IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel. MISSOURI COALITION FOR THE ENVIRONMENT, et al.	)	
Appellants,	)	**No. SC95546**
vs.	)	
JOINT COMMITTEE ON ADMINISTRATIVE RULES, et al.,	)	
Respondents.	)	

On Appeal from the Circuit Court of Cole County
Nineteenth Judicial Circuit Court, Division IV,
The Hon. Patricia S. Joyce
No. 14AC-CC00133

Brief of Respondents Joint Committee on Administrative Rules and the Honorable Governor Jeremiah Nixon

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JURISDICTIONAL STATEMENT

This appeal arises out of a judgment by the Circuit Court of Cole County, Missouri. The Supreme Court has exclusive appellate authority over this matter because it involves the validity of Missouri Statutes. Missouri Constitution, Article V, § 3.

STATEMENT OF FACTS

Although the Relator-Plaintiffs' Statement of Facts contains the relevant facts, it does so through a maze of mixed legal argument with irrelevant factual statements. For clarity and focus therefore, the Joint Committee on Administrative Rules, its members and Governor Nixon offer this statement of facts which contains only the undisputed facts material to this case.

In 2008, Proposition C was passed through a statewide initiative. (L.F. III, 516). Proposition C was codified as Mo. Rev. Stat. § 393.1030. (L.F. III, 516). That statute directed the Public Service Commission to promulgate rules to enforce the statute. (L.F. III, 516). On January 8, 2010, the Public Service Commission ("Commission") submitted a Proposed Order of Rule Making to the Secretary of State and the Joint Committee on Administrative Rules ("JCAR"). (L.F. II, 277-325). That proposed rule included sections 4 CSR 240-20.100 (2)(A) and (2)(B)2, otherwise known as the geographic sourcing provisions. (L.F. II, 289-309).

On June 2, 2010, the Commission filed its final order of rulemaking with the Secretary of State and JCAR. (L.F. III, 395-457). JCAR then convened a hearing on the final order of rulemaking. (L.F. I, 066; L.F. III, 498). Afterwards, JCAR voted to disapprove the two "geographic sourcing" provisions of 4 CSR 240-20.100 (2)(A) and (2)(B)2. (L.F. I 067, 086; L.F. III,

498). On the same date, the Commission voted to file a Revised Order of Rulemaking with the Secretary of State and JCAR. That order was transmitted to the Secretary of State and JCAR on July 6, 2010. (L.F. II, 332). The Revised Rule did not contain the two "geographic sourcing" provisions. (L.F. II, 330). The transmittal letter requested that the Secretary of State hold the two "geographic sourcing" provisions as reserved "for later use in the event the Commission decides to amend the rule." (L.F. II, 332). On August 16, 2011, the Secretary of State published the revised order in the Missouri Register, with the two "geographic sourcing" provisions designated as "Reserved." (L.F. I, 37).

On January 26, 2011, the Commission issued an "Order Withdrawing Geographic Sourcing Provisions (2)(A) and (2)(B)2 of 4 CSR 240-20.100 Pursuant to the Actions of JCAR." (L.F. III, 473-474). The General Assembly passed Concurrent Resolution No. 1 (CR 1) on February 1, 2011. (L.F. III, 498-99). CR 1, passed by both houses of the General Assembly, "permanently disapproves and suspends the final order of rulemaking" for the "geographic sourcing provisions." (L.F. III, 498-99). CR 1 also instructed the Secretary of State to not publish those sections of 4 CSR 240-20.100. (L.F. 498-99). Governor Nixon received CR 1 on February 7, 2011. (L.F. III, 497). Governor Nixon chose to not to sign or veto CR 1 because the Commission's order

withdrawing the "geographic sourcing" provisions rendered CR 1 moot. (L.F. III, 497).

