. Pub. Serv. Comm'n*, 312 S.W. 2d 791 (Mo.banc 1958) (internal citation omitted.)

Review of Commission orders is a two-pronged analysis: first the appellate court determines whether the Commission's order was lawful and, second, the court determines whether the Commission's order is reasonable. *State ex rel Praxair, Inc. v. Pub. Serv. Comm'n*, 344 S.W.3d 178, 186 (Mo.banc 2011).

"The lawfulness of an order is determined 'by whether statutory authority exists, and all legal issues are reviewed de novo.'" *Praxair*, 344 S.W.3d at 184 (quoting *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 734 (Mo.banc 2003).

The reasonableness prong of the analysis depends on an analysis determining whether:

“i) the order is supported by substantial and competent evidence on the whole record, (ii) the decision is arbitrary, capricious or unreasonable, or (iii) the [PSC] abused its discretion.” *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm’n*, 328 S.W.3d 316, 318 (Mo. App. W.D. 2010)(quoting *State ex rel. Mo. Gas Energy v. Pub. Serv. Comm’n*, 186 S.W.3d 376, 381 (Mo. App. W.D. 2005).

## ARGUMENT

- I. The Commission’s Order in Docket Number EC-2013-0377 was lawful and reasonable in determining that Section 393.1050 is valid because there is no legal prohibition against the state legislature passing laws of the same subject matter or affecting an initiative in that an initiative is an independent means of passing legislation, unlike a referendum. .**

The first question posed in this appeal is whether the state legislature could lawfully pass a law, during the pendency of an initiative action under Art. III Section 49 of the Missouri Constitution, which affects certain provisions of the pending initiative. The answer is yes. This question is a question of law that is reviewed *de novo*. *Praxair*, 344 S.W.3d at 184 (quoting *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm’n*, 120 S.W.3d 732, 734 (Mo.banc 2003)).

Renew Missouri relies on *Drain v. Becker*, 240 S.W. 229 (Mo.banc 1922) in asserting that Section 393.1050 was an unlawful attempt by the state legislature to amend Proposition C. *Drain* is inapposite because that case dealt with a referendum and not an initiative. In *Drain*, the Court held that the legislature could not amend a law that was the subject of a *referendum*.

Constitutional initiatives and referendums serve explicitly different functions under the Missouri Constitution. The purpose of an initiative: “to propose and enact *or* reject laws and amendments to the *constitution*.” (emphasis added.) Mo. Const. Art. III, Sec. 49. The purpose of a referendum: “to approve or reject...any act of the general assembly.” *Id.*

The difference in purpose between a referendum and an initiative was described generally in *State ex rel. St. Louis Regional Health Care Corp. v. Wamser*:

The [initiative] is the proposal of legislation by the public.

The [referendum] is the overturning of legislation enacted by the representatives of the people. The former has no need for time limits and warrants a lesser initial support to justify submission to the voters. The latter requires strict time limits so as not to unduly delay the effectiveness of duly enacted legislation, and warrants a greater showing of initial support. The two are not, by their very nature, interchangeable. The City charter provisions are roughly comparable to the scheme established by the Missouri Constitution. Mo. Const. Art. III, Secs. 49–53. 735 S.W.2d 741.

While *St. Louis Regional Health Care Corp.* does not deal specifically with Article 3, Section 49 of the Missouri Constitution, the analysis is roughly comparable and thus instructive.

The difference in purpose of referendum and initiative renders the analysis and rationale of *Drain*, inapplicable to the passage of Section 393.1050, RSMo. A referendum is a mechanism to challenge a specific law passed by the legislature: A law is passed by the state legislature. The people do not want the law. A referendum is a mechanism outside of the state legislature to repeal that law passed by the state legislature which the people do not want.

It is logical that the legislature loses “jurisdiction” over the specific law being considered in a referendum. The referendum’s function is similar to that of an appeal court engaged in an appellate review of a circuit court or administrative agency. Analogously, the legislature or administrative agency loses “jurisdiction” of a statute or a rule after that law is put up for review through a referendum.

