

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

Michael and Paula Sexton,	)	
	)	
Complainants,	)	
	)	
v.	)	Case No. EC-2008-0315
	)	
Empire District Electric Co.,	)	
	)	
Respondent.	)	

**STAFF RECOMMENDATION**

**COMES NOW** the Staff of the Missouri Public Service Commission (Staff), and for its recommendation to the Missouri Public Service Commission (Commission), respectfully states the following:

1. On April 4, 2008, Michael and Paula Sexton (Complainants) filed a Complaint with the Commission against Empire District Electric Company (Empire).
2. The Complaint outlines the events of February 12, 2008, claiming Empire clear cut trees on the Complainants private property.
3. The Complainants request as relief “[a]cknowledgement by Empire District that they do not have the right to destroy private property without permission,” and “[c]ompensation for the damage to my property and the cost of cleaning up my property.”
4. On April 7, 2008, the Commission sent its Notice Of Complaint to Empire, allowing 30 days to file an answer or to file notice that the Complaint has been satisfied.
5. On May 6, 2008, Empire filed its Answer To Complaint, referencing an easement held on the Complainant’s property and Tariff Sheet No 17c., Sec. 5.
6. The easement referenced by Empire is attached as Exhibit A.
7. The tariff referenced by Empire is attached as Exhibit B.
8. On April 7, 2008, the Commission issued its Order Directing Staff To Investigate And

File A Report. Staff's Memorandum is attached as Appendix 1.

9. Staff conducted an inspection of the property on May 13, 2008. Photographs from that inspection are attached as Photographs one through four.

10. Two issues present themselves from the Complaint; first, whether any Commission rule, order or tariff has been violated, and second, whether the Commission has the authority to grant the relief requested.

#### **Whether Any Commission Rule, Order Or Tariff Has Been Violated**

11. The Commission has the authority to establish rules and regulations to require a public utility to operate "in such a manner as to promote and safeguard the health and safety of....customers, and the public." Section 386.310 RSMo (2000).

12. With that authority is the Commission's ability to determine whether those rules or regulations have been violated. Section 386.390 RSMo (2000).

13. Staff conducted an investigation and determined there was no Commission rule, order or tariff violated by Empire. That investigation is attached as Appendix 1.

#### **Whether the Commission Has The Authority To Grant The Relief Requested**

14. After reviewing the filings and relevant case and statutory law, it is the opinion of Counsel for Staff that the Commission is, respectfully, without jurisdiction to order the relief requested.

15. The Commission is without authority to award money damages. *American Petroleum Exchange v. Public Service Commission*, 172 S.W.2d 952, 955 (Mo. 1943).

16. Additionally, the Commission is without Section 386.250 jurisdiction to determine private property rights, as it "is purely a creature of statute and its powers are limited to those conferred by the [Missouri] statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted." *GS Technology Operating Company, Inc*, Case No. EC-99-553 (2000).

17. Therefore, both requests for relief by Complainants' are outside the Commission's authority to grant.

18. While a hearing may identify the issues surrounding the events and decisions made by Empire in the restoration of electrical service after the ice storm, neither the determination of property rights, nor the award of money damages, is within the Commission's authority.

**WHEREFORE,** Counsel for Staff concludes that Empire has not violated any Commission rule, order or tariff, and the Complainants have not requested relief in their Complaint that the Commission has authority to order. Staff respectfully recommends the Complaint be dismissed.

Respectfully submitted,

**/s/ Jennifer Hernandez**

Jennifer Hernandez

Legal Counsel

Missouri Bar No. 59814

Attorney for the

Missouri Public Service Commission

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Jefferson City, MO 65102

(573) 751-8706 (Telephone)

(573) 751-9285 (Fax)

[jennifer.hernandez@psc.mo.gov](mailto:jennifer.hernandez@psc.mo.gov)

### **CERTIFICATE OF SERVICE**

I certify that on this 20<sup>th</sup> day of May, 2008, the foregoing instrument was served upon all parties to this cause via electronic mail, first class mail or hand delivery.

