

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

In the matter of the Application of The)
Empire District Electric Company for)
authority to issue and sell under its)
existing Indenture of Mortgage and Deed)
of Trust dated as of September 1, 1944,)
as amended and supplemented, up to and)
including \$200,000,000 principal amount)
of its First Mortgage Bonds, in one or more)
series and to, among other things, execute)
and deliver a Supplemental Indenture or)
Indentures to provide for the terms of)
said Bonds.)

Case No. EF-2004-0109

**RESPONSE OF THE EMPIRE DISTRICT ELECTRIC
COMPANY TO STAFF RECOMMENDATION**

COMES now The Empire District Electric Company ("Empire" or "Company") and for its response to Staff's Recommendation in the captioned matter, states as follows:

1. On March 29, 2004, Staff filed its Recommendation in the referenced case.

In summary, Staff has recommended that the Commission approve the Application subject to twelve (12) specific conditions.

2. Empire's first observation about Staff's Recommendation is a technical one that needs to be noted but should in no way represent a material difference as between Empire and Staff. The Staff Recommendation states that the Company should be "authorized to issue the reduced amount of \$89,000,000 in debt securities." See, Condition number 1. This is a technical misstatement of the relief requested by the Company. Empire's Application seeks authority to mortgage its properties located in the State of Missouri to secure bonded indebtedness in the amount of \$89,000,000. Empire is not seeking approval to issue the debt securities themselves. This may merely be a difference

of semantics but it is important that the Commission's order grant the relief requested by Empire.

3. Staff's proposed condition number 3 states that "the interest rate for this debt issuance is not to exceed 9% including any applicable discounts." Empire does not oppose this condition but requests that an order approving the Application include the additional language "without having first obtained the Commission's approval." This will permit Empire to file for more flexibility in the interest rate cap in the event market conditions justify so doing. Empire does not believe that this additional language is inconsistent with the spirit of Staff's recommendation.

4. Because of Empire's special circumstances, it opposes Staff's proposed condition number 5 which states that "the Company's total borrowing, including all instruments, shall, at no time, exceed its regulated rate base." Empire is of the understanding that Staff views this language as encompassing all debt, even unsecured indebtedness. Empire opposes this condition. This condition may make some sense for utilities that are chartered in the State of Missouri and over which the Commission has statutory authority concerning the issuance of securities, both debt and equity. In the case of Empire, however, it is a condition that is inappropriate and unwarranted. As noted in the Application, Empire is a Kansas corporation that has filed an Application pursuant to §393.190 RSMo 2000 for authority to encumber its properties to secure payment of bonded indebtedness. See, Application ¶19. The Application has not been filed pursuant to §393.200 RSMo 2000 which is applicable only to Missouri chartered companies.¹

¹ *Public Service Commission v. Union Pacific Railroad Co.*, 197 S.W. 39 (Mo. banc 1917); *Re Suburban Service Co.*, 14 Mo.P.S.C. 114 (1923).

Consequently, imposing a condition that purports to confer upon the Commission the authority to regulate Empire's capital structure that has not been granted by statute would be an effort to regulate indirectly what the Commission is not authorized to regulate directly under the Missouri Public Service Commission Act.² Because Empire is not subject to the same comprehensive regulation in this state over the issuance of securities as are domestic companies, condition number 5 is unlawful as applied to Empire and should not be imposed on its operations.

5. Staff's proposed condition numbers 9, 10 and 11, collectively, address the purposes to which proceeds from the up to \$89,000,000 of First Mortgage Bond issued pursuant to the Commission's order in this case may be put. Staff's proposed conditions 9 and 10 state that future First Mortgage Bond proceeds (and the associated benefits accruing thereto) acquired through the issuance of First Mortgage Bonds authorized by the Commission in this case shall be used exclusively for Empire's regulated operations. These conditions require special mention. Empire concurs with the purpose and spirit of this language. It is not Empire's intention that proceeds associated with the issuance of its First Mortgage Bonds be used for anything other than regulated purposes. Staff's proposed condition no. 11, however, deals with making available to Staff documentation sufficient to demonstrate compliance with conditions 9 and 10. Empire believes that it can fully comply with both the letter and spirit of this condition by maintaining and providing internal documentation that will demonstrate that First Mortgage Bond proceeds have not been used for anything other than its regulated operations by showing that expenditures on incremental utility obligations equal or exceed the proceeds derived from its issuance of up

² *State ex rel. Springfield Warehouse and Transfer Co., v. Public Service Commission*, 225 S.W. 2d 792 (Mo. App. 1949) [Commission cannot adopt a rule or practice that nullifies the expressed will of the General Assembly as set forth in statute.]

to and including \$89,000,000 of First Mortgage Bond proceeds during the relevant time period. This approach should suffice to meet Empire's obligations under proposed condition number 11. Consequently, Empire has no objection to Staff proposed conditions 9, 10 and 11.

6. Empire objects to Staff's proposed condition number 12 which purports impose on Empire the obligation to develop a special company-specific procedure for processing financing applications in the future. This unusual condition should not be imposed on Empire. The Commission's existing rules of practice and procedure govern the filing of such applications, including requests for expedited consideration. See, 4 CSR 240-2.080(16). No special and more limiting obligations should be imposed on Empire. If this process is to be reviewed, it should be in the context of a rulemaking of general applicability. The Commission has previously rejected Staff's attempts to put in place company specific procedures that circumvent the process set forth in existing rules. See, Order Granting Financing Application dated January 29, 2004, Case No. EF-2004-0205.

7. Empire does not oppose any of the remaining conditions proposed by the Commission's Staff.

WHEREFORE, Empire requests that the Commission grant the relief requested in Empire's Application taking into account its comments in paragraphs 2 and 3 aforesaid subject to Staff's recommended conditions except proposed conditions 5 and 12 for the reasons set forth above.

Respectfully submitted,

/s/ Paul Boudreau

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Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand-delivered, on this 27th day of May 2004, to:

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