BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

MOTION TO DISMISS STAFF'S COMPLAINT
FOR FAILURE TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED

The Empire District Electric Company ("Empire" or the "Company"), by and through its undersigned attorneys and pursuant to 4 CSR 240-2.070(6), hereby moves the Missouri Public Service Commission ("Commission") for an order dismissing the complaint filed by the Commission Staff ("Staff") on February 6, 2009, on grounds that the complaint fails to state a claim for which the relief requested therein can be granted. Section 393.190.1, RSMo 2000,[1] does not apply to sales, transfers, or other dispositions of contracts for the future purchase and delivery of natural gas; therefore, Empire did not violate that statute, or any other applicable law or regulation, when it "unwound" portions of one or more fixed-price, forward gas supply contracts without first obtaining the Commission's approval. Because the Company's actions do not constitute a violation of any applicable law, there is no basis upon which the Commission can lawfully grant Staff any of the relief requested in its complaint.

In support of its motion, Empire states as follows:

1. 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

[1] All statutory citations in this motion are to RSMo 2000 unless otherwise indicated.

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.

2. 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.

3. Staff alleges that Empire's actions to unwind a portion of its gas supply contracts with BP without prior authorization from the Commission constitute a violation of Section 393.190.1, which states, *inter alia*, as follows:

> No . . . electrical corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system necessary or useful in the performance of its duties to the public . . . without having first secured from the commission an order authorizing it to do so.

Staff bases this allegation on its assertion that Empire's gas supply contracts with BP are part of the Company's "works or system" necessary to the fulfillment of Empire's duties as a regulated public utility.

4. Staff cites no case law to support its interpretation of Section 393.190.1. In fact, the only purported authority cited by Staff in support of its assertion that Empire's gas supply contracts are part of its "works or system" is the Commission's September 9, 1992, *Order Establishing Jurisdiction and Clean Air Act Workshops*, which was issued in Case No. EO-92-250, *In re Kansas City Power & Light Co.*, 1 Mo.P.S.C.3d 359 ("*KCPL*"). In that order the Commission found that "[SO_2] emission allowances are . . . part of KCPL's 'system', and any sale or transfer of these allowances is void without prior Commission approval." *Id.* at p. 362.

5. But Staff's reliance on *KCPL* is unfounded. *KCPL* involved no actual dispute but was, instead, initiated in response to a request from Kansas City Power & Light Company for an

advisory opinion as to whether its sale of SO_2 emission allowances to a third party required Commission approval under Section 393.190. *KCPL* at p. 359. In *State ex rel. Kansas Power & Light Co. v. Pub. Serv. Comm'n.*, 770 S.W.2d 740 (1989), the Missouri Court of Appeals, Western District, held: "[T]he Commission may not promulgate declarations of law in the abstract because the Commission 'has no power to expound authoritatively any principle of law or equity . . .." *Id.* at p. 743. Because the Commission had no power to find in *KCPL* that Section 393.190 requires a Missouri utility to obtain prior approval before it transfers SO_2 emissions allowances, that finding is a nullity and it has no precedential effect whatsoever. Consequently, the so-called "authority" on which Staff bases its complaint against Empire is, in reality, no authority at all.

6. Although the terms "works" or "system" found in Section 393.190.1 are not defined in Section 386.020 or anywhere else in the Public Service Commission Law, there are both court and Commission decisions interpreting or defining these key terms. Those decisions clearly show that there is no reason to conclude, as Staff has, that the requirement for prior Commission approval found in Section 393.190.1 applies to transactions such as Empire's disposition of a portion of its forward gas supply contracts with BP.