**/s/ Dawn M. Carafeno**

## **MEMORANDUM**

TO: Missouri Public Service Commission Official Case File  
Case No. EC-2008-0315 Michael and Paula Sexton, v. The Empire  
District Electric Company

FROM: James Ketter, Energy Department – Engineering Analysis

<u>/s/ Lena M. Mangle 05/20/08</u> Energy Department / Date	<u>/s/ Jennifer Hernandez 05/20/08</u> General Counsel's Office / Date
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Subject: Staff Report

Date: May 20, 2008

## **OVERVIEW**

On April 4, 2008, Michael and Paula Sexton (Complainants) filed a formal complaint against The Empire District Electric Company (Empire). On April 7, 2008, the Commission notified Empire of the complaint and allowed thirty days in which to file an answer. On May 6, 2008, Empire filed its response to the Commission. The Staff was directed to investigate and file a report two weeks after Empire's response.

## **DISCUSSION**

Michael and Paula Sexton filed this formal complaint as a result of action taken by Empire during restoration efforts after an ice storm that caused extensive electric outages in Empire's service territory. The Sexton's reside in a subdivision located north and east of Ozark, Missouri.

The Complainants' filing outlines the events of the night in which tree trimmers were working in their yard clearing trees. In its response, Empire states that it did cut trees in the Sexton's yard that were outside to the twenty (20) feet easement. The complaint asks for compensation for damage to their property and the cost of cleaning up trees and limbs left by Empire and acknowledgement that Empire does not have the right to destroy private property without permission.

Staff conducted an inspection of the property on May 13, 2008. The subdivision consists of large lots with houses served by underground electric facilities. Lots along the perimeter of the development, like the Sexton's home, are served by an underground extension from the poles. Most of the houses in this development are a significant distance from the overhead facilities that are typically in the rear of the lot. The Sexton's home sits in such a way that the overhead electric line is along the side of the house, as

illustrated by the photograph provided by Empire in its Answer To Complaint. Staff Photographs 1-4 are attached to this memorandum.

Empire's Answer to Complaint, paragraph seven, references a twenty-foot wide easement across the Complainants' property. The easement was not filed with Empire's Answer, and Staff inquired. A copy of the easement was provided to Staff and is attached hereto as Exhibit A. Empire has a right-of-way identified as ten (10) feet on each side of the centerline of said electric line. It appeared, and Complainants' confirmed, that the electric lines are ten (10) feet inside the development boundary. Therefore, the entire twenty (20) feet easement is on the Complainants' property. Empire's Answer to Complaint accurately conveys the language of the easement.

In its response, Empire cites its approved tariff that states the company "shall have the right, when and as necessary, to trim properly and keep trimmed any trees located upon the customer's premises which may interfere with service to customer or service to any other customer." Exhibit B is a copy of the Empire tariff. Empire representatives in charge of the restoration activities and the Complainants saw the damage caused by the ice on the trees and wires due to the ice storm. Tree stumps are the only evidence that remains for Staff to observe. It is evident that trees were cut both within and outside of the easement. Staff has no opinion of the conditions that precipitated the decisions to trim trees outside the easement in response to the ice storm or the peril the trees may have caused to the safety of the electrical lines.

From the face of the Complaint, it appears no rule or tariff has been violated by Empire. Without needing to consider the easement held by Empire, the Commission approved Sheet No. 17c allows Empire to trim, when and as necessary. The Commission has responsibility for the provision of safe and reliable electric service and may approve rules to help ensure delivery of service. The tariff referenced by Empire in its response (Sheet No. 17c) allows the trimming of trees that may interfere with the provision of electric service to the customer or others.

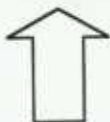
It is the opinion of the Counsel to the Staff, the Commission is without the authority to grant the relief requested by the Complainants. While a hearing may identify the issues surrounding the events and decisions made by Empire in the restoration of electrical service after the ice storm, neither the determination of property rights, nor the award of money damages, is within the Commission's authority

### **STAFF RECOMMENDATION**

Counsel for Staff concludes that the Complainants have not requested relief in their complaint that the Commission has authority to order. Staff respectfully recommends the complaint be dismissed.



