IN THE SUPREME COURT OF MISSOURI

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

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

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Missouri Constitution

Executive Order

POINTS RELIED ON

I

The trial court erred in dismissing the petition because the case is not moot in that (a) the revised PSC rule perpetuates the error in the original rule by again omitting the contested paragraphs; and (b) the Court can issue effectual relief by an order in mandamus compelling the Secretary of State to publish the geographic sourcing provisions. (Responding to PSC Point I, JCAR Points I and II, and the Secretary of State's brief.)

Missouri Coalition for the Environment v. Joint Committee on Administrative Rules, 948 S.W.2d 125 (Mo. banc 1997)

Rice v. Griffith, 349 Mo. 373, 161 S.W.2d 220 (1942)

State ex rel. Nesbit v. Lasky, 546 S.W.2d 51 (Mo.App. E.D. 1977)

II

The trial court erred in dismissing Count I of the petition because the Joint Committee on Administrative Rules had no authority to review and disapprove of any part of the Renewable Energy Standard rule in that JCAR's authority is limited by § 536.024.1, RSMo, to acting "When the general assembly authorizes any state agency to adopt administrative rules or regulations," but the delegation of rulemaking authority for the Renewable Energy Standard was granted by ballot initiative and not by the general assembly. (Responding to JCAR Point IV and PSC Point II.)

Section 536.024, RSMo

III

The trial court erred in dismissing the petition because the case is not moot in that the Commission did not voluntarily withdraw the geographic sourcing provisions and was not free to change its final order of rulemaking, which had been promulgated when it was filed with the Secretary of State. (Responding to JCAR Point III and PSC Point II.)

Missouri Coalition for the Environment v. Joint Committee on Administrative Rules, 948 S.W.2d 125 (Mo. banc 1997)

§ 536.021.5, RSMo

IV

The trial court erred in dismissing the petition because the legislative veto exercised by JCAR and the full legislature with the agreement of the governor violated the separation of powers in Article II, Section 1 of the Missouri Constitution in that the legislature did not limit itself to offering comment or input; the governor inevitably violated the separation of powers by acquiescing in the legislature's violation; and JCAR usurped the power of the judiciary to decide the meaning and validity of statutes. (Responding to JCAR's Point III.)

Missouri Coalition for the Environment v. Joint Committee on Administrative Rules, 948 S.W.2d 125 (Mo. banc 1997)

State ex rel. Missouri Energy Development Ass'n v. PSC, 386 S.W.3d 165 (Mo.App. W.D. 2012)

State v. Raccagno, 530 S.W.2d 699 (Mo. 1974)

ARGUMENT

Not one respondent defends the legislative veto. JCAR concedes that it is unconstitutional (JCAR Brief pp. 8, 14–5). JCAR and the PSC between them make essentially three arguments in an attempt to evade review:

1. The PSC's 2015 revision of the rule insulates the original rule from review despite the fact that the new rule preserves the issues on appeal.
2. The PSC "voluntarily" disavowed the paragraphs disapproved by JCAR as if JCAR did not exist.
3. The legislative veto in Chapter 536 is not a veto, merely a vehicle for legislative "input" and "comment," despite the legislative mandate not to publish disapproved rules.

To the extent that JCAR defends the statutory plan for a legislative veto on the merits, Appellants deal with these arguments in Point IV below.

I

The trial court erred in dismissing the petition because the case is not moot in that (a) the revised PSC rule perpetuates the error in the original rule by again omitting the contested paragraphs; and (b) the Court can issue effectual relief by an order in mandamus compelling the Secretary of State to publish the geographic sourcing provisions. (Responding to PSC Point I, JCAR Points I and II, and the Secretary of State's brief.)

JCAR and the Governor (collectively referred to here as "JCAR") and the PSC attempt to make the Commission's 2015 rule revision an impenetrable barrier to reaching

the merits, despite the fact that it continues the constitutional error.

