SHOW-ME THE SUN: HOW MISSOURI CAN SUPPORT ITS COMMITMENT TO RENEWABLE SOURCES OF ENERGY THROUGH PREEMPTION OF LOCAL ZONING ORDINANCES

INTRODUCTION

IKEA is the world's largest furniture retailer with more than 300 stores in 41 countries.[1] IKEA's products are notoriously complex to assemble, but purchasers keep flocking.[2] Among the rows of bedroom sets and shelves of modern-looking table lamps, the store's British customers will soon find solar panels.[3] That a home-furnishings store sells solar panels is a testament to the progress made in residential-scale renewable energy generation technology.[4] But what if IKEA were to sell the product in the United States? Customers might find the hoops through which they must jump to simply receive approval to install the panels to be as difficult, if not more, than assembling one of the brand's infamously complicated pieces of furniture.

Home improvement projects are the American Dream perfecting itself. The progression of what is possible, from indoor plumbing, to gas-powered lights, to electricity, to air conditioning, has now reached residential-scale renewable energy generation systems. American home-improvement enthusiasts would no doubt clean out IKEA's solar panel stock in a heartbeat.[5] But as with any advance in technology, the law takes quite a while to catch up.[6]

1. Walter Loeb, *IKEA Is a World-Wide Wonder*, FORBES (Dec. 5, 2012), http://www.forbes.com/sites/walterloeb/2012/12/05/ikea-is-a-world-wide-wonder/.

2. *See*

In this Comment, I argue that the state of Missouri, in seeking to achieve its goal of increased reliance on renewable sources of energy, would be best served by strong state-level control over land use regulation affecting residential-scale renewable energy systems. First, I give a brief overview of how energy is generated and regulated. I then explain land use regulation, highlighting how municipalities can influence the installation of distributed generation systems. Next, I describe a recent decision from the Missouri Court of Appeals for the Western District that illustrates the power struggle between installers of residential systems and hesitant local governments. I analyze that ruling for the confusion it causes regarding what regulations a local government may place on distributed generation. To close, I suggest that the state should clarify land use regulation by preempting municipal ordinances with a statewide standard.

I. BACKGROUND

A. Generation and Regulation of Electricity

I have typed this Comment on a computer powered by electricity, and if you are not reading it on a computer screen, you are at least sitting under a lamp with a machine-printed copy in your hand. The electricity generated to power these processes could have either been generated using renewable or non-renewable fuel sources. Additionally, it could have been generated either hundreds of miles away or in your very own backyard. Each of these attributes of electricity generation, and additionally how the industry is regulated, are examined in turn.

Electricity is generated using either renewable or non-renewable sources. Fuel sources such as coal, petroleum, and natural gas are referred to as "non-renewable."[7] These non-renewable sources currently provide the bulk of the nation's power at 82% of total energy consumed.[8] However, non-renewables' dominance is waning. Renewable sources of energy made up more than half of all added generation capacity worldwide within the last year.[9] Moreover, the

National Solar Survey, SOLAR ENERGY INDUS. ASSOC., http://www.seia.org/research-resources/national-solar-survey (last visited Feb. 4, 2014).

6. *See* Hannah Wiseman, Lindsay Grisamer & E. Nichole Saunders, *Formulating a Law of Sustainable Energy: The Renewables Component*, 28 PACE ENVTL. L. REV. 827, 827 (2011) (examining the pace of legislative responses to technological advances).

7. Federal Energy Management and Planning Programs Definitions, 10 C.F.R. § 436.101 (2014).

8. U.S. ENERGY INFO. ADMIN., ANN. ENERGY REV. 2011, at 37 tbl.2 (2012), *available at* http://www.eia.gov/totalenergy/data/monthly/pdf/flow/primary_energy.pdf.

9. REN21, RENEWABLES 2013 GLOBAL STATUS REPORT 13 (2013), *available at* http://www.ren21.net/Portals/0/documents/Resources/GSR/2013/GSR2013_lowres.pdf. More added capacity is on its way. In fact, Ameren Missouri, one of the state's largest energy suppliers,

U.S. Energy Information Administration predicts that generation from renewable resources will increase by 77% between 2010 and 2035.[10] These resources include solar radiation, wind, and hydropower.[11]

The nation's 6000[12] power plants feed into regional grids composed of 160,000 miles of high-voltage transmission lines.[13] This massive electricity infrastructure has developed entirely within the past 140 years.[14] The industry is regulated by the state and federal governments because of two characteristics in particular: it provides essential services and has the tendency to form a natural monopoly.[15] To explain, because electricity companies provide what is considered an essential service,[16] and do so best when there is only one such provider in a particular service area,[17] governmental entities have stepped in to make sure that they consistently operate with the best interests of the public in mind.[18]

