

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

The Staff of the Missouri Public Service Commission,)	
)	
)	
Complainant,)	
)	
v.)	Case No. EC-2009-0288
)	
The Empire District Electric Company,)	
)	
Respondent.)	

**STAFF’S MOTION FOR DETERMINATION ON THE PLEADINGS
AND RESPONSE TO EMPIRE’S MOTION TO DISMISS COMPLAINT
FOR FAILURE TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED**

COMES NOW the Staff of the Missouri Public Service Commission (“Staff”) and for its *Motion for Determination on the Pleadings and Response to Empire’s Motion to Dismiss Complaint for Failure to State a Claim for which Relief Can Be Granted* states:

1. In its February 20, 2009 *Motion to Dismiss Complaint for Failure to State a Claim for which Relief Can Be Granted*, The Empire District Electric Company (“Empire”), averred:

a) As stated in Staff’s complaint, in November 2004 Empire and BP, PLC (“BP”), entered into one or more fixed-price, forward contracts for the purchase of natural gas by the Company for use in the generation of electricity sold to its customers. The gas was to be delivered to one or more of Empire’s generating plants in July and August of 2010 and July and August 2011, with payment for the gas due on delivery.

b) In February 2008, Empire “unwound” a portion of these contracts – that is, the Company sold, transferred, or otherwise disposed of its rights to approximately 25 percent of the gas it had contracted to buy from BP, Empire realized an after tax gain of approximately \$1.3 million on this transaction, which was duly recorded on the Company’s books of account during the first quarter of

2008. Empire did not seek Commission authorization to unwind the BP contracts either before or after the transaction was consummated.¹

2. Empire states that Staff's reference to the Commission's September 9, 1992, *Order Establishing Jurisdiction and Clean Air Act Workshops*, issued in Case No. EO-92-250, *In re Kansas City Power & Light Co.*, 1 Mo.P.S.C.3d 359 in its *Complaint* is not precedent binding on the Commission in this case. Staff's reference to that case was made simply to indicate that there is likely a workable solution to the problem of a utility's need to obtain Commission authorization, or preauthorization, for the expedient disposal of a part of its system or works, and not for any other purpose.

3. Empire cites the holding of *State ex rel. Kansas Power & Light Co. v. Pub. Serv. Comm'n*, 770 S.W.2d 740, 743 — that the Commission may not promulgate declarations of law in the abstract — to be relevant to whether Staff has stated a claim for which relief can be granted. Apparently, Empire cites to this authority to indicate that the Commission's *Order Establishing Jurisdiction and Clean Air Act Workshops*, issued in Case No. EO-92-250, is not binding precedent. Commission cases are not *stare decisis*, as Staff acknowledged outright in footnote 2 of Staff's *Complaint*.

4. As regards the rule of *Kansas Power & Light Co. v. Pub. Serv. Comm'n* — that the Commission may not promulgate declarations of law in the abstract — in its *Complaint* Staff averred, and in its motion Empire has admitted, Empire disposed of natural gas contracts it purchased for use in the generation of electricity to sell to its customers, without Commission authorization, in direct violation of Section 393.190; therefore, Staff is requesting the Commission to apply the law to a specific set of facts.

¹ Paragraphs 1 -2 of Empire's *Motion*.

5. Contrary to Paragraph 6 of Empire's *Motion*, the absence of cases addressing the sale of natural gas futures contracts does not mean that Empire's disposition of a portion of its forward gas supply contracts with BP is not subject to the prior to sale Commission approval requirement found in Section 393.190.1.

6. More to the point, the definition of "electric plant" cited by Empire that is contained in Section 386.020(14) plainly includes "personal property." Conspicuously absent from the statute is a limitation to "tangible personal property."

7. Contrary to Empire's assertions in paragraph 9 of its *Motion* that the Commission addressed this issue in Case No. GO-2003-0354, neither the August 5, 2004 *Order Closing Case*, in that case, nor the concurring opinions of Commissioners Davis or Murray, in any manner or degree address gas supply contracts, much less determine those contracts to not be part of a utility's "franchise, works, or system." Rather, the *Order* and opinions deal solely with the transfer of employees from the regulated operations of the company to its unregulated operations.

8. Similarly, Staff takes issue with Empire's assertion, contained in paragraph 11 of its *Motion*, that in Case No. ER-2006-0315 "the Commission stated that the sale of a portion of those [future delivery] contracts was reasonable." Empire's assertion is erroneous. The Commission stated that, "[i]t seems reasonable that a gain in the fuel category should offset a loss in the fuel category of roughly the same time." However, when it made that statement the Commission was addressing the following issue:

Should Empire's gain from unwinding a forward natural gas contract during the test year offset test year fuel and purchased power expense? If so, should the entire gain be an offset in the test year, or should it be amortized and only a portion of the gain be applied as an offset in the test year?

The Commission concluded that “the most reasonable approach to this issue is to allow Empire to use the gain to directly offset the under-recovery of fuel and purchased power costs.” There was no finding, nor even consideration, of the reasonableness or lawfulness of the act of disposing of the natural gas contracts it purchased for use in the generation of electricity to sell to its customers.

9. Empire asserts “system” is limited to tangible property.

10. Webster's Dictionary defines “system” as “a group of devices **or artificial objects** or an organization forming a network especially for distributing something or serving a common purpose <a nationwide dial telephone system> <an express highway system> <a system of public parks> <a hot air heating system>.” (emphasis added)²

11. By statute, Sections 386.020(50), and 386.020(60), the Missouri Legislature has defined “Sewer System” and “Water System,” respectively, to include “personal property” as an element of the respective “system,” and do not reference “tangible personal property.”

12. Those definitions limit the inclusion of personal property, like every other asset described in Sections 386.020(50) and 386.020(60), contingent on that personal property being “owned, operated, controlled or managed in connection with or to facilitate” the utility purpose.

13. Empire does not deny that it owned the subject gas futures contracts in connection with, or facilitation of, its provision of electrical service to its customers. In fact, in its *Motion*, it concedes that “[a]s stated in Staff’s complaint, in November 2004 Empire and [BP], entered into one or more fixed-price, forward contracts for the purchase of natural gas by the Company for use in the generation of electricity sold to its customers.”

² See, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 2322 (1993).

14. As stated in paragraph 14 of Empire's *Motion*:

The sole question raised by Empire's motion is strictly one of law: Were the gas supply contracts between Empire and BP part of the Company's "franchise, works or system" such that disposition of those contracts, in whole or in part, required prior approval of the Commission.

15. Based on the dearth of precedent on the matter, and Empire's unauthorized sale of these natural gas contracts Empire purchased for use in the generation of electricity to sell to its customers, the issue is plainly ripe for determination. Empire's argument that a claim based on any novel factual scenario is necessarily an uncountenancable claim, must fail.

WHEREFORE, the Staff moves the Commission to make a determination on the pleadings pursuant to **4 CSR 240-2.117(2)** and grant the relief sought in Staff's Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 26th day of February, 2009.

/s/ Sarah Kliethermes