An initiative petition is different. With an initiative, the people step into the role of the legislature. An initiative petition is not by its nature reactive like a referendum or an appeal from an administrative agency or circuit court. It is not a defensive measure that targets a pre-existing law or action and reviews that law or action in isolation. An initiative action is proactive in nature and works simultaneously and independently with the state legislature as an alternative, and potentially simultaneous, means of passing laws. The state legislature and initiative process are not mutually exclusive mechanisms where one must switch off when then other switches on. The nature of these separate, but parallel, legislative mechanisms is confirmed by the language of Article 3, Section 49 of the Missouri Constitution, “the initiative, *independent* of the general assembly”. (emphasis added.) Section 49 does not grant a referendum the same independence from

the general assembly, because it is only a referendum, and not an initiative, that is linked directly to an act of the general assembly.

For all of these reasons, the Commission's determination in case number EC-2013-0377 that Section 393.1050 is valid should be affirmed.

**II. The Commission's Order in Docket Number EC-2013-0377 was lawful in determining that Section 393.1050 is not in irreconcilable conflict with Section 393.1030 because Section 393.1050 contains the provision "Notwithstanding any other provision of law" in that this proviso has the effect under Missouri Supreme Court precedent of harmonizing Section 393.1030 and Section 393.1050.**

The second question in this appeal is whether the words "Notwithstanding any other provision of law" in a statute are sufficient to harmonize two statutes which deal with the same subject matter. The answer is yes. This is a question of law that will be reviewed *de novo*. *Praxair*, 344 S.W.3d at 184 (quoting *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 734 (Mo.banc 2003)).

Renew Missouri's second argument is that Section 393.1050 is in irreconcilable conflict with Proposition C, and was "impliedly repealed" by Proposition C. The basis of this argument is the fact that Proposition C creates a subsidy for solar power and Section 393.1050 exempts a utility from having to pay any solar subsidy if it reaches a certain level of renewable energy.

Renew Missouri's argument is contrary to two Supreme Court of Missouri cases. First, *State ex rel. City of Jennings v. Riley* in that Section 393.1050 discusses the phrase "Notwithstanding any other provision of the law." 236 S.W.3d 630 (Mo.banc 2007). As in *Riley*, this phrase harmonizes Section 393.1030 and Section 393.1050.

Second, Renew Missouri's argument also conflicts with this Court's opinion *Berdella v. Pender*. The Court in *Berdella* states: "The general rule in Missouri is and has been that acts adopted in the same session are to be construed in harmony, and if they cannot be construed in harmony, then the more specific act takes precedence over the general." 821 S.W.2d 846, 849 (Mo.banc 1991).

In *Riley*, this Court explains, "In other words, to say that a statute applied 'notwithstanding any other provision of the law' is to say that no other provisions of law can be held in conflict with it." *Id.* at 631-32. Here, Section 393.1050 starts with the phrase, "Notwithstanding any other provision of law." Based upon this language in Section 393.1050, the Commission found that the statutes were not in conflict, because by including this phrase the statutes are harmonized. Section 393.1050 carved out a specific exemption to the more general statute, Section 393.1030.

In *Riley* this Court explains that the inclusion of the "notwithstanding" phrase eliminates any conflict with another statute unless both statutes include the phrase. "A conflict would be present, then, only if both statutes included a prefatory 'Notwithstanding' clause or if neither statute included such a clause." *Riley*, 236 S.W.3d at 632. If *both or neither* Section 393.1050 and Section 393.1030 had the "notwithstanding any other provision of the law" language then a conflict would be

present. But because Section 393.1050 did have the language and Section 393.1030 did not have the language, the effect was to harmonize the statutes by creating an exemption for utilities that hit a certain mark for renewable energy.

