

In the matter of the application of The Empire District Electric Company for a waiver of the Provisions of its tariff and 4 CSR 240-14.020 with Regard to The Lakes at Shuyler Ridge Subdivision in conjunction with a Proposed First Territorial Agreement with Ozark Electric Cooperative. ) ) ) Case No. \_\_\_\_\_

Comes now The Empire District Electric Company ("Applicant" or "Empire"), by and through its counsel, and pursuant to 4 CSR 240-2.060, 4 CSR 240-3.015 and 4 CSR 240-14.010(2), requests a variance from the Commission's promotional practices rules (4 CSR 240-14.020) and certain provisions in its tariff that implement those rules, as follows:

2. Applicant is a Kansas corporation with its principal office and place of business at 602 Joplin Street, Joplin, Missouri 64801. Empire is engaged in the business of providing electrical and water utility services in Missouri to customers in its service areas. Empire is an “electrical corporation,” a “water corporation,” and a “public

utility” as those terms are defined in § 386.020 RSMo., and is subject to the jurisdiction and supervision of the Commission as provided by law. As of June 1, 2006, Empire has a wholly owned subsidiary that is a “gas corporation” with the acquisition of a gas system from Aquila. Empire has no pending or final unsatisfied judgments or decisions against it from any state or federal agency or court which involve customer service or its rates, which have occurred within the three years immediately preceding the filing of this Application. Empire has no overdue Commission annual reports or assessment fees. Empire’s documents of incorporation have been previously filed with the Commission in Case No. EF-94-39, and said documents are incorporated herein by reference in accordance with 4 CSR 240-2.060(1)(G). A Certificate of Authority from the Missouri Secretary of State to the effect that Empire, a foreign corporation, is duly authorized to do business in the State of Missouri was filed with the Commission in Case No. EM-2000-369, and is incorporated herein by reference.

3. All correspondence, communications, notices, orders and decisions of the Commission with respect to this matter should be sent to:

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4. This application arises from a fact situation pertaining to a rather large area of land situated south of the present corporate limits of the City of Republic, Missouri ("the City"). Due to its proximity to the cities of Springfield and Branson, some areas around the City are experiencing rapid development in the form of new housing tracts. The City has entered into what are called Development Agreements with some of the developers. These Development Agreements are comprehensive documents addressing numerous issues involved with topics such as the provision of City services and standards for infrastructure such as access road design and location and traffic signals. They also provide for voluntary annexation of the tracts to occur at the timing and discretion of the City.

5. Annexation by the City is a key factor in this situation. Empire has a franchise from the City to provide electric service at retail inside the corporate limits of the City. The current franchise is effective until February 14, 2014. Empire also provides retail electric service in areas adjacent to but outside of the corporate limits of the City. The area within the corporate limits of the City is not a "rural area" as defined in section 394.020 RSMo. As a result, Empire is the only electric service provider entitled by law to provide retail electric service to new structures located within the City. However, Empire competes with Ozark Electric Cooperative ("Ozark") for service to new structures outside of the City. Ozark presently serves numerous customers in areas all around the City. The act of annexation by a city with a population greater than 1,500 changes the legal ability of Ozark to provide service within the corporate limits. Pursuant to Missouri statutes and case law, Ozark is permitted to continue supplying service to a structure it was serving with permanent service facilities immediately prior

to the annexation. See 394.315 RSMo. Ozark cannot, however, lawfully serve new structures in the City once the annexation takes place. In this situation, as noted above, service in an area annexed by the City is to be provided by the franchised supplier, which is Empire.

6. At the request of the City, representatives of Empire, Ozark, the City, and two different sets of real estate developers met on March 23, 2006, in Republic. The request for the meeting from the City stated that the purpose was to “address and finalize any issues regarding a territorial agreement between” Empire and Ozark. The City offered its facilities and assistance in addressing questions and issues that had arisen regarding two major developments, annexation of those developments into the City, and electric service to the developments. At the meeting, it became apparent that some developers who were operating under Development Agreements with the City were unaware of the provisions of Missouri law discussed above regarding the providers of retail electric service. They had entered into contractual arrangements with Ozark to provide retail electric service and other things -- such as street lighting -- to the developments, not knowing that Ozark’s ability to provide electric service would be affected by the act of annexation. The City also made the attendees aware of provisions of Missouri law regarding the impact of municipal annexation on fire protection districts and provisions relating to compensation having to be paid to the districts. Generally speaking, the meeting revealed sharply opposing interests as to the timing of annexation of the developments by the City due to several aspects of state law. The possibility of litigation over the Development Contracts was mentioned. The City, as indicated in the notice of the meeting, strongly encouraged Empire and Ozark to

