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.	)	

THE EMPIRE DISTRICT ELECTRIC COMPANY'S
REPLY TO 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

The Empire District Electric Company ("Empire" or the "Company"), by and through its undersigned attorneys and pursuant to 4 CSR 240-2.080(15), hereby replies to "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"("Response"), which was filed on February 26, 2009. For its reply, Empire states as follows:

STAFF'S MOTION FOR DETERMINATION ON THE PLEADINGS

Although the title of Staff's Response indicates that, in part, it includes a motion for a determination on the pleadings pursuant to 4 CSR 240-2.117(2), it is unclear to Empire: a) if Staff, in fact, has made such a motion; b) if Staff made such a motion, what is the basis for that motion; and c) what legal authority Staff believes entitles it to a judgment on the pleadings.

Assuming Staff's Response qualifies as a motion for judgment on the pleadings, the Commission cannot, as a matter of law, grant Staff the relief such a motion requests because a motion for a judgment on the pleadings is premature at this time. It is well established in Missouri law that a motion for judgment on the pleadings is only available after pleadings are closed. *State*

ex rel. Premier Panels, Inc. v. Swink, 400 S.W.2d 639, 642 (Mo. App. 1966). And pleadings are not closed until an answer is filed. *Bramon v. U-Haul, Inc.*, 945 S.W.2d 676, 679 (Mo. App. 1997).

Empire has not yet filed its answer to Staff's complaint; in fact, by its *Order Granting Motion to Defer Filing Answer*, dated February 23, 2009, the Commission has stayed the Company's answer until after a ruling is made on Empire's pending "Motion to Dismiss Staff's Complaint for Failure to State A Claim for Which Relief Can Be Granted." Because the Company has not yet filed its answer, the pleadings in this case are not yet closed; and because the pleadings are not yet closed, Staff's motion for a judgment on the pleadings is premature and cannot be granted by the Commission.

STAFF'S RESPONSE TO EMPIRE'S MOTION TO DISMISS

Much of Staff's Response simply begs the questions of: a) whether the gas supply contracts at issue in this case are part of the Company's "works or system"; and b) whether Empire's disposition of all or a part of those contracts without prior approval by the Commission constitutes a violation of §393.190.1, RSMo 2000.[1] For example, Staff states in paragraph 4 of the Response: "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 . . .." But the Company made no such admission. Certainly, Empire "unwound" a portion of certain fixed-price, forward contracts for the purchase of natural gas without first seeking Commission authorization to do so.[2] However, as its motion to dismiss makes clear, the Company does not believe – and never has admitted – that such actions violated §393.190.1 or otherwise were unlawful.

The Company notes that Staff admits in its Response that the Commission's September 9, 1992, *Order Establishing Jurisdiction and Clean Air Act Workshops*, issued in Case No. EO-92-

[1] All statutory citations in this reply are to RSMo 2000 unless otherwise indicated.
[2] Empire's *Motion to Dismiss Staff's Complaint for Failure to State A Claim for Which Relief Can Be Granted* at ¶ 2.

250,[3] is not binding precedent for the legal issues that are at the heart of Staff's complaint. Yet, as Empire pointed out in its motion to dismiss, that order is the only so called "authority" – binding or otherwise – that Staff cited in the complaint as support of its allegations that the Company's disposition of a portion of its gas supply contracts without Commission authorization constitutes a violation of law for which statutory penalties should apply.

Having backed away from the Commission's order in Case No. EO-92-250, the Response suggests that Staff now adopts as the legal basis for its complaint against Empire the theory that *all* personal property that is owned, operated, controlled, or managed by a utility is part of that utility's "works and system" as that phrase is used in §393.190.1[4]. Staff bases its theory on the fact that the phrase "personal property" appears in the definitions of "sewer system" and "water system" that are found in §§386.020(50) and 386.020(60), respectively.[5] Empire argued in its motion to dismiss – and argues anew here – that those definitions are useful in understanding the scope of the phrase "system and works" used in §393.190.1 because that statute applies to electric, gas, sewer, and water utilities alike. But there is no justification – either in law or common sense – for the virtually limitless definition Staff imparts to the phrase "personal property" found in those definitions.

