

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

JAMES EVANS, ET AL.

APPELLANTS,

**v.
EMPIRE DISTRICT ELECTRIC
COMPANY, ET AL.**

RESPONDENTS.

DOCKET NUMBER WD73376

DATE: May 31, 2011

Appeal From:

Cole County Circuit Court
The Honorable Paul C. Wilson, Judge

Appellate Judges:

Division One: Gary D. Witt, Presiding Judge, James E. Welsh, Judge and Alok Ahuja, Judge

Attorneys:

Henry B. Robertson, St. Louis, MO, for appellants.

Diana C. Carter, Jefferson City, MO for respondent Empire District Electric Company
James R. Layton, Jefferson City, MO, for respondent Missouri Public Service Commission.

MISSOURI APPELLATE COURT OPINION SUMMARY

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v.

**EMPIRE DISTRICT ELECTRIC
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RESPONDENTS.

No. WD73376

Cole County

Before Division One: Gary D. Witt, Presiding Judge, James E. Welsh, Judge and Alok Ahuja, Judge

James Evans, Kelly Cardin, and Power Source Solar appeal the circuit court's Final Judgment of Dismissal of their claims against Empire District Electric Company and the Missouri Public Service Commission.

WE AFFIRM.

Division One holds:

Plaintiffs filed suit against Empire District Electric Company and the Missouri Public Service Commission seeking a declaratory judgment that Missouri's Renewable Energy Standard, section 393.1050, is invalid. The trial court granted Empire's Motion to Dismiss on the grounds that the PSC has "primary jurisdiction" over Empire and the application of section 393.1050. Plaintiffs now appeal.

First, the issue of whether the circuit court has the statutory authority to proceed before the matter is brought before the PSC should be raised as an affirmative defense. However, where, as here, it appears from the face of the petition that an affirmative defense is applicable, a defendant may properly file a motion to dismiss for failure to state a claim under Rule 55.27(a)(6).

In Point One, Appellants argue that the trial court erred in granting Empire's Motion to Dismiss because Appellants have no adequate remedy to exhaust before the PSC. Contrary to 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. Point One is denied.

In Point Two, Appellants argue the trial court abused its discretion in granting the PSC's motion to dismiss because the PSC is an interest party required to be joined under section 527.110. For the reasons stated in Point One, the trial court did not err in dismissing the Petition as against the PSC on this basis as well.

Opinion by Gary D. Witt, Judge

May 31, 2011

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