JCAR advances some fanciful scenarios that are unsupported by the record. One is that the PSC took note of this lawsuit and "voluntarily" undertook to correct the "deficiency" caused by the legislative veto (JCAR Brief, p. 9), which JCAR concedes is unconstitutional (Brief, p. 8). The Commission did not correct the deficiency because the paragraphs JCAR ordered it to omit are still missing. The changes the PSC made to the rule in 2015 are irrelevant to this case.

Appellants cited a comment in the 2015 rulemaking to show that the PSC still considered itself bound by JCAR's order (Brief, pp. 30–1). JCAR argues that a comment is not part of the rule (JCAR Brief, p. 7). But an agency is required to respond in its final order of rulemaking to the merits of comments. § 536.021.6(4), RSMo (Appellants' A7). The PSC's response can therefore be considered evidence of its intent. Even if it is not, the fact remains that the rule is unchanged in the material respect.

The PSC argues that the Court can give no effectual relief because of the revised rule (PSC Brief, pp. 8, 9) and that the "geographic sourcing provisions…cannot be inserted into the rule as a result of this case" (PSC Brief 9–10). But they most certainly can, by an order of this Court, which is the relief Appellants seek.

The Secretary of State's entire argument is that then-secretary Carnahan did what the PSC instructed her to do (Brief, pp. 10–13) and that she could not determine the constitutionality of statutes (Brief at 12). The first *MCE v. JCAR* established that the Secretary of State had a ministerial duty to disregard unconstitutional statutes in publishing administrative rules. 948 S.W.2d 125, 128, 136 (Mo. banc 1997). Once this

Court finds that the 1997 amendments to the JCAR statutes are no less unconstitutional, the Secretary of State's duty will be clear.

JCAR asserts that Appellants "have other proper remedies by means of initiative or legislative or agency persuasion to achieve that goal" (Brief, p. 8). An adequate remedy at law that will preclude mandamus is an action at law as opposed to equity. *Rice v. Griffith,* 349 Mo. 373, 161 S.W.2d 220, 225 (1942). It is not a political remedy. Furthermore, an adequate remedy "must be equally adequate and sufficient," *State ex rel. Nesbit v. Lasky,* 546 S.W.2d 51, 53 (Mo.App. E.D. 1977), not something as fraught with uncertainty and expense as the lobbying recommended by JCAR.

II

The trial court erred in dismissing Count I of the petition because the Joint Committee on Administrative Rules had no authority to review and disapprove of any part of the Renewable Energy Standard rule in that JCAR's authority is limited by § 536.024.1, RSMo, to acting "When the general assembly authorizes any state agency to adopt administrative rules or regulations," but the delegation of rulemaking authority for the Renewable Energy Standard was granted by ballot initiative and not by the general assembly. (Responding to JCAR Point IV and PSC Point II.)

Both JCAR (Brief at 17–8) and the PSC (Brief at 11) point to § 386.125, RSMo, which subjects PSC rulemaking to "all of the provisions of chapter 536." These provisions include § 536.024.1 with its restriction of JCAR's jurisdiction to rules made under authority delegated by the general assembly rather than by initiative.

The Commission is subject to chapter 536 in full, no more and no less. The statutes in chapters 386 and 393 that incorporate chapter 536 by reference do not alter the rulemaking regime as it applies to the Commission. The meaning of § 536.024.1 is a question of first impression for the courts that calls for interpretation of Chapter 536. It is unaffected by the Commission's statutes.

Section 386.250.6, RSMo, cited by the PSC (Brief at 11), is distinguishable for an additional reason. It is limited to rules on certain subjects: "the conditions of rendering public utility service, disconnecting or refusing to reconnect public utility service and billing for public utility service." The RES rule does not fall into any of these categories.