negotiate a territorial agreement in an effort to mitigate or resolve at least some of the voiced concerns. Empire and Ozark participated in negotiations with appropriate consideration being given to the respective interests of the City and the developers. What emerged from essentially a day of discussion and negotiation, and subsequent investigation of relevant facts, was an agreement in principle that Ozark and Empire would seek Commission approval of the first territorial agreement to be negotiated between them, and that Empire would seek a variance from the Commission's promotional practices rules in order to address the situation concerning the developers of one of the subdivisions and their contractual relationship with Ozark that would be affected by approval of the territorial agreement. This, in turn, has produced the simultaneous filing with the Commission of this application for variance and a joint application by Ozark and Empire for approval of their First Territorial Agreement since, to implement the agreement in principle, Commission approval on both is required by Missouri law.

7. The agreement in principle, as reflected in these two interdependent filings with the Commission, represents a compromise between several competing interests. As a result, the Application for Variance and the application for approval of the First Territorial Agreement are mutually dependent. In other words, both must be approved by the Commission in order to satisfy all the competing interests in this situation. The agreement in principle would result in one large (517 lots in approximately 245 acres) planned subdivision immediately adjacent to the south City limits, known as The Lakes at Shuyler Ridge, being served by Empire instead of Ozark. The other large planned subdivision, Terrell Creek, located further to the south, would continue to be served by

Ozark. In addition to those specific subdivisions, Empire and Ozark were able to negotiate proposed exclusive service territories for large tracts adjacent to those subdivisions, basically resulting in a proposed division of territory covering most of the area south of the City. In general, the agreement in principle, if approved and implemented, would produce the following results: Empire obtains a large area (approximately 4.5 square miles) adjacent to the southwest side of the City as its exclusive service area, free from future competition for electric customers by Ozark; Ozark gets a large area (approximately 4.0 square miles) adjacent to the southeast side of the City as its exclusive service area, free from future competition for electric customers by Empire; the developers get certainty as to the electric supplier boundaries and generally get the benefit of their previous contractual arrangements with Ozark and the City without the prospect of litigation since one development will be in Empire's service area and the other will be in Ozark's; the City gets to realize the benefit of the Development Agreements, and the commensurate control over the planning for city services in areas adjacent to the City, and the elimination of threatened impairments to its plans for annexation and development; and the public in the area benefits from the certainty of boundaries for electric service, the reduction in the possibility of electric line duplication that could have occurred in annexed areas, and the placement of certain access roads and traffic signals for the affected developments.

8. Ozark, as a Chapter 394 RSMo rural electric cooperative, provides electric service in portions of the Empire electric service area established by the Commission. Because it is a cooperative, Ozark is not considered a "public utility" and is not regulated by the Commission as to its charges and terms of service. As is particularly

relevant here, Ozark is self-regulated as to the conditions of service it may offer by policy of general application to new customers. In contrast, Empire is regulated by the Commission as to such terms and conditions of service, and is generally prohibited by 4 CSR 240-14.020 from competing for new electric customers by offering things which are “free, or less than actual cost or value.” Empire does not have the legal ability to unilaterally modify its tariff provisions on an ad hoc basis to meet the more favorable terms and conditions that may be offered by Ozark under its own business plan and efficiencies. Therefore, Ozark can and does offer developers some services such as underground installation of facilities and street lighting fixtures without the upfront payment required by Empire’s tariff. Experience demonstrates that the prohibitions in 4 CSR 240-14.020, in some circumstances where a direct competitor operates under distinctly different pricing policies, means that Empire cannot effectively compete for new customers where such competition exists. It is Empire’s position that the conditions offered by Ozark under its policies are a substantial and effective tool for Ozark in securing new customers. A copy of relevant portions of Ozark’s policies and its agreement pertaining to this development are attached hereto as **Appendix A**.