The Missouri Public Service Commission is responsible for regulation of investor-owned electric utility companies in Missouri.[19] That agency is charged by Missouri statute with ensuring that customers receive safe and

has recently announced its intention to construct a solar-energy center on a 19-acre site in O'Fallon, Missouri. Tim Bryant, *Ameren Missouri Plans to Build Solar Energy Center*, ST. LOUIS P

adequate service at just and reasonable rates.[20] Pursuant to their goal, the Public Service Commission regulates many aspects of the generation process, including siting of power plants.[21] A finished power plant will take millions of dollars and several years to construct.[22]

Electricity is also generated on a smaller scale. A distributed generation system installed on a residential home can provide enough energy to power all of that home's electricity requirements.[23] Because distributed generation systems are not constructed by investor-owned utility companies, they are not covered by the Missouri Public Service Commission's siting jurisdiction.[24] However, a recent Missouri law has given the Commission a greater role in promoting and regulating the installation of distributed generation systems.

"Prop C," the "Missouri Energy Efficiency Investment Act" (MEEIA), and the "Missouri Renewable Energy Standard" are all names given to an initiative passed with the overwhelming support of a majority of Missouri voters in 2008.[25] Robert Kenney, Chairman of the Missouri Public Service Commission, notes that the fact that MEEIA was passed by initiative[26] rather than by an executive action or legislative measure is "significant to the extent that proponents of the environment argue that it's a strong manifestation of a state public policy preference."[27] The numbers, which indicate two-thirds majority passage statewide and three-fourths majority passage in the City of St. Louis, speak to that fact.[28]

20. INFORMATION GUIDE, *supra* note 19, at 1.

21. *See* DANIEL R. MANDELKER, LAND USE LAW § 4.32 (5th ed. 2003). Most states require electric utility companies to obtain a "certificate of convenience and necessity" prior to construction of a power plant. *See, e.g.*, TEX.

In substance, MEEIA clearly advances pro-renewable causes. Under its provisions, investor-owned utilities are required to derive 15% of the electricity they generate from renewable energy sources by 2021.[29] Two percent of that total must come from solar photovoltaics.[30] The Missouri Public Service Commission adopted a regulation,[31] 4 CSR 240-20.100, which acts as the muscle behind the mandate, setting forth in greater detail how utilities can achieve compliance with the renewable energy portfolio standards.[32]

In addition, that rule affects Missouri residents who wish to install distributed generation systems. 4 CSR 240-20.100(4) includes a requirement that utility companies provide a rebate to retail customers for electricity generated by those systems.[33] Utility companies may purchase the renewable energy credits (RECs) generated by customers' distributed generation systems to count towards their 15% renewable sources requirement.[34] However, before they are connected to a utility company's grid, customers' distributed generation systems must comply with the prerequisites set forth in the Public Service Commission's rule.[35] Section 4 CSR 240-20.100 incorporates a set of requirements from the "net metering rule" set forth at 4 CSR 240-20.065.[36] That regulation reads:

> Each qualified electric energy generation unit used by a customer-generator shall meet all applicable safety, performance, interconnection, and reliability standards established by *any local code authorities*, the National Electrical Code, the National Electrical Safety Code, the Institute of Electrical and Electronics Engineers (IEEE), and Underwriters Laboratories (UL) for distributed generation . . . .[37]

29. MO. REV. STAT. § 393.1030.1.

30. MO. CODE REGS. ANN. tit. 4 § 240-20.100(2)(D) (2013).

31. The Public Service Commission was authorized to adopt regulations regarding distributed generation by MO. REV. STAT. § 393.1030(6) (2013).

32. MO. CODE REGS. ANN. tit. 4 § 240-20.100. Subjects addressed in the Public Service Commissions regulations include renewable energy credits, *id.* § 240-20.100(3), retail rate impact, *id.* § 240-20.100(5), and cost recovery, *id.* § 240-20.100(6).

33. "[E]lectric utilities shall include in their tariffs a provision regarding retail account holder rebates for solar electric systems. These rebates shall be available to Missouri electric utility retail account holders who install new or expanded solar electric systems that become operational after December 31, 2009." *Id.* § 240-20.100(4). Customers within Ameren Missouri's territory apply for the rebate with a form distributed by that company. Interconnection Application/Agreement for Net Metering Systems with Capacity of 100 kW or Less, *available at* https://www.ameren.com/sites/AUE/Rates/Documents/UECSheet171EPPNetMetering.pdf.

34. MO. CODE REGS. ANN. tit. 4 § 240-20.100(3).

35. *Id.* § 240-20.100(1)(D).