7. Regarding the term "works," in *State ex rel. City of Trenton v. Pub. Serv. Comm'n.*, 174 S.W.2d 871 (1943), the Missouri Supreme Court concluded that the term means electric plant, gas plant, or both. *Id.* at pp. 879-80. And, as the definition found in Section 386.020(14) makes clear, "electric plant" includes only tangible assets used to provide electricity:

> "Electric plant" includes all real estate, fixtures and personal property operated, controlled, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power; and any conduits, ducts, or other devices, materials, apparatus or property for containing, holding, or carrying conductors used or to be used for the transmission of electricity for light, heat or power;"

8. Although the terms "system" or "electrical system" are not specifically defined in the Public Service Commission Law, the terms "sewer system" and "water system" are defined in

Sections 386.020(50) and 386.020(60), respectively. The definition of each of these terms consists of a list of the equipment, facilities, and other tangible assets that are used to provide service to customers. Because the term "system" used in Section 393.190.1 applies equally to all utilities, it is would be unreasonable to assume that the General Assembly, in enacting the statute, intended the term to mean one thing for sewer and water utilities and something else for electric utilities, like Empire. And although there are no Missouri cases interpreting the term "system" as it applies to electric utilities, courts in other states have held that an electric utility's system consists of the machinery, poles, lines, land, and other equipment necessary to produce electricity and to deliver it to customers. *See, e.g., Yamhill Elec. Co. v. City of McMinnville*, 274 P. 118, 126 (Ore. 1929).

9. The Commission's decision in Case No. GO-2003-0354, *In the Matter of the Transfer of Assets Including Much of Southern Union's Gas Supply Department to EnergyWorx, a Wholly Owned Subsidiary*, also sheds light on the question of whether the gas supply contracts at issue in Staff's complaint fall within the scope of Section 393.190.1. That case involved Staff's allegation that Southern Union violated Section 393.190 when, as part of a sale of its natural gas distribution assets to ONEOK, Inc., but without prior authorization from the Commission., Southern Union offered employees in its gas supply department the option to transfer elsewhere within the company or to accept employment with ONEOK. In its August 5, 2004, order in that case, the Commission dismissed Staff's allegation on the ground that Staff had not met its burden of showing "that the transfer of personnel invokes the Commission's jurisdiction" under Section 393.190.[2] But, as the concurring opinions filed by Commissioners Davis and Murray make clear, the real problem was not Staff's failure to bear its burden of proof; instead, Staff's allegation was fundamentally defective because items like gas supply contracts are not part of a utility's "franchise, works, or system."

[2] *Order Closing Case* at p. 3, Case No. GO-2003-0354 (August 5, 2004)

10. Commissioner Davis expressed his views regarding the limits of the Commission's jurisdiction under Section 393.190.1 as follows:

> The employees of Southern Union's gas purchasing division may have been useful in performing the duties of the utility in this case; however, the definitions of the words making up the phrase "franchise, works or system" reveal that employees were not contemplated when this statute was created and subsequently amended. . . "Franchise" refers to the company's right to operate and MGE has given up no rights. Likewise, "works or system" refers to the physical infrastructure owned by the company, not employees.
>
> This interpretation is further supported by the fact that this statute has been in existence for at least 60 years. **No Missouri Public Service Commission or superior court has ever found the transfer of employees like we have in this case to be a transaction invoking the commission's authority under Section 393.190.** (emphasis original)[3]

And Commissioner Murray's concurrence was equally emphatic regarding the limitations of the Commission's jurisdiction under the statute: "[I]t is clear that the Commission's jurisdiction was neither invoked by the sale of office equipment in Texas, nor by the transfer of personnel. The fact that Section 393.190 does not apply to the facts of this transaction should have been apparent from the start."[4]

11. In addition, the Commission considered Empire's decision to unwind a portion of its gas supply contracts with BP, and issues related to that decision, in each of the Company's two most recent general rate cases – Case Nos. ER-2006-0315 and ER-2008-0093. But in neither of those cases did the Commission suggest – much less find – that Empire's actions were unlawful. Indeed, in Case No. ER-2006-0315 the Commission stated that the sale of a portion of those contracts was reasonable and that the gain from the transaction should be used to offset a portion of Empire's unrecovered fuel and purchased power costs.[5] If the Commission believed, as Staff's complaint contends, that Empire's unwinding of those contracts was unlawful and therefore void, surely the Commission would have addressed that issue in one or both of those cases. The fact that the final orders issued in both cases are silent on the legal issue raised by Staff's complaint

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[3] *Concurring Opinion of Commissioner Jeff Davis* at pp. 5-6, Case No. GO-2003-0354 (Aug. 13, 2004).
[4] *Concurring Opinion of Commissioner Connie Murray*, Case No. GO-2003-0354 (Aug. 5, 2004).
[5] See *Report and Order upon Reconsideration*, at p. 53 (Ap. 5, 2008).

suggests the Commission was untroubled by the Company's handling of the gas supply contracts and did not view Empire's actions as a violation of applicable law.