Photograph 1



Tree stump in foreground is approximately ten (10) feet from the centerline of the easement. Photograph taken looking north along boundary of subdivision.



Photograph 2

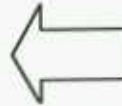


Photograph looking south along approximate edge of easement.



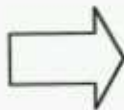
Photograph 3

Photograph looking north along easement. House in background



Photograph 4

Photograph looking south along easement. House behind camera.



71884

14711

In consideration of the sum of One 00/100 Dollars (\$ 1.00),  
 receipt of which is hereby acknowledged, the undersigned hereby grant and convey unto The Empire District Electric Company, hereinafter  
 referred to as the Company, its successors, assigns, lessees, licensees and agents, a permanent right-of-way to construct, repair, replace,  
 inspect, operate and maintain lines for the transmission and distribution of electrical energy and joint communication lines, including the  
 necessary poles, crossarms, wires, guy wires, anchors, markers, aerial and underground cables, conduits, vaults, equipment foundations and  
 pad mount transformers, and all appurtenances thereto as may in the opinion of the Company be required from time to time upon, over and  
 under land of the undersigned, described as follows:

SW 1/4

P. BRUCE HARRIS  
 RECORDER OF DEEDS  
 CHRISTIAN COUNTY

Filed this 20 day  
 of Nov. 1989  
 10:32 A.M.

In Section 7, Township 27, Range 20, County of Christian, State of MO

The Company assumes the responsibility for the proper installation of overhead and underground lines and  
 agrees to save the undersigned harmless from any and all damage caused to the undersigned's property due to the negligence of the Company,  
 its agents and employees.

The Company is hereby granted the right and permission to clear, remove and keep cleared of trees, limbs, roots and other  
 obstructions which in the opinion of the Company might damage, endanger, or interfere with the operation or safety of said lines for a distance of  
10 feet on each side and ~~xxxx feet on xxxxxxxxxxxx side~~ of centerline of said lines, and to enter upon said land and  
 right-of-way for the purpose of repairing and replacing said lines and keeping same in order, and in making examination thereof at any time so  
 long as such lines shall be maintained and operated.

The Company agrees that the undersigned shall have full and free use of said right-of-way for farming, grazing and other purposes,  
 subject to the rights herein granted to it, provided that no operation or construction shall be performed by the undersigned on the right-of-way  
 herein granted which might in the opinion of the Company damage, endanger or interfere with the operation or safety of said lines.

The undersigned, for themselves, their heirs, successors and assigns, warrant that they are the owners of the land herein conveyed  
 and have the right to make this conveyance and receive the payment therefor; and covenant that The Empire District Electric Company, its  
 successors and assigns, may quietly enjoy the premises for the uses herein stated, and that they will not create or permit any obstruction which  
 may endanger or interfere with the construction, operation and maintenance of said systems.

RECEIVED BY

JUN 22 1989

Bill Vanvig

ENGINEERING

Accepted: THE EMPIRE DISTRICT ELECTRIC COMPANY

Date: June 21, 1989

By: D. A. Vice

(VICE PRESIDENT)

D. A. VICE

Exhibit A  
 Page 1 of 2



THE EMPIRE DISTRICT ELECTRIC COMPANY

P.S.C. Mo. No. 5 Sec. 5 1<sup>st</sup> Revised Sheet No. 17b

Canceling P.S.C. Mo. No. 5 Sec. 5 Original Sheet No. 17b

For ALL TERRITORY

**RULES AND  
REGULATIONS**

The customer will pay a minimum of five percent (5%) of the customer's contribution at the time of application for such extension as evidence of good faith and the remainder on completion of the construction. With proper credit (as determined by the Company), the customer may pay the remainder in no more than sixty (60) equal monthly payments with an interest charge of six percent (6%) on an annual basis on the unpaid portion of the original amount put on monthly payments. For a period of five (5) years the Company will pay the customer or credit the customer's unpaid extension cost balance for each new customer added to the extension a pro rata amount of the original cost of the extension, based on the ratio of 1,000 feet to the original length of the extension in excess of 1,000 feet.