36. *Id.*

37. *Id.* § 240-20.065(6)(A) (2013) (emphasis added).

detailed list of requirements to which systems must adhere before installation is permitted.[59] According to the zoning regulations, these requirements were established "to protect properties from incompatible uses in the interest of property values, public health and the welfare of the community while promoting the use of alternative energy sources, where appropriate."[60] Other Missouri municipalities that have zoning regulations expressly addressing the installation of residential-scale distributed generation include Fenton,[61] Pattonsburg,[62] and O'Fallon.[63]

Ordinances addressing the installation of distributed generation vary widely in their content. For example, while the City of Clayton's regulations include a detailed list of requirements to be fulfilled prior to installation,[64] Pattonsburg's Solar Code emphasizes homeowners' solar access rights subsequent to installation.[65] Homeowners must take care to determine the requirements of their own municipality's law, as the laws can change drastically from town to town.

To complicate things, many municipalities have ordinances that do not include any mention of distributed generation systems.[66] Failure to address distributed generation technology can be nearly as detrimental as banning it outright.[67] Silence on the topic of distributed generation naturally leaves potential installers uncertain over whether they may proceed with installation or if a permit will be necessary.[68] Even if a homeowner relies on that silence, the municipality may later determine that such a project actually falls under

considered an accessory structure in all zoning districts subject to the approval of a Conditional Use Permit pursuant to Article VII of this Chapter." *Id.* "Accessory uses are those uses of land found on the same lot as the principal use and that are subordinate, incidental to, and customarily found in connection with the principal use." JOHN R. NOLON & PATRICIA E. SALKIN, LAND USE AND SUSTAINABLE DEVELOPMENT LAW: CASES AND MATERIALS 230 (8th ed. 2012). An example of a traditional accessory use is a garage. *Id.*

59. Clayton, Mo., Ordinance 6191 (Feb. 28, 2012), *available at* http://www.claytonmo.gov/Assets/Planning+and+Development/solar+and+wind.pdf.

60. *Id.*

61. FENTON, MO., MUN. CODE § 464 (2013), *available at* http://www.fentonmo.org/DocumentCenter/View/3719.

62. N

from its current location [and therefore located in the next town over], none of this [struggle with the application process] would have ever happened."[76] While some municipalities have attempted to address distributed generation technology in their ordinances,[77] the majority do not have any enumerated regulations or standards for conducting the permit process. In order to ensure that municipalities are able to carry out their duty to protect the safety of citizens, the state should implement those regulations that do so the most effectively as a statewide standard. Without guidance, local officials may not be able to make consistent decisions about installation of distributed generation systems.

Without consistent decisions by local officials regarding installation, potential installers are unable to predict what trajectory their application process will take. While MEEIA has laid the foundation for deciding which regulations a local government may impose, the language of that statute is vague and has not lent itself to clear interpretation in the courts.[78] The uncertainty generated by that statute threatens to halt progress towards greater reliance on renewable resources; this is the exact opposite effect than that for which the statute was passed. The case below illustrates the uncertainty engendered by the law, and I follow it up with a suggestion for clarification.

III. BABB V. MISSOURI PUBLIC SERVICE COMMISSION

A. Background

In *Babb v. Missouri Public Service Commission*, homeowners appealed a city's denial of a special use permit for the installation of a residential-scale distributed solar energy system on their home.[79] The homeowners sought a court's review of that denial.[80] The case exemplified the struggle between installers and municipalities, highlighting each faction's respective interests. In an interesting twist, the appellate court's opinion managed to both favor and

James and Frances Babb (the Babbs) are residents of the City of Clarkson Valley,[81] (the City), a municipality located within St. Louis County, Missouri.[82] Inspired by the successful passage of MEEIA in 2008, the Babbs began planning to install solar panels on the roof of their Victorian-style[83] home.[84]

The trial court explained that the enforcement scheme established by MEEIA preempted that formulated by the City.[103] More specifically, the court noted that requiring the issuance of a special use permit from the Board of Aldermen created an unlawful condition precedent that was inconsistent with the Public Service Commission's rules.[104] The trial court concluded that the Babbs' solar energy system complied with all regulatory requirements contained in 4 CFR 240-20.100, and that they were not required to conform to the City's additional requirements.[105]

A particularly expansive part of the court's ruling on the preemption issue interpreted 4 CFR 240-20.100 as establishing a new property right. "Section 442.012.1, RSMo confers a legally protectable right to the Babbs to use solar energy at their property, and they have a legally protectable right to participate in the solar rebate program authorized by 4 CSR 240-20.100(4)."[106]