Plaintiff-Relators then filed this suit in the Circuit Court of St. Louis County on August 19, 2013. (L.F. I, 14-32). Venue was later transferred to the Circuit Court of Cole County. (L.F. I, 2). The Circuit Court granted the Commission's Motion for Summary Judgment and denied the Relator-Plaintiff's motion on May 20, 2015. (L.F. III, 515-21). The Relator-Plaintiffs' appeal of that decision was dismissed for lack of a final judgment. (L.F. III, 522). The Circuit Court again entered judgment on January 11, 2016 holding that the case was moot. (L.F. III, 522). The Relator-Plaintiffs' now appeal that order.

ARGUMENT

I. This case was originally moot when filed because the Public Service Commission withdrew and amended the rule before suit was ever filed and alternatively became moot when the Public Service Commission promulgated a new rule that superseded the rule in question in this case. (Responding to Point III of Appellant's Brief)

JCAR and the Governor address Appellant's Points Relied On out of order because if the controversy is moot for either of the reasons advanced by JCAR and the Governor there is no need to consider any of the other points raised.

Mootness is an issue of justiciability. *State el rel Reed v. Reardon*, 41 S.W.3d 470, 473 (M0. 2001). "As such, before addressing the merits of the appellants appeal we initially address whether the case is moot…" *Id.* (Internal citation omitted). "When an event occurs that makes a court's decisions unnecessary or makes granting effectual relief impossible, the case is moot and should be dismissed." *Dotson v. Kander*, 435 S.W.3d 643, 644 (Mo. 2014). "(Courts) do not decide questions of law disconnected from the granting of actual relief. An issue that is moot is not subject to consideration." *State ex rel. Missouri Energy Development Ass'n v. Public*

Service Com'n, 386 S.W.3d 165, 176 (Mo. Ct. App. 2012). Courts in Missouri generally do not decide moot controversies or give advisory opinions. *Friends of the San Luis, Inc. v. Archdiocese of St. Louis,* 312 S.W.3d 476, 483 (Mo. Ct. App. 2010).

Because there is no effectual relief to be granted here the case should be dismissed as moot.

After the Missouri Court of Appeals held that the rule without "geographic sourcing" provisions became effective April 1, 2011 (*State ex rel. Missouri Energy Development Ass'n v. Public Service Commission*, 386 S.W. 3d 165, 176 (2012)), Appellants filed this suit attacking the Public Service Commission's response to JCAR's disapproval of the initial proposed rule which included the sourcing provisions. In the previous challenge to the 2010 version of this regulation, the Western District Court of Appeals noted that once the 2010 version became effective, the PSC would have to engage in the rule-making process laid out in Mo. Rev. Stat. § 536.021. *Id*. At 176-177. The PSC so engaged in that process and promulgated a new 4 C.S.R. 20-100.

The new regulation, 4 C.S.R. 20.100, was published in the Code of State Regulations on October 31, 2015. This new version of 4 C.S.R. 20.100 did not include the "geographic sourcing" provisions that are the subject of this litigation. 4 C.S.R. 20.100. The Appellants have not alleged that there was

anything improper in the process by which the PSC promulgated the 2015 version of 4 C.S.R. 20-100. Nor have the Appellants alleged that JCAR took any unconstitutional actions with regard to the new 2015 regulation. That the new regulation does not include the "geographic sourcing" provisions, or references the previous process in a comment does not change that a new rule has been promulgated.

Appellants' argument that this Court must strike the 2015 regulation because a comment makes reference to JCAR's actions regarding the 2010 rule is illogical and lacks legal support. A comment is not part of the rule itself. Section 536.021.6(4) only requires "[a] brief summary of the general nature and extent of the comments submitted in support of or in opposition to the proposed rule…" "The purpose of the notice and comment procedures is to provide information to the agency through statements of those in support of or in opposition to the proposed rule." *NME Hospitals, Inc. v. Dep't of Soc. Servs., Div. of Med. Servs.*, 805 S.W.2d 71,74 (Mo. 1983). Moreover, it would be totally illogical to accept Appellants' view of the effect of that comment. First Appellants do not dispute that the full General Assembly could pass legislation pursuant to the provisions of Article III rejecting the "geographic sourcing" provisions. And although an agency is required by law to at least consider comments to proposed rules (and possibly change a proposal) it would be impossible for it do so in response to a legislative comment. Thus if

any legislative comment, whether right, wrong, constitutional, or unconstitutional, was made the agency would be required to totally ignore it. JCAR I invalidated the legislative veto by JCAR of a proposed regulation. Whether or not the ills criticized in JCAR I were cured by legislative amendments and executive order are irrelevant here. That *was not the process* followed by the 2015 rule. It is undisputed that the PSC properly promulgated a new rule that supersedes the 2010 version. Because the allegations in this case are based on actions taken by JCAR on the 2010 version of the rule, which is no longer in effect, the issues in this case are moot.