9. There are two specific aspects to Empire’s request for variance that are related to such terms from Ozark. The first concerns Empire’s current tariff provisions for subdivision extensions. Those require that a developer pay Empire all installation costs in advance. Under Empire’s tariff, the developer is then entitled to receive a rebate for each lot that receives permanent power from Empire within a five-year period. The rebate represents a package of material and labor that currently has a value of \$2,679 per lot. For example, Empire’s current estimate (including the cost to Empire to

purchase certain existing Ozark facilities already installed in Phase I of The Lakes at Shuyler Ridge subdivision) to extend service to Phase I is \$531,772.74. Under Empire's tariff, the developer would only be eligible for \$436,677.00 (163 lots in Phase I x \$2,679 per lot) in rebates, which leaves a balance of \$95,095.74 that would be non-refundable to the developer under Empire's tariff. In contrast, Ozark's current practice is to install all facilities at no cost to the developer. Empire's intention through this variance application is to hold the developer of The Lakes at Shuyler Ridge harmless from this difference in policies between the electric suppliers. Thus, if this variance application is approved, the developer would pay no upfront cost to Empire, which produces the same result that the developer would have had under its agreement with Ozark. But the developer would not receive any rebates under Empire's tariff because no upfront costs were paid. Therefore, Empire seeks a variance that waives the requirements for the developer of The Lakes at Schuyler Ridge to make up front payments for the installation of the electric service facilities and also waives the requirement for Empire to make corresponding rebates. These tariff provisions are contained in Empire's electric tariff, PSC Mo. No. 5, Sec. 5, Original Sheets 17c and 17d.

10. The second aspect of the variance request deals with street lighting facilities within The Lakes at Shuyler Ridge. The developer had previously selected a style of decorative street lighting facilities to be supplied by Ozark. Empire's current street light tariff provisions applicable within the City require the developer to pay Empire all cost associated with installing decorative street lighting. Empire then bills the City for the energy necessary for operation of the lights pursuant to its rate schedule



SPL at the applicable tariff rate. If the street lighting occurs outside the corporate limits, Empire's rate schedule for private lighting – rate schedule PL -- applies. Empire's current estimate to install the desired decorative street lighting for Phase I of The Lakes at Schuyler Ridge is \$60,800.00. In contrast, Ozark's current policy is that it will install street lighting at no charge up to a cost of \$1,500.00 per light, at which time the developer would then pick up any additional cost. In this instance, Ozark is willing to install \$57,000.00 of street lighting at no cost to the developer in Phase I. Ozark installs a street light for every fifth lot, plus one light, and requires the subdivision developer to include in the covenants applicable to the subdivision that operation costs are to be borne by the residents. For the energy necessary for the operation of the lights, Ozark takes its current street light charge of \$17.50 per month and divides that equally among the five lots and bills the customers. Empire's intention through this variance application, as with the service facilities aspect, is to hold the developer of The Lakes at Shuyler Ridge harmless from this difference in policies between the electric service providers. Thus, Empire would spend \$57,000 for the decorative street lights in Phase 1; just as Ozark would have under its agreement with the developer. The developer would pay the \$3,800 difference ( $\$60,800 - \$57,000 = \$3,800$ ), which produces the same result that the developer would have had under its agreement with Ozark. Thus, Empire seeks a variance that waives the requirements for the developer of The Lakes at Shuyler Ridge to make up front payments for the installation of the decorative street light facilities up to \$1,500 per light. No variance is necessary for the energy to supply the street lights since Empire will bill the City for that pursuant to Empire's tariff. Empire understands that it is the intention of the City to annex The Lakes at Shuyler Ridge as

soon as possible after Commission approval of this variance and the territorial agreement, so there should not have to be any use of Empire's PL schedule, but it is available if that becomes necessary.

11. Empire has performed a pro forma financial analysis for extending its service to serve the 517 lots platted in the four phases of development at The Lakes at Shuyler Ridge under different scenarios. Assuming timely approval of the First Territorial Agreement and this Application for Variance, and assuming an average growth rate of 80 lots per year, after ten years Empire's service (priced at current prices) would produce approximately \$5.6 million in revenue compared to \$1.8 million in installation costs. Since Empire's ability to serve The Lakes at Shuyler Ridge is at this time (absent the Territorial Agreement) totally dependent upon when the City might annex all or a portion of The Lakes at Schuyler Ridge, and the timing of those future annexations could be impacted by the sharply differing interests expressed at the March 23 meeting referred to previously, Empire made several further assumptions as to that possible timing in other scenarios reflected in **Appendix B** to this application. These scenarios all demonstrate that it is most beneficial to Empire and its other customers if Empire provides service to the subdivision sooner rather than later. Additionally, they demonstrate that it is economically feasible for Empire to provide service to the subdivision and that all of Empire's customers would benefit from the portion of revenue representing contributions to cover fixed costs being made by these new customers.

