# BEFORE THE PUBLIC SERVICE COMMISSION
# STATE OF MISSOURI

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| In the Matter of the Application of The Empire District Electric Company and Ozark Electric Cooperative for Approval of a Written Territorial Agreement Designating the Boundaries of an Exclusive Service Area for Ozark within a Tract of Land in Greene County, Missouri and Associated Requests for Approval of a Transfer of Facilities and Change of Supplier. | ) | Case No. EO-2008-0043 |

## APPLICATION FOR REHEARING AND MOTION TO MODIFY

Comes now The Empire District Electric Company (Empire), pursuant to section 386.500 RSMo 2000 and 4 CSR 240-2.160, and, for its Application for Rehearing and Motion to Modify, respectfully states as follows to the Missouri Public Service Commission (Commission):

1. On March 4, 2008, the Commission issued a Report and Order in this case approving the proposed territorial agreement between Empire and Ozark Electric Co-operative, authorizing a change of supplier for "approximately 32 structures," and authorizing a transfer of assets that had been sought in conjunction therewith. While the Report and Order grants the relief requested by the applicants, Empire has three areas of concern with the text of the Report and Order that Empire believes require modification by the Commission.

1. **Certain Errors**. The first topic of concern is errors in the Findings of Fact. The last sentence in Finding of Fact paragraph 9 on page 6 says: "That agreement called for the Developer to pay Ozark significantly less than Empire's tariffed rates to install street lighting and install service extensions to units in Shuyler Ridge." The

phrase “that agreement” refers to the electric service agreement between Ozark and the developer. The phrase “That agreement called for” indicates that the referenced agreement specified something; in this situation, something regarding Empire’s tariffed rates. That phrasing is factually incorrect because “that agreement” did not involve Empire as a party and the text of “that agreement” did not make any mention of Empire’s tariffed rates, so by definition it could not have “called for” anything with regard to Empire’s rates. Left unchanged, this finding of fact is not supported by competent and substantial evidence. A correct way to phrase the underlying point that the Commission is apparently trying to make is: “Ozark’s rates are significantly less than Empire’s tariffed rates to install street lighting and install service extensions.”

2. Finding of Fact paragraph 12 on page 7 says: “Under the territorial agreement resulting from the March 2006 meeting, the Developer only agreed to take service from Empire if it received the same installation rates it had contracted to receive from Ozark.” Use of the introductory phrase “Under the territorial agreement” incorrectly implies that the Developer was a party to the original proposed territorial agreement in 2006. The testimony referenced as evidentiary support for the finding of fact actually states: “The developer was only willing to take service from Empire if that dollar impact was eliminated.” The implication that the developer was a party to the original proposed territorial agreement is not supported by competent and substantial evidence. A correct way to phrase the underlying point that the Commission is apparently trying to make is: “The Developer was only willing to take service from Empire if it received the same installation rates it had contracted to receive from Ozark.”

3. **Thirty-two structures**. The second topic of concern is directed to the text of ORDERED paragraph 2, although there are several other places where the same problem occurs. ORDERED paragraph 2 reads as follows: "The change in electric supplier for approximately thirty-two structures located in a single tract of land in Greene County located south of the City of Republic, Missouri, alternately identified as the Lakes at Shuyler Ridge, from The Empire District Electric Company to Ozark Electric Cooperative is approved." From the outset, the application in this case indicated that development in this 245 acre residential subdivision was taking place and that the number of customers actually being served was likely to change from time to time; in other words, it was a "moving target" and due to the circumstances, neither of the applicants could control how many structures would be created during the time it took the Commission to process the application. When the application was filed in mid-August 2007, it indicated that as of the end of July 2007, there were approximately 21 structures being served in the subdivision with permanent service, and approximately 11 with temporary service. (Exhibit 1, p. 4) At the time of the hearing in December 2007, there was testimony that there were approximately 30 structures in existence with an additional 15 or 20 under construction. (Transcript page 48, line 23 to page 49, line 2). This latter reference indicates there now may be 50 or more structures. Since permission to transfer has been granted, Empire and Ozark will have to carefully plan and coordinate the change-out of equipment such as transformers and meters so that the transfer is performed in a safe and timely manner. At this time, Empire is unable to estimate exactly how many structures may exist in the subdivision at the actual time their transfer to Ozark will take place. Indeed, because of that uncertainty, the portion

of the application requesting relief did not mention a specific number but (on page 6, in paragraph (b)) instead sought approval of a change of supplier "for the structures affected by the proposed transaction." Empire is concerned that the present wording of ORDERED paragraph 2 and the other references to "approximately thirty-two structures" applying to the grant of authority in the Report and Order could be narrowly construed to only authorize a change of supplier for a certain number of structures rather than all of them, especially since the actual number of structures now significantly exceeds 32 in number.