The current litigation is not a proper method for Appellants to legislate their goals. Appellants may believe that the purpose of Prop C would be better served by the inclusion of geographic sourcing provisions but have other proper remedies by means of initiative or legislative or agency persuasion to achieve that goal. Therefore, this case should be dismissed.

II. Even if the promulgation of the 2015 rule is not considered to render this case moot the 2015 rule is a valid exercise of the PSC's rule making powers because it did not result from any process of legislative veto or application of alleged unconstitutional provisions in Chapter 536 or Executive Order 97-97.

The 2015 rule stands alone and independent of any of the deficiencies raised in Point Relied on I of Appellants' brief. JCAR and the Governor incorporate by reference their arguments above relating to mootness. They also point out that Appellants sought a rule making process unfettered by the so-called legislative veto condemned in JCAR I. That is exactly what they have received whether they like the result or not. Although there is no evidence why the PSC proceeded to enact a new rule while this suit is pending its motivations are irrelevant. There is no prohibition against a defendant looking at arguments made in a pending suit and deciding maybe they're right and correcting the deficiency. Appellants want to play a game of "gotcha" prohibiting the PSC from acceding to the relief Appellants seek. There is no legal justification for a court to agree and punish a party for voluntarily doing what the opposing party requests.

III. Sections 536.019, 536.021, 536.028, 536.073 and EO 97-97 are proper exercises of legislative and executive powers and not unconstitutional. Moreover the withdrawal of portions of the 2010 rule mooted Appellants' claim before it was filed. The one line mention of encroachment upon judicial powers is an argument not raised below, is improperly included in Point Relied I, is not developed in the brief and should be disregarded. (Responding to Point I of Appellant's Brief)

One initial difficulty in responding to Point I is the failure of Appellants to precisely designate the exact parts of these statutes that they consider unconstitutional. Presumably they refer to any word, phrase, clause or sentence that deals with suspension of any proposed administrative rule or review by JCAR or the General Assembly. They base their constitutional argument on JCAR I and its discussion of violation of the separation of powers. The separation at issue was legislative power versus executive power. Appellants completely fail to explain how an executive order of the governor (the head of the executive branch) can somehow violate the powers of the executive branch. Because no legal argument is advanced EO 97-97 should remain untouched.

This failure to successfully attack EO 97-97 should be sufficient to deny Appellants' claims without reaching any constitutional issue. EO 97-97 is at

the very least an expression of the executive branch that it wishes to give the legislative branch sufficient time provide input concerning proposed rules given that the legislature is only in session a few months of each year. Appellants do not contend that the legislature has no right to comment on proposed rules as it acknowledges that the General Assembly can completely reject a rule by the bill passage process. There is no constitutional reason why that should be the only alternative means for legislative input. This is recognized by EO 97-97 which directs agencies to give time for input. Although the order directs agencies to abide by alleged unconstitutional legislative vetoes there is no constitutional or other legal argument that an executive agency cannot accept and accommodate negative input from the legislative branch as it can with any comments by non-governmental interested parties. Appellants do not claim that an agency cannot amend or even withdraw a proposed rule before it becomes final. Nor do they contend that the legislature cannot establish time deadlines and tolling provisions for finality of proposed rulemaking. Whether called "legislative veto" or consideration of legislative comments the promulgation of the 2010 version of the RES regulation was proper and constitutional.

All issues regarding JCAR were already mooted by the PSC's January 26, 2011 withdrawal of the geographic sourcing provisions.

