

IN THE SUPREME COURT OF MISSOURI

EARTH ISLAND INSTITUTE,
d/b/a RENEW MISSOURI

Appellant,

v.

EMPIRE DISTRICT ELECTRIC CO.

Respondent,

and

MISSOURI PUBLIC SERVICE COMMISSION,

Intervenor- Respondent

No. SC93944

ON WRIT OF REVIEW TO THE
MISSOURI PUBLIC SERVICE COMMISSION

APPELLANT'S REPLY BRIEF

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JURISDICTIONAL STATEMENT

Both respondents make half-hearted attempts to contest this Court’s jurisdiction. Empire contends that the Court of Appeals has jurisdiction, citing *State ex rel. Doniphan Telephone Co. v. Public Service Commission*, 369 S.W.2d 572 (Mo. 1963); and *State ex rel. Missouri-Kansas-Texas Railroad Company v. Public Service Commission*, 378 S.W.2d 459 (Mo. 1964). Both cases hold that simply citing state and federal constitutional provisions does not render the case one of “construction” of those constitutions. *Doniphan*, 369 S.W.2d at 575; *M. K. T.*, 378 S.W.2d at 462–4. The references in those cases to the statutes defining the PSC’s powers should be understood simply as meaning the statutes the PSC is empowered to enforce, as the Court of Appeals did in *Evans v. Empire*, 346 S.W.3d 313, 318, with specific reference to Chapter 393. Section 393.1050 does affect the PSC’s powers by removing its enforcement authority over Empire as it concerns the RES’s solar obligations.

Both respondents make some attempt to distinguish the challenge to § 393.1050 from the challenge to the PSC’s order (Empire brief 4; PSC brief 1). Certainly without the order there would be nothing to review, but where the substance of the order concerns the validity of a statute, the Supreme Court unquestionably has jurisdiction and the appeal should go directly to the court having jurisdiction. Article V, §§ 3 and 11. The Commission having construed the statute, this Court must correct its errors of law. *State ex rel. Sprint Missouri v. PSC*, 165 S.W.3d 160, 164 (Mo. banc 2005).

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)

Dubyak v. Kovach, 164 Ohio St. 247, 129 N.E.2d 809 (1955)

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.

Edwards v. St. Louis County, 429 S.W.2d 718 (Mo. banc 1968)

Leonard v. District of Columbia, 794 A.2d 618 (D.C.App. 2002)

State v. Lawler, 144 Or.App. 456, 927 P.2d 99 (1996)

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.

State ex rel. Major v. Ryan, 232 Mo. 27, 133 S.W. 8 (1910)

State ex rel. Wallace v. Summers, 227 Mo.App. 782, 9 S.W.2d 867 (W.D. 1928)

Treadway v. State, 988 S.W.2d 508 (Mo. banc 1999)

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.

Empire points out (brief p. 12) that the people’s power of initiative is “independent of the general assembly.” Mo. Constitution, Art. III, § 49. This is precisely why the general assembly may not interfere by attempting to amend an initiative during the process of enactment. *Oklahoma Tax Commission v. Smith*, 610 P.2d 794, 807 (Okla. 1980), interpreting the same “independent of” the legislature language. The possibility that the initiative might not pass serves to “accentuate the absurdity” of the attempt. *State ex rel. Drain v. Becker*, 240 S.W. 229, 232 (Mo. banc 1922).

Both respondents continue to insist on the difference between initiative and referendum, pointing to the differences in timeline and signature requirements (Empire

Brief 11; PSC brief 10). These procedural matters are irrelevant, as the Oklahoma Supreme Court pointed out, *loc. cit.* The argument is refuted by the plain text of the constitution: “The people reserve power to propose and enact **or reject laws** and amendments to the constitution by the initiative, independent of the general assembly...” Mo. Constitution, Article III, § 49 (emphasis added).

A law can be repealed by a new law passed by the initiative as well as by the referendum. *Dubyak v. Kovach*, 164 Ohio St. 247, 129 N.E.2d 809, 813 (1955); *In re Initiative Petition No. 347, State Question 639*, 813 P.2d 1019, 1023 (Okla. 1991).