The definitions of "sewer system" and "water system" found in §386.020 state as follows:

> (50) "Sewer system" includes all pipes, pumps, canals, lagoons, plants, structures and appliances, an all other real estate, fixtures and personal property, owned, operated, controlled or managed in connection with or to facilitate the collection, carriage, treatment and disposal of sewage for municipal, domestic or other beneficial or necessary purposes;
>
> (60) "Water system" includes all reservoirs, tunnels, shafts, dams, dikes, headgates, pipes, flumes, canals, structures and appliances and all other real estate, fixtures and personal property, owned, operated, controlled or managed in connection with or to facilitate the diversion, development, storage, supply,

[3] *In re Kansas City Power & Light Co.*, 1 Mo.P.S.C.3d 359.
[4] Response at ¶ 12.
[5] Response at ¶ 11.

distribution, sale, furnishing or carriage of water for municipal, domestic or other beneficial use.

In each definition, the phrase "personal property" is preceded by a list of tangible equipment and other property that comprise the components of the *physical system* used by a utility to provide service to its customers. In addition, while most of the enumerated assets are real, not personal, property, all of the property enumerated in the defintions share one common characteristic: they all are *tangible* property.

To determine the meaning and scope of the phrase "personal property" as it is used in the above definitions, the Commission must apply established principles of statutory interpretation. One such principle instructs that proper interpretation of statutory language requires consideration of the context in which words are used and the problem the legislature sought to address when it enacted a particular statute. *Mabin Constr. Co. v. Historic Constructors, Inc.*, 851 S.W.2d 98, 100 (Mo. App. 1993) In addition, under the principle of *ejusdem generis*, the law requires that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated in the preceding specific words." *Vocational Services, Inc. v. Developmental Disabilities Resource Bd.*, 5 S.W.3d 625, 631 (Mo. App. 1999).

The expansive definition of the phrase "personal property" proposed by Staff in its Response violates all of the aforementioned principles of statutory interpretation and construction. For example, by interpreting the phrase "personal property" as used in the definitions of "sewer system" and "water system" to include both tangible and intangible property, Staff asks the Commission to ignore the context in which that phrase appears in each of those definitions. In each definition, the phrase "personal property" is preceded by a list of equipment, fixtures, and other tangible property. Moreover, all of the tangible property enumerated in those definitions is dissimilar in virtually every respect to Empire's gas supply contracts. Accordingly, and based on the holdings in *Mabin* and *Vocational Services*, *supra*, it

would be both unreasonable and unlawful for the Commission to conclude that the use of the general phrase "personal property" in those definitions was intended to include intangible property as part of a utility's system.

But notwithstanding the principles of statutory interpretation and construction discussed above, the breathtakingly broad definition that Staff asks the Commission to adopt for the personal property component of a utility's system defies common sense. As noted previously, in paragraphs 11 and 12 of its Response Staff argues that an electric utility's system includes all tangible and intangible personal property that is owned, operated, controlled, or managed in connection with or to facilitate a utility's purpose. Given the breadth of Staff's proposed definition of the personal property component of a utility's "system," it is hard to imagine any utility property that would not fit within that definition. In addition to the gas supply contracts at issue in this case, Staff's definition most certainly would include vehicles, desks, chairs, computers, paper, pencils – even paper clips – because all of these are owned, operated, controlled, or managed by a utility and are used in connection with or to facilitate the utility's purpose. Consequently, should the Commission adopt Staff's definition, §393.190.1 would require a utility to obtain prior Commission approval before the utility sold, transferred, or otherwise disposed of *any* property.

Obviously, the Commission has never interpreted its authority under §393.191.1 to be this broad and all-encompassing. And for good reason: when the General Assembly enacted that statute it never intended that dispositions of all utility property be subject to prior Commission approval. As the Missouri Court of Appeals, Eastern District, stated in *State ex rel. Fee Fee Trunk Sewer, Inc.*, 596 S.W.2d 466 (1980), the authority conferred on the Commission by §393.190.1is limited: "The obvious purpose of this provision is to ensure the continuation of adequate service to the public." *Id.* at p. 468. That purpose is accomplished if the scope of the phrase "works or system" as used in that statute is limited to tangible property that comprises the *physical system* used by a utility to provide service to its customers. Such an interpretation also gives effect to the

continued vitality of a principle of regulation announced by the United States Supreme Court more than eighty-five years ago:

> It must never be forgotten that while the State may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and is not clothed with the general power of management incident to ownership.

State ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n., 262 U.S. 276, 289 (1923).

Staff's Response also takes issue with Empire's assertion that in Case No. ER-2006-0315 the Commission found that it was reasonable for the Company to dispose of a portion of its gas supply contracts and to use the revenue derived from that disposition to offset fuel and purchased power costs that Empire was unable to recover through rates.[6] Certainly, Staff is correct in one respect: the specific issue before the Commission in that case was not the same as the issue raised in Staff's complaint. But Staff's criticism of Empire's assertion that the Commission's decision in Case No. ER-2006-0315 is relevant to the issues in this case ignores two important facts. First, if the disposition of gas supply contracts without Commission authorization is unlawful, why did Staff not raise the issue in that case? And second, if, as stated in §393.190.1, dispositions of a utility's system or works without Commission authorization are void, why did the Commission conclude that it was reasonable for Empire to dispose of a portion of its gas supply contracts and to book the revenue received from that transaction as it did?

Finally, as Empire discussed in its motion to dismiss, 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*, the Commission rejected an attempt by Staff to expand the scope of §393.190.1 to include transfers of a utility's employees.[7] Staff argues in its Response that the Commission's August 24, 2004, *Order Closing Case* in that docket does not "in any manner or degree address gas supply contracts, much less determine those contracts to not be part

---

[6] Response at ¶ 8.

[7] Empire's *Motion to Dismiss Staff's Complaint for Failure to State A Claim for Which Relief Can Be Granted* at ¶¶ 9-10.

of a utility's 'franchise, works or system.'"[8] Certainly the facts in that case are distinguishable from the facts in Staff's complaint against Empire, but the Company continues to believe that the conclusions expressed by the Commission in that case regarding the scope of §393.190.1 – particularly those expressed in the concurring opinions of Commissioners Murray and Davis – are equally applicable to Staff's current complaint.

But regardless of whether the Commission ultimately decides that the conclusions announced in *Southern Union* are applicable to this case, Empire recently learned of a prior decision wherein the Commission specifically rejected the theory underlying Staff's complaint in this case – that §393.190.1 requires a utility to obtain prior approval to sell or otherwise dispose of a gas supply contract. In Case No. GR-96-181, *In the Matter of Laclede Gas Company's Tariff Sheets to be Reviewed in its 1995-1996 Actual Cost Adjustment*, the Office of the Public Counsel argued that Laclede Gas Company acted unlawfully when it sold, without prior Commission approval, rights to natural gas that the company acquired through gas supply contracts. In its May 18, 1999, *Order Denying Application for Rehearing* in that case, the Commission stated as follows:

> Public Counsel also argues that the Commission erred in not finding that Laclede made the sales at issue in violation of Section 303.190.1, and by not addressing its argument on this point in the Report and Order. This is the argument to which Laclede referred in its reply brief when it said: "With all due respect, it is difficult to imagine a more specious and unconvincing argument." The Commission did consider (and dismiss) this argument, but did not believe it required discussion in the Report and Order.

Id. at p. 2. Like the Public Counsel's position in that case, Staff's argument in this case is both specious and unconvincing; and just as the Commission dismissed that argument in the Laclede Gas case, it should do so here, as well.

WHEREFORE, for the reasons stated herein, the Commission should reject Staff's Response. As was the case in Staff's complaint itself, the Response provides no basis for the Commission to reasonably conclude that gas supply contracts are part of Empire's "works or

[8] Response at ¶ 7.

system" under §393.190.1, which thereby requires the Company to obtain prior authorization before it can dispose of all or part of those contracts. Therefore, Empire renews its request for the Commission to issue an order that grants the Company's motion to dismiss 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

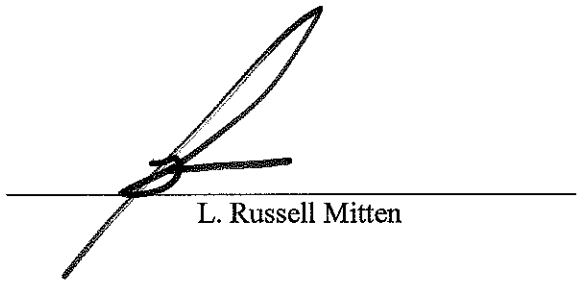
CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2009,, a copy of "The Empire District Electric Company's Reply to 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" 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