It is a substantive rule implementing renewable energy requirements. "Conditions of service" are those conditions governing the offering of services by a utility and the acceptance of such conditions by a customer, and the differences in costs of service which justify different conditions for different customers. *State ex rel. City of Grain Valley v. PSC,* 778 S.W.2d 287, 290–1 (Mo.App. W.D. 1989). The provision of renewable energy onto the utility's system is not such a condition.

III

The trial court erred in dismissing the petition because the case is not moot in that the Commission did not voluntarily withdraw the geographic sourcing provisions and was not free to change its final order of rulemaking, which had been promulgated when it was filed with the Secretary of State. (Responding to JCAR Point III and PSC Point II.)

This point answers Respondents' procedural arguments based on the 2010 rulemaking.

Respondents insist that the PSC voluntarily disavowed the geographic sourcing paragraphs (JCAR Brief 12–3; PSC Brief 12–3) despite the fact that both the title and the text of the withdrawal order of January 26, 2011, make it clear that the Commission acted under the compulsion of JCAR. The title of the order is "Order Withdrawing Geographic Sourcing Provisions (2)(A) and (2)(B)2 of 4 CSR 240-20.100 Pursuant to the Actions of JCAR," and the text recites that the Commission acted "pursuant to the actions of JCAR" (L.F. III, 473–4).

JCAR argues that the withdrawal order was timely because § 536.021.5 tolled the 90 days allowed for finalizing or withdrawing a rule (JCAR Brief at 12–3). This argument depends on the argument that the PSC acted voluntarily (JCAR Brief at 13), which it clearly did not. But even disregarding that, JCAR's argument fails. Section 536.021.5 says that within 90 days after the hearing on a rule, "the state agency proposing the rule shall file with the secretary of state a final order of rulemaking either adopting the proposed rule, with or without further changes, **or** withdrawing the proposed rule."

The agency at that point has discretion to withdraw or finalize the rule. (Appellants' Appendix A6–7; emphasis added.) *State ex rel. Missouri Growth Ass'n v. State Tax Commission,* 998 S.W.2d 786, 788 (Mo. banc 1999)("*STC*").

Presented with these two options, the PSC chose not to withdraw the rule but to finalize it on July1, 2010, before JCAR had acted. The Commission made several changes to the rule which did not include withdrawing the geographic sourcing provisions (L.F. III, 364, "Explanation of Revised Order of Rulemaking"). Only after learning of JCAR's disapproval of these paragraphs did the PSC decide not to "file" the paragraphs, and then only because "the Commission **expects** that the disapproved portions of the rule will be held in abeyance by JCAR and continue to work through the process set forth in Chapter 536 for the General Assembly to act" (L.F. II, 332; emphasis added).

The 90-day limitation is tolled when the rule is "held under abeyance pursuant to an executive order." § 536.021.5. The executive order, EO 97-97, says that an agency

> 3. Shall hold in abeyance for thirty (30) legislative days a final order of rulemaking if the final order of rulemaking has been disapproved by [JCAR] within thirty (30) days of [JCAR] receiving the final order of rulemaking.

(Appellants' A28)

The tolling in § 536.021.5 can only refer to the 30 legislative days allotted to the full general assembly to act. § 536.019.1 (A3); § 536.073.6 and .9 (A19, A20–1). By the terms of EO 97-97, a rule is held in abeyance only after a final order has been disapproved by JCAR. In such a case the agency has already decided to finalize the rule,

not withdraw it, and the fate of the rule is no longer in its hands.

Once the Commission submitted its rule to the Secretary of State, it had exercised its discretion under § 536.021.5. When the Secretary refused to publish the disapproved paragraphs, "the rule was, for purposes of this litigation, promulgated." *Missouri Coalition for Environment v. Joint Committee on Administrative Rules,* 948 S.W.2d at 135. The PSC could then only withdraw the rule by starting over with a new order of rulemaking. 948 S.W.2d at 136.

The PSC's "voluntary" withdrawal was neither voluntary nor an effective withdrawal.