The PSC (brief, p. 11; also Empire brief 12) analogizes that “the legislature or administrative agency loses ‘jurisdiction’ of a statute or a rule after that law is put up for review through a referendum.” It follows that the legislature never *had* “jurisdiction” over an initiative before its enactment.

The consequence of respondents’ position is that the supporters of Proposition C would have had to file a separate referendum petition against § 393.1050 and complete the petition drive within 90 days of the end of the legislative session, in the midst of the initiative campaign. Mo. Constitution, Article III, § 52(b). Endorsing this argument would impose an undue burden on the exercise of the right of initiative and create an opening for the General Assembly to encumber initiative campaigns with amendments that would have to be separately referred.

Empire asserts (brief pp. 9–10) that “§393.1050 does not in any way modify the portfolio standards established by Proposition C,” i.e. the goals for renewable electricity set as percentages of sales. This suggests that the legislature may amend a pending

initiative as long as the amendment does not touch some vaguely conceived essence of the initiative. The rule in *Drain*, 240 S.W. at 232, applies to any “amendment” or attempt to “modify” the law in question. Anyway, § 393.1050 did modify the portfolio standard by making the 2% solar portfolio standard or “carve-out” inapplicable in Empire’s service territory. (“At least two percent of each portfolio requirement shall be derived from solar energy.” § 393.1030.1, RSMo; A17.)

Empire urges the Court to disregard the Oklahoma cases. They are not binding on this Court but cited for their persuasive effect. Before tossing them out as mere *dicta*, the Court should consider their reasoning. *In re Initiative Petition No. 347, State Question 639*, 813 P.2d 1019 (Okla. 1991), did not ultimately reach the question, but it did say, “However, the effect of Senate Bill 711 may directly change the essence of a question before the people in an initiative petition, which is not permitted,” 813 P.2d at 1029.

Oklahoma Tax Commission v. Smith, 610 P.2d 794, 806–7 (Okla. 1980), may be distinguishable, but this Court should consider it persuasive:

“The House Bill 1484 did not change the question initiated however, but simply amended a separate taxation statute. Both acts encompassed the same subject. Had both passed they would have both constituted positive law, and in the case of irreconcilable conflict, the act passed last would be determinative. The point made in *In re Referendum* [203 Okl. 298, 220 P.2d 454 (1959)] is correct but not applicable to the facts here, although it does state a principle applicable to initiative measures, and that is that the Legislature may not validly change the question before the electorate.

Had HB 1484 purported to amend the provisions of State Question 539 it would have been null and void.” 610 P.2d at 807.

The case points to the same result Renew Missouri seeks here—§ 393.1050 was unlawfully enacted and it was repealed by the passage of Proposition C.

Empire is in no position to argue that § 393.1050 did not amend Proposition C, since Empire has convinced the PSC that it did. Indeed, Empire admits as much by stating that “§393.1050 applies to ‘*any* installation subsidy, fee, or rebate’ and to ‘*any* mandated solar renewable energy standard requirements’ – not **only** to requirements created by Proposition C.” (Empire brief 10, bold added.) It is more than a “related” measure even if it could also apply to some hypothetical, non-existent, other solar requirements.

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 Commission (brief at 12) pins its argument entirely on the initial clause, “Notwithstanding any other provision of law.” But § 393.1050 is not a constitutional provision, and no mere statute can make itself irrepealable by any later statute.

Respondents rely on *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631–2 (Mo. banc 2007), as holding that a notwithstanding clause eliminates any conflict (Empire brief 17; PSC brief 13). In *Riley* it was the later statute, § 508.010.4, RSMo. Supp. 2005, that had the notwithstanding clause and prevailed over § 508.050, RSMo. 2000. Courts seldom find it necessary to state explicitly that the notwithstanding clause applies only to earlier, existing legislation, but there are cases that do so, e.g. *Leonard v. District of Columbia*, 794 A.2d 618, 626 (D.C.App. 2002); *State v. Lawler*, 144 Or.App. 456, 927 P.2d 99, 104 (1996).

Both respondents (Empire brief 15; PSC brief 13) discuss *Berdella v. Pender*, 821

S.W.2d 846 (Mo. banc 1991), without mentioning an essential holding of that case: when two laws are passed at the same legislative session, the “later in time” rule for repeal does not apply. 821 S.W.2d at 849. The Court succeeded in harmonizing the laws at issue there, but it noted that the laws would be read *in pari materia*, and the later-enacted would still repeal the former in the case of inherent conflict.