The court also found in favor of the Babbs on the abuse of discretion issue.[107] The court built the foundation for its conclusion that there was "no reasonable basis to deny the Babbs' application for a Special Use Permit"[108] by placing it after discussions of how the Babbs' plan complied with the Missouri Public Service Commission's rules, gained Ameren Missouri's apTD4uLlr[109] ra, and received a recommendation for apTD4al from both the City's Planning and Zoning Commission and the Monarch Fire Protection Dlr raistrict.[110] This seemingly unanimous apTDoval of the Babbs' plans led the court to conclude that the City's denial was "arbitrary, capricious, unreasonable and an abuse of discretion."[111] The trial judge then ordered the City of Clarkson Valley to issue a special use perme Babbs' within one day of the entry of his judgment, instructing the Babbs that they could lawfully proceed with construction if the City did not comply with his order.[112]

C. What the City Appealed

Instead of issuing the permit, the City of Clarkson Valley apTealed the trial

contesting the trial court's substantive rulings.[113] The issues that most prominently figured into the appellate court's disposition of the case were the City's challenges to the trial court's rulings on the preemption and abuse of

section 89.110's thirty-day time limit for submission of a complaint had passed by the time the Babbs filed suit, the City asserted that the original petition was not timely filed.[116] No argument was made that the Board of Aldermen's denial was not arbitrary and capricious.

D. The Appellate Court's Ruling

The appellate court disagreed with the trial court's ruling on preemption.[117] The court referenced specific language of the Public Service Commission's regulations, which states that "[e]ach qualified electric energy generation unit used by a customer-generator shall meet *all applicable safety, performance, interconnection, and reliability standards established by any local code authorities*, the National Electrical Code, the National Electrical Safety Code."[118] Thus, the appellate court concluded that rather than preempting local authority, the regulation allowed local officials to establish "safety, performance interconnection, and reliability standards."[119] The appellate court examined the trial court's ruling to determine if there was sufficient evidence to establish that the local ordinance did not adhere to that statutory language.

The court asserted that although an ordinance may not conflict with state law, it may impose "additional regulations."[120] However, the court cautioned that additional regulations are not permitted where they are prohibited or limited by express language in the statute.[121] Unfortunately, even though the court explained the rule, it did not reach a determination of whether the regulations in the ordinance at issue were included in the list of subjects upon which "local code authorities" could "establish standards."[122] Instead, the court concluded that there was insufficient evidence to make that determination at the trial court level.[123]

The appellate court appeared to indicate that it would have reached a different conclusion on the preemption issue if the trial court's opinion contained a more detailed side-by-side comparison between specific provisions of the state statute and conflicting wording in the local ordinances. The court stated, "while it may be that some of these provisions either individually or in concert may be 'inconsistent and irreconcilable' with the requirements of the statutes or the regulations in practical application, the motion for partial

116. Appellants' Brief, *supra* note 113, at 38–41.

117. *Babb*, 414 S.W.3d at 69.

118. *Id.* at 71 (quoting MO. CODE REGS. ANN. tit. 4 § 240-20.065(6)(A) (2013)).

119. MO. CODE REGS. ANN. tit. 4 § 240-20.065(6)(A) (2013).

120. *Babb*, 414 S.W.3d at 70 (citing State *ex rel.* Hewlett v. Womach, 196 S.W.2d 809, 815 (Mo. 1946)).

121. *Id.* at 70.

122. MO. CODE REGS. ANN. tit. 4 § 240-20.065(6)(A).

123. *Babb*, 414 S.W.3d at 79.

summary judgment failed to show how they were in conflict and therefore the grant of partial summary judgment on these grounds was in error."[124] Thus, instead of ruling with finality as to whether certain restrictions imposed by the City[125] conflicted with the state statute, the appellate court simply pointed to a lack of sufficient evidence at the trial level.[126]

The appellate court's ruling on the abuse of discretion issue was also limited to procedural considerations. As mentioned above, the City's argument

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regulations"[138] is a time consuming method unsuited for the rapid pace with which distributed generation technology is evolving.[139]

California's statute clarifies what local regulations fall under the "health" and "safety" categories.[143] California's Solar Rights Act of 1978 describes in great detail what that state's local governments can regulate using the "health" and "safety" of citizens as justification.[144] It outlines the role of local governments as thus:

> Review of the application to install a solar energy system shall be limited to the building official's review of whether it meets all health and safety requirements of local, state, and federal law. The requirements of local law shall be limited to those standards and regulations necessary to ensure that the solar energy system will not have a specific, adverse impact upon the public health or safety . . . . A "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified, and written public health or safety standards, policies, or conditions as the existed on the date the application was deemed complete.[145]

California's statute allows for the local government to carry on its traditional role of preserving the health and safety of its citizens. The clear delineation of what falls into those categories offers local officials protection from making

will lead to increased installation of, and reliance upon, renewable energy sources. Increased renewables capacity will bring Missouri closer towards the 15% milestone approved of by its citizens in 2008's Missouri Energy Efficiency Investment Act. Thus, the Missouri Legislature should use the public's broad support for renewable energy to draw up a comprehensive, straightforward state statute that will promote the installation of distributed solar energy systems.

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