In *Berdella*, this Court considered a case in which the General Assembly passed two bills; H.B. 974 revoking Chapter 460 in its entirety, and the other, S.B. 563 reenacted two sections of Chapter 460. Governor Ashcroft signed H.B. 974 after signing S.B. 563. 821 S.W.2d 846, 848 (Mo. 1991). The appellants in *Berdella* argued that because H.B. 974 was signed after S.B. 563 that it repealed the reenacted sections of S.B. 563. *Id.* *Berdella* is useful in demonstrating this Court's aversion to finding that two statutes, one more specific than the other, are in conflict and the lengths the Court is willing to go to harmonize two statutes.

For all of these reasons, the Commission's determination in case number EC-2013-0377 regarding "harmonization" of Section 393.1050 and Section 393.1030 should be affirmed.

**III. The Commission’s Order in Docket Number EC-2013-0377 was lawful in determining that Section 393.1050 was not a special law because Section 393.1050 involved open-ended characteristics that did not limit the statute’s applicability to a single entity in that any utility could avail itself of the Section 393.1050 exemption if it took actions to reach a certain renewable energy goal.**

The third and final issue in this case is whether Section 393.1050 is of a sufficiently “open-character” as not to be considered a “special law” and whether there was a rational basis for the classification in the statute. The answer is yes. Section 393.1050 is not a “special law” and its classification has a rational basis. The party challenging the constitutionality of a statutory classification has the burden of demonstrating that a classification is arbitrary and lacks a rational relationship to any legislative purpose. *Treadway v. State*, 988 S.W.2d 508, 511 (Mo.banc 1999).

Section 393.1050 provides the following open-classification: “...any electric corporation as defined by subdivision 15 of section 386.020 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...”

Renew Missouri argues that this language constitutes a “special law,” alleging that the statute could only apply to Empire. This argument fails on two-levels: first, Section 393.1050 is “open-ended” in that other utilities could have availed themselves of the

solar-rebate exemption provided by the statute. Second, there is a rational basis for the open-ended characterization used in the statute.

This Court in *City of St. Louis v. State* explained that the test for whether or not a law is “special” is whether it has close-end or open-ended characteristics. 382 S.W.3d 905, 914 (Mo.banc 2012). Examples of close-end characteristics include “historical facts, geography, or constitutional status.” *Jefferson Cnty. Fire Protection Dist Ass’n v. Blunt*, 205 S.W.3d 866, 870 (Mo.banc 2006). For instance, statutes based on population are open-ended because “others may fall into the classification.” *Id.*

But *Jefferson County* cautions that open-ended characteristics could be deemed special laws if “[T]he classification is so narrow that as a practical matter others could not fall into that classification.” *Id.* The law does not require that “falling into the classification” be accomplished with equal ease and success across all potentially eligible parties. Rather the test is whether the classification is so narrow that realistically no one else could be affected. Despite Renew Missouri’s conspiracy theory that Section 393.1050 could only apply to Empire, the Commission found that *any* utility could avail itself of the Section 393.1050 exemption if the utility “made the effort to comply.” (LF 246).

Further the Commission found a rational-basis for Section 393.1050: “Section 393.1050 is 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.” (LF 246).

If the Court does find that the statute is not facially special, then the “burden is on the party challenging the constitutionality of the statute to show that the statutory classification is arbitrary and without a rational relationship to a legislative purpose.” *Jefferson Cnty.*, 205 S.W.3d at 870. Renew Missouri has failed to meet this burden. Additionally, because of the 2013 amendment to Section 393.1030, the issue presented in this point and, in fact, this entire appeal will become moot as the solar-rebates are phased-out by 2020.

For all of these reasons, the Commission’s determination that Section 393.1050 is not a “special law” in case number EC-2013-0377 should be affirmed.

### CONCLUSION

For the above reasons, the Commission respectfully requests that its order granting summary determination be affirmed in its entirety. 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 3841 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 29<sup>th</sup> day of May, 2014 to:

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