4. For the purpose of clarification, Empire therefore requests that the Commission issue an order modifying ORDERED paragraph 2 to more fully convey the concept that Empire is being authorized to disconnect and transfer to Ozark the electric service at *all* of the sites within The Lakes at Shuyler Ridge that may exist at the time the physical transfers occur, rather than attempt to identify the structures by a number that may be inaccurate due to the passage of time. Empire suggests that one way to accomplish this is to reword the ordered paragraph as follows: "The change in electric supplier for all of the structures which may be located in a single tract of land in Greene County located south of the City of Republic, Missouri, alternately identified as the Lakes at Shuyler Ridge, from The Empire District Electric Company to Ozark Electric Cooperative is approved." Similarly, the Commission should change the text on page 2 of the Report and Order in the third and fourth lines under the heading "Syllabus" to read: "for all of the affected structures, which numbered approximately fifty at the time of the hearing." To correct a factual error, it should also change the text on page 2 of the Report and Order in the fourth line under the heading Procedural History to read:

"electric supplier for all the affected structures located in a single tract of land in … ." That portion of the text of the Report and Order erroneously implies that Empire and Ozark specifically asked the Commission for permission to change the supplier for 32 structures in the application itself. Again, while there happened to be approximately 32 structures close to the time the application was filed, and realizing that number was very likely to change with the passage of time, the specific relief requested by the application was a change of supplier "for the structures affected by the proposed transaction." For the same reason, the Commission should also change: (a) the text of Finding of Fact No. 28 on page 10 by changing the number "thirty two" to "fifty"; (b) the number "thirty two" to "fifty" in both the second and fourth lines of the last paragraph on page 25, and (c) the number "thirty two" to "fifty" in the seventeenth line on page 27.

5. **Allegations of Tariff Violation**. The third topic of concern is that in some portions of the Report and Order, language used by the Commission in discussions of Empire's tariff may be construed as the Commission having made certain conclusions or findings, and thereby it is prejudging certain facts to be presented in, or the outcome of, a proceeding that has not even been filed. Empire does not believe it was the intent of the Commission to make factual determinations or otherwise prejudge issues that belong in a complaint proceeding. The topic of a complaint case was not mentioned by the Staff until its Reply Brief, which was well after the close of the evidentiary record. Significantly, the Commission clearly states on page 26 of the Report and Order: "The appropriate place to address the apparent transgressions of Empire's management is in a complaint proceeding." This statement indicates to Empire that the Commission does not intend to prejudge facts or issues from another case in this proceeding, but the

particular wording in some discussions in other parts of the Report and Order could be argued as being in conflict with that statement. To maintain the integrity of its statement that the appropriate place to address findings and conclusions regarding allegations of tariff violation, the Commission should modify its Report and Order to remove or alter certain language as detailed herein.

6. At the top of page 4 of the Report and Order, the Commission listed "the issues" that it said were before it in this case. None of those issues include any mention of tariff violations, so it appears the Commission did not consider allegations regarding tariff violations to be properly before it in this case. In ***State v. Carroll***, 620 S.W.2d 22 (Mo. App. S.D. 1981), the Court of Appeals found that the Commission must first determine that a person is acting unlawfully before the courts should be called upon to act. This determination must be made after "proper hearing."