The issues in this case originally became moot on January 26, 2011, when the PSC voluntarily withdrew the disallowed provisions of the rule it had previously promulgated. This occurred before the General Assembly adopted its Concurrent Resolution 1. Under § 536.021.5, the PSC has ninety days after the expiration of time for public comment to file with the Secretary of State the final order of rulemaking. That same section also states that the ninety day time period shall be tolled for the time that any rule is held under abeyance. Section 536.021.5.

The PSC held a hearing on the proposed rule CSR 240-20.100 on April 6, 2010. (L.F. I, 066). On July 1, 2010, 86 days later, JCAR voted to disapprove two sections of proposed CSR 240-20.100, subsection (2)(A) and paragraph (2)(B)2. (*See* L.F.I, 067). Under section 536.021.5, the time to withdraw was tolled once JCAR voted to disapprove the provisions. Mo. Rev. Stat. § 536.021.5 ("[S]uch ninety days shall be tolled for the time period any rule is held under abeyance pursuant to an executive order.") On January 26, 2011, the PSC issued an order withdrawing the two provisions that had been disapproved. (L.F. III, 471). Even if this Court finds that JCAR's exercise of authority over administrative rules is unconstitutional, it will be unable to

grant Relator-Plaintiffs the relief they request because the PSC voluntarily withdrew the challenged provisions of 4 CSR 240-20.100. Consequently, there is no issue ripe for adjudication, and this Court should affirm the order of the circuit court dismissing this case.

JCAR did not exercise an unconstitutional veto.

By voting to disapprove two provisions of the rule that PSC promulgated, JCAR did not exercise an unconstitutional veto. Legislation passed subsequent to the Supreme Court's ruling in *Missouri Coalition for the Environment et al., v. Joint Committee on Administrative Rules, et al.*, 948 S.W.2d 125, 134 (Mo. 1997) requires that for any rule to be disallowed, a Concurrent Resolution must be passed by the Missouri General assembly. *See* Mo. Rev. Stat. 536.021. A Concurrent Resolution is required to be presented to the Governor for his signature before it becomes effective, and is effectively a new piece of legislation that amends or supplements the original law to control the executive branch. Mo. Const. Art. IV, sec. 49; *See Missouri Coalition for the Environment*, 948 S.W.2d at 134. Consequently, JCAR is not exercising an unconstitutional veto by disapproving rules, and this Court should affirm the order dismissing this case.

The action of JCAR and the Missouri General Assembly is a subsequent legislative action and is not a unilateral legislative veto.

The prohibition on the legislative veto comes from the constitution's requirement that government powers be divided amongst the three branches of government. Mo. Const. Art. II, Sec. 1. However, "[i]n practice, the functional lines between the two political departments are not hard, impenetrable ones. There is a necessary overlap between the functions of the departments of government. This is nowhere more evident than in the administrative law area, where the legislature delegates rule-making authority to executive expertise." *State Auditor v. Joint Committee on Legislative Research, et al.*, 956 S.W.2d 228, 321 (Mo. 1997). "The legislature may not unilaterally control execution of rulemaking authority after its delegation of rulemaking power, regardless of whether it does so by suspension, revocation, or prior approval of administrative rules." *Missouri Coalition for the Environment*, 948 S.W.2d at 134. "Once the legislature 'makes its choice in enacting legislation, its participation ends.'" *Id.; citing Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986).

Although it is clear the legislature may not act unilaterally, "[i]t may, of course, attempt to control the executive branch by passing amendatory or supplemental legislation and presenting such legislation to the governor for

signature or veto, or, by the power of appropriation." *Missouri Coalition for the Environment*, 948 S.W.2d at 134. In this case, the process of disapproving a provision of a promulgated rule is a process for the legislature to pass subsequent legislation directed at the provisions the legislature wishes to prevent from becoming effective. "A preemptive action of the legislature, whether such action be suspension of a rule, revocation of a rule, or prior approval of a proposed rule must be a legislative action. For, if such action is not legislative, the legislature has no right to do it." *Id*.