12. The requested variance/waiver sought here is limited in scope, applying only to the Lakes at Shuyler Ridge subdivision located in Section 28, Township 28 North, Range 23 West in Greene County, Missouri.

13. Based upon the information available to it, and as explained herein, Empire believes good cause exists to grant the relief it requests. The waiver of the particular provisions is limited in scope to the one subdivision but the benefits extend beyond those boundaries to include allowing Empire to achieve an exclusive service territory as regarding Ozark in this region, and a benefit to Empire's existing customers through more efficient utilization of equipment, transmission and distribution facilities that are already in place to serve this area. Empire believes that the facts demonstrate that the proposed variance is just and reasonable as a business practice, economically feasible and compensatory, and reasonably calculated to benefit both Empire and its customers. It does not seek to address situations beyond those immediately necessary to resolve the present conflicting interests.

14. Empire will not legally be able to meet the financial terms available from Ozark without this variance. Without this variance, the developer of The Lakes at Shuyler Ridge will not have any incentive to take electric service from Empire since it already has an agreement in place with Ozark. Without the tentative agreement of the developer, Ozark and Empire to have The Lakes at Shuyler Ridge served by Empire instead of Ozark under the proposed territorial agreement, it is uncertain when annexation of the subdivision might occur by the City and it is unlikely that there would be a territorial agreement presented to the Commission for approval. Empire therefore believes that if it is not granted the relief it seeks, Ozark will become the permanent energy provider for this substantial development and an estimated \$5.7 million in revenue over the next ten years will not be available to Empire from this location.

15. The Commission in the past has recognized the need of regulated public utilities to meet unregulated competition by granting requests similar in nature to this. See Case No. EO-94-254 and the Order Approving Variance and Tariff issued March 18, 1994.

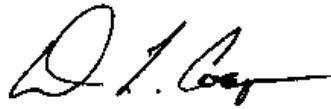
16. In accordance with 4 CSR 240-14.010(2), Empire has caused a copy of this Application to be served on each public utility providing the same or competing utility service in all or any portion of the service area of Empire. As far as Empire's electric service is concerned, the only competing public utility is Missouri Gas Energy and a copy of the application has been sent to MGE's chief operating officer. The geographical area in southwest Missouri covered by this Application for Variance does not include the geographical area in western and northwestern Missouri that is served by Empire's subsidiary that is a gas utility. The Empire District Gas Company does compete with electric operations of Aquila, Kansas City Power & Light Company, and Ameren. Therefore, a copy of this application has also been sent to the offices of Aquila, KCPL, and Ameren. As far as Empire's water service area is concerned, there are no other public utilities providing a competing service in that area.

17. Because construction is already under way in Phase I of the subdivision, Empire requests that the Commission process this application with all deliberate speed.

WHEREFORE, Empire requests an order from the Commission granting a variance from 4 CSR 240-14.020(1)(B) and (D), and to the extent they may be construed to apply to this situation, (1)(E) and (F), and a variance from the provisions of Empire's electric rules and regulations (PSC Mo. No. 5, Sec. 5, Sheets 17c and 17d) and rate schedules (SPL and PL) to permit Empire to meet but not exceed the terms

offered by Ozark with regard to the installation of electric service and decorative street lighting within the boundaries of The Lakes at Shuyler Ridge as described herein.

Respectfully submitted,



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Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing document was served on the Office of the Public Counsel, Commission Staff and representatives of Missouri Gas Energy, Kansas City Power & Light Company, Aquila, Inc., and Ameren Corporation this 18<sup>th</sup> day of July, 2006, by placing a copy of same in the United States Mail, first class postage prepaid and properly addressed, or hand delivering same, or by electronic service.

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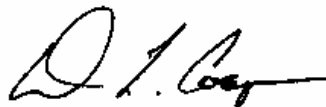
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