12. Applicable law clearly establishes that items such as the gas supply contracts between Empire and BP are not part of the Company's "franchise, works or system"; therefore, those items are beyond the scope of Section 393.190.1 and their transfer is beyond the jurisdiction of the Commission conferred by that statute. Empire's actions to unwind portions of those contracts without first obtaining the Commission's approval did not violate that statute or any other applicable law or regulation. Accordingly, Staff's complaint, which is based solely on the allegation that the Company's actions were unlawful because they were taken without Commission approval, fails to state a claim for which relief can be granted.

13. A judgment on the pleadings dismissing a petition for failure to state a claim for which relief can be granted is appropriate where the question before the tribunal is strictly one of law. *Eaton v. Mallinckrodt, Inc.*, 224 S.W.3d 596, 600 (Mo. 2007). The rule allowing dismissal exists "to permit resolution of claims as early as they are properly raised in order to avoid the expense and delay of meritless claims or defenses or to permit the efficient use of scarce judicial resources." *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993). The question presented by a motion to dismiss for failure to state a claim is whether the moving party is entitled to judgment as a matter of law on the face of the pleadings. *RGB2, Inc. v. Chestnut Plaza, Inc.*, 103 S.W.3d 420, 424 (Mo. App. 2003). And such a motion should be granted unless the challenged petition invokes principles of law that entitle the petitioner to the relief requested. *See Murray v. Ray*, 862 S.W.2d 931, 933 (Mo. App. 1993).

14. 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? Based on applicable law and a reasoned interpretation of Section 393.190.1, the answer to that question is "no." Staff's complaint, therefore, fails to invoke any principles of law

that entitle Staff to the relief it has requested – an order finding the Empire acted unlawfully and authorizing the Commission's General Counsel's Office to seek penalties in Circuit Court. Consequently, the Company is entitled, as a matter of law, to a judgment dismissing Staff's complaint, with prejudice. Should the Commission refuse to grant Empire's motion, the Company will be required to expend time and resources and to incur significant expense contesting Staff's meritless claim, and the Commission will be required to expend its time and resources hearing and adjudicating the matter. These unnecessary consequences can be avoided if the Commission grant's Empire's motion and dismisses Staff's complaint, with prejudice.

WHEREFORE, for the reasons stated herein, Empire requests the Commission to issue an order that grants the Company's motion and that summarily dismisses Staff's complaint, with prejudice.

Respectfully submitted,

L. Russell Mitten MO Bar # 27881
BRYDON, SWEARENGEN & ENGLAND, P.C.
312 East Capitol Avenue
P. O. Box 456
Jefferson City, Missouri 65102-0456
Telephone: (573) 635-7166
Facsimile: (573) 636-6450
Email: rmitten@brydonlaw.com

ATTORNEYS FOR
THE EMPIRE DISTRICT ELECTRIC COMPANY

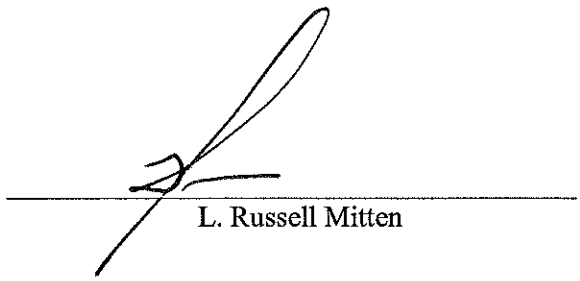
CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2009,, a copy of the Motion to Dismiss Staff's Complaint for Failure to State A Claim for Which Relief Can Be Granted of The Empire District Electric Company was sent, via regular United States Mail or e-mail, to the following parties:

Kevin Thompson
General Counsel
Missouri Public Service Commission
200 Madison Street, Ste. 800
P.O. Box 360
Jefferson City, MO 65102

Office of the Public Counsel
P.O. Box 2230
Jefferson City, MO 65102

Steven C. Reed
Sarah L. Kliethermes
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102



L. Russell Mitten