The PSC cites the *STC* case for the proposition that an agency cannot be compelled to adopt any particular rule (PSC Brief, pp. 11–2). But in *STC* the legislature had adopted a concurrent resolution under § 536.021 rejecting a *proposed* order of rulemaking, not a final one. 998 S.W.2d at 788. The trial court therefore erred by ordering the proposed rule to be submitted as a final one because the STC could still have changed it. *Id.* at 789. In this case the PSC took final action, and it is now the Secretary of State that has the ministerial duty under *JCAR* I to publish a rule unblemished by unconstitutional legislative action.

IV

The trial court erred in dismissing the petition because the legislative veto exercised by JCAR and the full legislature with the agreement of the governor violated the separation of powers in Article II, Section 1 of the Missouri Constitution in that (a) the legislature did not limit itself to offering comment or input; (b) the governor inevitably violated the separation of powers by acquiescing in the legislature's violation; and (c) JCAR usurped the power of the judiciary to decide the meaning and validity of statutes. (Responding to JCAR's Point III.)

Appellants cannot understand how JCAR can say that we have failed to designate precisely which portions of the JCAR statutes are unconstitutional (JCAR Brief 10). We cited not only whole sections but subsections and even sentences in our petition (L.F. I, 29–30) and again in the conclusion to our brief (Appellants' Brief 36) as well as through quotations of the statutes (Appellants' Brief at 15–7, 19–20, 21–22).

Legislative veto is unconstitutional.

JCAR says that the legislature may provide "input" or "comment" on rules (Brief at 11). (At another place in its brief (pp. 7–8) JCAR goes so far as to say, contradictorily, that an agency "would be required to totally ignore" legislative comment. Appellants would not go so far.) Certainly legislative input is allowed. "The legislature may also hold committee hearings, conduct investigations, or request information from the executive branch." *JCAR* I, 948 S.W.2d at 134. But the JCAR statutes go beyond this to constitute a veto. The operative words are not comment or input but disapprove, suspend, hold in abeyance, and concurrent resolution. The PSC could disagree with a comment

and choose to disregard it. The JCAR statutes say that a disapproved rule shall not be published. That is a veto.

JCAR argues that when it disallows a "provision" it votes on a "measure" as if it were a bill in committee (Brief at 15). JCAR admits that rejection of a rule must be a "legislative act" (*id.*), but under *JCAR* I that act must be specifically a bill passed pursuant to Article III, § 21. 948 S.W.2d at 134. JCAR votes on an order of rulemaking, not a bill in the Article III sense.

JCAR is correct in saying that under Article IV, section 8, a concurrent resolution "shall be proceeded upon in the same manner as in the case of a bill" (JCAR Brief at 15, and at p. 13 with a mistaken citation to Art. IV, § 49, an inapplicable section of the Constitution). But the Court must preserve the constitutional distinction between a bill and a concurrent resolution. The latter cannot amend a law (including an administrative rule). Article IV, § 8, expressly says that a concurrent resolution "shall be proceeded upon in the same manner as in the case of a bill; provided, that no resolution shall have the effect to repeal, extend, or amend any law." Even if the difference seems like a matter of form, the Constitution gives it significance.

EO 97-97 violates the separation of powers.

JCAR argues that Appellants have made no legal argument that the executive order is unconstitutional, and suggests that it is impossible for the executive to "somehow violate the powers of the executive branch" (JCAR Brief at 10).

Appellants make the legal argument that the legislature and the governor colluded in a violation of the separation of powers by agreeing to a scheme of legislative veto of

administrative rules. It is entirely possible for one branch to derogate its own powers in violation of the separation of powers. The clearest examples of this are instances where the legislature impermissibly delegates its authority to the executive branch to make what are in effect laws. In *State v. Raccagno,* 530 S.W.2d 699, 703–4 (Mo. 1974), the Court struck down a law that delegated to the Director of Revenue the authority to create misdemeanor criminal offenses. Congress can violate the separation of powers by delegating its own authority to an executive agency to promulgate regulations if the delegation does not include an "intelligible principle" to guide the agency. *Whitman v. American Trucking Ass'n,* 531 U.S. 457, 472, 121 S.Ct. 903, 912, 149 L.Ed.2d 1 (2001).