Empire’s attempt to distinguish *State ex rel. City of Springfield v. Smith*, 344 Mo. 150, 125 S.W.2d 883 (Mo. banc 1939), and enlist it in their favor (brief at 18) fails for the same reason. The Court said: “where the general act is later, the special will be construed as remaining an exception to its terms, *unless it is repealed* in express words or *by necessary implication*. 125 S.W.2d at 885 (emphasis added).

Empire’s attempt (brief 18) to distinguish *St. Joseph Board of Public Schools v. Gaylord*, 86 Mo. 401 (1885), is also ineffective. Empire is trying to use the notwithstanding clause in § 393.1050 to do exactly what the Court said a statute cannot do: immunize itself from repeal by later legislation. 86 Mo. at 406.

Empire invokes the rule of construction for statutes that are *in pari materia* (brief, 15), which states that statutes on the same subject “are intended to be read consistently and harmoniously in their several parts and provisions.” *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. banc 1991). Section 393.1050 cannot be said to have any “several parts and provisions” to be harmonized. It is not a stand-alone statute. If it is to be saved at all, it can only be as a specific law that survives as an exception to a later, general law (Empire brief at 14–5), but this argument also fails.

In that situation a repeal by implication still takes place where “the two are in irreconcilable conflict, or are patently inconsistent [citation omitted], and the legislative intention to supersede the local law and to prescribe one single authoritative rule which shall govern in all cases is made clearly manifest.” *Edwards v. St. Louis County*, 429 S.W.2d 718, 722 (Mo. banc 1968). In *Edwards* the Court held that a statute setting the maximum interest rate for bonds issued by any political subdivision, including counties, repealed an earlier, “special” law setting a lower maximum interest rate for counties only. *Id., loc. cit.* By the same token, a law applicable to all public utilities supersedes one that applies to less than all.

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.

Empire justifies its exemption thus (brief at 20–21): “Without the exemption, utilities like Empire would be forced to pay solar subsidies and rebates, when their ratepayers had already borne the cost of achieving the 15 percent renewable energy technology nameplate capacity.” This past achievement is the kind of historical fact or “immutable characteristic” that makes a law special. *Treadway v. State*, 988 S.W.2d 508, 510 (Mo. banc 1999).

The courts have held, with reference to population classifications, that a political subdivision must be able to grow into the class if its population increases, or grow out of it if its population decreases. *State ex rel. Wallace v. Summers*, 227 Mo.App. 782, 9 S.W.2d 867, 868 (W.D. 1928). “Once in, always in, is a dogma we do not subscribe to,” *State ex rel. Major v. Ryan*, 232 Mo. 27, 133 S.W. 8, 12 (Mo. banc 1910).

This exposes another defect in the January, 20, 2009 cut-off date and shows why it is a closed-ended classification. Empire could thereafter divest itself of all its renewable generating capacity and cease to meet the renewable energy standard, yet it would continue to be exempt from the solar requirements. It would then fall out of the virtuous class of 15% renewable generators without suffering the consequence of non-membership in the class. There is no rational basis for such a classification.

The classification is not commensurate with the RES to begin with. The solar exemption is tied to renewable generating *capacity* while the RES is based on sales, i.e. on electricity actually generated. § 393.1030.1, RSMo; A17. Possession of generating capacity is meaningless unless that capacity is being used to generate the amounts of renewable energy required by the RES. Under § 393.1050, Empire could escape the generation requirement. There is no rational basis for a privilege that has such a fragile relationship to the larger statutory purpose Empire claims to be serving. Empire is not entitled to exemption “unless some reason exists for the distinction having a just relation to the object to be accomplished.” *State ex inf. Taylor v. Currency Services*, 358 Mo. 983, 218 S.W.2d 600, 605 (Mo. banc 1949).

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 reply brief complies with the limitations of Rule 84.06(b), containing 3,415 words and 432 lines all-inclusive.

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Certificate of Service

Counsel for Appellant has made service of this brief on all other counsel of record by way of electronic filing on this 11th day of June, 2014.

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