7. Section 536.063, RSMo 2000 states, in part, as follows: (1) . . . a "contested case shall be commenced by the filing of a writing by which the party or agency instituting the proceeding seeks such action as by law can be taken by the agency only after opportunity for hearing ... ." (2) "Any writing filed whereby affirmative relief is sought shall state what relief is sought or proposed and the reason for granting it ..." (3) "Reasonable opportunity shall be given for the preparation and presentation of evidence bearing on any issue raised or decided or relief sought or granted... ." Similar requirements for proper notice appear in statutes and rules relating to complaints at the Commission. Sections 386.390.1 and 393.260.1, RSMo call for a "complaint in writing." Section 393.270.1, RSMo states that "before proceeding under a complaint …, the commission shall cause notice of such complaint, and the purpose thereof, to be served

upon the person or corporation affected thereby." 4 CSR 240-2.070 specifies in section (3) that the complaint is to be in writing, in section (5) that it is to contain certain information, in section (7) that the respondent is to be served with the complaint in a particular manner, and in section (8) that the respondent is to be allowed the opportunity to file an answer setting forth defenses.

8. Case No. EO-2008-0043 was initiated by a joint application by Empire and Ozark seeking approval of a proposed territorial agreement, and in conjunction therewith, authorization to change suppliers and to sell certain assets of Empire to Ozark, all of which was designed to have Ozark become the exclusive supplier of retail electric energy within The Lakes at Shuyler Ridge. The application did not provide notice of, or imply that, any alleged violations of statutes, rules or tariffs would be at issue in the case.

9. Furthermore, in compliance with the Commission's order, the parties filed on December 10, 2007, a List of Issues, Order of Witnesses, and Order of Cross Examination. The Commission recites that List of Issues at the top of page 4 of the Report and Order. None of these issues provided Empire with notice that the Commission would be making a determination concerning alleged violations of statutes, rules or tariffs or underlying facts related thereto. In summary, the joint application and the Issue List do not provide sufficient notice for the Commission to consider in this Report and Order possible penalty actions or any underlying allegedly related facts. Some of the Commission's findings or discussion, as more particularly pointed out below, in this regard violate 4 CSR 240-2.070, Sections 386.390, 393.260.1, 393.270.1, 536.063, RSMo, and the right to due process provided by the Missouri and United

States Constitutions, and therefore are unlawful, unjust, unreasonable, arbitrary, and not supported by competent and substantial evidence, all in material matters of fact and law, individually or cumulatively, or both.

10. Finding of Fact paragraph 18 (page 8) is factually incorrect in that it concludes "Empire and Ozark prematurely began executing and operating under the EO-2007-0029 Territorial Agreement." That is a gross overstatement and mischaracterization of the testimony cited as the foundation for the Commission's statement, and it is not supported by competent and substantial evidence. It wrongly implies that Empire and Ozark were operating in the entire eight and half square miles as if the proposed territorial agreement had been approved, when in fact, the testimony was that for engineering and economic reasons, there was a transfer of assets only in the particular phase of The Lakes at Shuyler Ridge that was actually under construction. The Commission should modify Finding of Fact paragraph 18 to accurately reflect the stated facts, or more appropriately, eliminate the paragraph entirely because it is cumulative of statements made in other findings and therefore not essential to the ultimate conclusion approving the proposed territorial agreement.

11. Finding of Fact paragraph 21 (page 8) states, in part: "Further, in violation of its approved tariff, Empire submitted billing invoices… ." The Commission should modify this Finding by removing the phrase "in violation of its approved tariff" since that phrase clearly indicates prejudgment of an issue that would be central to a properly formulated complaint proceeding, which Case No. EO-2008-0043 clearly was not. Furthermore, the phrase is not essential to the ultimate conclusion approving the

proposed territorial agreement, and it is not supported by competent and substantial evidence.

12. Finding of Fact paragraph 46 (page 13) states, in part: "… would not exist, but for Empire failing to follow its tariff in providing services… ." This finding is an attempt to paraphrase part of the testimony of Mr. Beck but it nevertheless is phrased as a finding of fact by the Commission. It also is not supported by competent and substantial evidence. The Commission should modify this Finding of Fact to indicate that it is not prejudging that particular potential issue for a complaint case. A suitable way to accomplish that end would be to change the finding to read as follows: "… would not exist, but for Empire allegedly failing to follow its tariff in providing services… ."