The absence of precedent for such an unusual agreement between the two branches to regulate their relations does not deprive Appellants' point of the status of a legal argument. The legislature violated the separation of powers. The governor, in ratifying the violation by issuing EO 97-97, inevitably did the same.

The legislative veto violates the separation of legislative from judicial powers.

The cases cited by JCAR are distinguishable (JCAR Brief at 16). They define the scope of judicial power as judicial review and the ability to decide issues and pronounce and enforce judgments. *Chastain v. Chastain*, 932 S.W.2d 396, 399 (Mo. 1996). It is the power of judicial review that is in issue here.

On direct review of the rule the Court of Appeals was asked to decide the merits of the geographic sourcing issue: could the Renewable Energy Standard be satisfied with renewable energy credits unrelated to Missouri? The question implicates the meaning of § 393.1030 and its constitutionality under the Commerce Clause of the federal

constitution. *State ex rel. Missouri Energy Development Ass'n v. PSC,* 386 S.W.3d 165, 175 (Mo.App. W.D. 2012). The court held that because JCAR had barred publication of the sourcing paragraphs they had never gone into effect, the case was moot, and the court could not issue an advisory opinion. *Id.* at 176.

The legislature had thus usurped the power of judicial review by deciding itself, whether expressly or implicitly, what the law meant. That is emphatically the role of the courts. At the very least the legislature had deprived the courts of judicial review in this instance.

In *Chastain* the Court held that the Division of Child Support and Enforcement did not conduct judicial review when it merely initiated the modification of a support order due to a material change in the circumstances that formed the basis of the original court order. 932 S.W.2d at 399. In *Corvera Abatement Technologies, Inc., v. Air Conservation Commission, et al.*, 973 S.W.2d 851, 857 (Mo. 1998), the Court found no encroachment on the judicial power in a statute that ordered agencies to ascertain if they had failed to comply with the law on fiscal notes and to file corrected fiscal notes if necessary, in which case the agencies' underlying rules would not be considered void.

In neither case did the legislation interfere with judicial review, as the very existence of this Court's decisions makes rather clear. An agency can be allowed to correct its own actions, or to commence a further enforcement action that will ultimately be approved by a court, without trespassing on the judicial power to decide questions of law.

JCAR, on the other hand, claims the power to override the executive on questions

of the meaning of laws. Under the tripartite constitutional structure, the legislature makes the laws, the executive executes them, and if there is a conflict between the two concerning the meaning or validity of the laws, the judiciary decides. In this case the legislature undertook the role of the judiciary in violation of the separation of powers

Conclusion

WHEREFORE Appellants pray the Court to reverse the judgment of the trial court and:

Declare that Sections 536.019, the last four sentences of 536.021.1, the last two sentences of 536.021.5, all of 536.028, and 536.073.4–.5 and .7–.10, RSMo, and Executive Order 97-97 are unconstitutional;

Declare that pursuant to § 536.024, RSMo, the authority of the legislature to veto administrative rules does not apply to rules made under delegations of rulemaking power by ballot initiative;

Issue its order in mandamus to the Secretary of State to publish 4 CSR 240-20.100, paragraphs (2)(A) and (2)(B)2 as promulgated by the PSC.

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CERTIFICATION

This brief complies with the limitations of Rule 84.06(b), containing 3,979 words and 446 lines all-inclusive.

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Certificate of Service

Counsel for Appellant has made service of this brief and the appendix on all other counsel of record by way of electronic filing on this 18th day of July, 2016.

/s/ Henry B. Robertson