The process for the legislature to disallow a provision begins with JCAR, made up of members of both houses voting on a measure. Mo. Rev. Stat. 536.021.1. If the measure is passed, it goes to both houses of the Missouri General Assembly to be voted on as a concurrent resolution. *Id.* A concurrent resolution is required to be presented to the governor before it becomes effective. *Id*., Mo. Const. Art. IV, § 8. Article IV, section 8 even states that a concurrent resolution "shall be proceeded upon in the same manner as in the case of a bill." To disallow any provision of any rule that the PSC or any other executive agency promulgates is not a unilateral action by the legislature, but a properly passed legislative action that requires presentment and approval from the Governor.

The authority of JCAR to review rules promulgated by executive agencies does not violate the separation of powers by usurping the power of the judiciary.

Furthermore, because this is a subsequent legislative action, the Missouri General assembly is not encroaching on the powers of the judiciary. "The separation of powers mandate is primarily concerned with separating the powers constitutionally assigned to one department of government, not with prohibiting one department from exercising the functions normally associated with another." *Corvera Abatement Technologies, Inc., v. Air Conservation Commission, et al.*, 973 S.W.2d 851, 857 (Mo. 1998) (Internal citations omitted.) "The authority that the constitution places exclusively in the judicial department has at least two components—judicial review and the power of courts to decide issues and pronounce and enforce judgments." *Chastain v. Chastain*, 932 S.W.2d 396, 399 (Mo. 1996). That the legislature reviews administrative rules for the purpose of determining whether subsequent legislative action is needed does not usurp the power of the judiciary granted under Article II. Therefore, JCAR's authority to review rules promulgated by executive agencies does not violate Article II, section 1 of the Missouri constitution, and this Court should affirm the Circuit Court's order dismissing this case.

IV. The trial court properly dismissed the Appellants' petition because JCAR does have the authority to review the rules promulgated under this statute.

JCAR had the authority to review the rules under this statute. JCAR has authority over rules promulgated by the PSC through Mo. Rev. Stat. § 386.125. That section was passed through Senate Bill 237 ("SB 237") in 2005[1]. Section 386.125 requires that all rules promulgated by the PSC must be done through the procedures set forth in Chapter 536, which includes the requirement to submit rules to JCAR. *See* Mo. Rev. Stat. § 536.024.

Relator-Plaintiffs assert that the PSC should not have submitted 4 CSR 20-100 to JCAR because § 536.021.1 begins with "[w]hen the general assembly authorizes any state agency to adopt administrative rules…" the PSC had no authority to submit the proposed rule that arose out of a statute passed by initiative. A law cannot require a governmental agency to violate another provision of law. Section 386.125 specifically requires the PSC to comply with the provisions of chapter 536 for any" rule or portion of a rule… that is created under authority delegated to the public service commission"

[1] Relator-Plaintiffs do not assert an argument challenging the constitutionality of § 386.125, therefore, these Respondents will treat that claim as abandoned.

Mo. Rev. Stat. § 386.125. Section 393.1030 did not include any specific exception for the PSC, or any alternative process for the PSC to follow in promulgating its rules under that statute. The PSC, then had no choice but to follow the procedure for rulemaking that is provided by statute. *See* Mo. Rev. Stat. § 386.125. Under § 386.125, JCAR has the authority to review rules proposed by the PSC. Consequently, JCAR had authority to review the rule passed by JCAR before it became effective, and this Court should affirm the district court's order dismissing this case.

CONCLUSION

For the reasons stated above, Respondents the Joint Committee on Administrative Rules, its individual members, and the Honorable Governor Jeremiah Nixon request this Court's decision affirming the decision of the Circuit Court of Cole County.

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CERTIFICATES OF SERVICE AND COMPLIANCE

I hereby certify that I filed electronically and served via Missouri Case.Net this Brief of Respondents Joint Committee on Administrative Rules, its members, and the Honorable Governor Jeremiah Nixon on this first day of July, 2016 upon Counsel of Record.

I hereby certify that this brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 4,041 words exclusive of cover, signature block, and certificates.

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