13. Beginning on page 19, and continuing on to the top of page 21, the Report and Order contains two sections entitled "Filed Rate Doctrine" and "Staff Authority to File a Complaint." The Commission should remove these sections of the Report and Order. They are not relevant to the List of Issues the Commission stated was before it in this proceeding, since the material in those two sections does not tend to prove or disprove (or even discuss) any listed issue or even relate to matters addressed in the Decision section. Nothing in the Decision or Ordered sections relies upon the discussion in these two sections, so for purposes of the Report and Order they are merely surplus. Just their presence in the Report and Order, however, indicates the Commission is not adhering to its statement that "The appropriate place to address the apparent transgressions of Empire's management is in a complaint proceeding." Neither are these two sections either necessary or effective to provide Staff any authority it may require to file a complaint proceeding.

14. In the first paragraph on page 25 of the Report and Order, the Commission is discussing arguments made by Staff. The following sentence appears therein: "However, Staff objects to their approval based on alleged inadequacy of notice to Shuyler Ridge customers, the change of supplier request not being in the public interest for a reason other than a rate differential, and that, but for Empire's violation of its tariff in providing service to Shuyler Ridge, the Agreement would be detrimental to Empire's customers." While the Commission placed the adjective "alleged" before the "inadequacy of notice" claim, it did not act in that same manner in the dealing with the phrase "violation of its tariff." This disparate treatment could imply that the Commission is making a finding of a tariff violation here on the same basis discussed in paragraph 12 above, which would be unlawful, unjust and unreasonable for the same reasons. Empire therefore requests that the Commission correct this oversight by changing the phrase to read: "but for Empire's alleged violation of its tariff …" and thereby leave the question of whether there was such a violation to a properly presented complaint proceeding.

15. In the first two full paragraphs on page 26 of the Report and Order, there are several phrases, some of which indicate the Commission has not prejudged the issue of a tariff violation and some indicate it has. The text at issue here reads as follows: "Staff next argues that the Agreement should be denied because, but for Empire's failure to comply with its tariff in installing facilities … ." For the reasons previously stated, the Commission needs to add the word "alleged" between the words "Empire's" and "failure". The next sentence reads: "The Commission agrees that part of the benefit afforded to Empire's current customers under the Agreement is the result

of Empire's management failing to comply with its approved tariff." Again, this clearly indicates a finding of non-compliance by the Commission. Empire's concern may be addressed by the Commission simply changing the phrase to: "… the result of Empire's management allegedly failing. . .." The next problematic sentence is: "If Empire had complied with its tariff, it would not be in its present situation." This indicates a finding of non-compliance which, on its face, clearly contradicts the sense of the next two sentences which say: "While the Commission appreciates Staff's concern over Empire's apparent failure to comply with its approved tariff, the interest of concern here is the interest of Empire's customers irrespective of the cause of the potential risk of monetary detriment. The appropriate place to address the apparent transgressions of Empire's management is in a complaint proceeding." In those latter two sentences, the Commission has used a different phraseology, e.g., "apparent failure" and "apparent transgressions." The use of the word "apparent" in the sense of "seeming" or "alleged" presumably is an attempt to emphasize the essence of the last sentence that the Commission is not making determinations on or prejudging here the issue of tariff compliance. As the Commission indicates in the last sentence, the appropriate forum for presentation and a determination of tariff compliance is a complaint case where the complaint sets forth in full detail the alleged violations, the facts are fully developed and discussed, any defenses are fully scrutinized, and in short, the full due process required and guaranteed by the law is afforded to the litigants. This brings us back to the problematic sentence: "If Empire had complied with its tariff, it would not be in its present situation." Empire recommends that this sentence be removed from the Report and Order because it prejudges the issue that the Commission says should be

addressed in a complaint proceeding, and for the other reasons discussed in paragraph 12 above.

16. Accordingly, the Commission should grant a rehearing of its Report and Order in order to eliminate or modify those referenced provisions in the Report and Order purporting to find a violation of or facts indicating a basis for a finding of noncompliance with Empire's tariff, and to correct the factual inaccuracies described.

WHEREFORE, Empire asks that the Commission rehear this matter and issue an order that addresses the concerns expressed herein.

Respectfully submitted,

**/s/ Gary W. Duffy**

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing was sent via U.S. Mail or electronic mail on this 13th day of March, 2008, to:

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