A copy of the Company's estimate of the cost of construction, including direct and indirect costs, shall be furnished to the customer upon request prior to construction.

The Company will not be required to obligate funds to secure private right-of-way for the purpose of making extension of distribution pole lines or other facilities to premises of prospective customers.

**b. Electric Distribution Extensions to Non-residential Customers:**

The company will provide an overhead distribution extension to an individual non-residential customer at no cost to the customer provided the estimated revenue from one year of electric service equals or exceeds the estimated direct and indirect costs of construction of the distribution extension. The Company shall require contributions in aid of construction for the portion of the investment in the total extension of the service to the customer that cannot be supported with the estimated revenues. In addition, if the customer cannot establish adequate credit or accurately project revenues as determined by the Company, the entire cost of the construction shall be required from the customer before the construction is commenced, in combination with minimum monthly or annual guarantees in term contracts to guarantee performance that the sales will develop or that the Company investment will be protected. At the end of five (5) years, the portion of the construction cost justified by the revenue will be refunded to the customer.

The Company will not be required to obligate funds to secure private right-of-way for the purpose of making extension of distribution pole lines or other facilities to premises of prospective customers.

**c. Overhead Service Conditions:**

Customer's service entrance shall be installed where it can be conveniently reached from Company's service drop without undue interference from trees, buildings and adjoining property, and in a location such that Company's service lines will have a clearance of not less than thirty-six (36) inches from windows, doors, porches or any building openings, as required by the NESC, for safety reasons. Where it appears impractical to provide thirty-six (36) inches clearance, customer should consult with the Company for assistance in working out the problem.

Customer shall not erect any structure or swimming pool under Company service lines or within Company easements without written approval from the Company.

**Exhibit B**  
**Page 1 of 2**

DATE OF ISSUE December 28, 2006  
ISSUED BY Kelly S. Walters, Vice President, Joplin, MO

DATE EFFECTIVE January 27, 2007

**ER-2006-0315**

December 14, 2007

**Filed**  
Missouri Public  
Service Commission

THE EMPIRE DISTRICT ELECTRIC COMPANY

P.S.C. Mo. No. 5 Sec. 5 1<sup>st</sup> Original Sheet No. 17c

Cancelling P.S.C. Mo. No. 5 Sec. 5 Original Sheet No. 17c

For ALL TERRITORY

**RULES AND  
REGULATIONS**

Complete instructions, specifications, construction requirements, and NEC standards are available at any office of the Company.

In order to permit proper operation of Company's service lines and feeder lines serving the customer, the Company shall have the right, when and as necessary, to trim property and keep trimmed any trees located upon the customer's premises which may interfere with service to customer or service to any other customer. ★

d. Temporary Distribution and Service Lines:

The Company shall not be required to provide service to temporary locations, such as for mobile homes, construction sites, etc., even though the line facilities are already in place, unless such customer advances the sum stated in Schedule CA, Credit Action Fees, as a construction payment for the cost of installation and removal of the meter, service, and other necessary facilities. The title to such property shall be and remain in the Company. Should the customer utilize electric service at this location for a period of twelve consecutive months from the date of initial service, the above payment, plus interest as designated by State Law or Commission order, will be refunded to the customer by the Company.

The Company shall not be required to provide electric service to temporary customers at locations that require the extension of the Company's lines unless the full cost of erection and removal, including indirect costs of construction, of the extension be contributed by the customer.

2. Underground and Overhead:

The Company's standard construction will be overhead. However, where feasible from engineering, operational, and economic considerations, new electric service to residential and commercial customers may be installed underground. Installation of facilities shall be made in accordance with the following provisions:

a. Primary and Secondary Distribution Facilities to Residential Subdivisions:

When application is received from a developer for an extension of electric service to a subdivision in an area not served by existing facilities, the Company shall prepare a detailed estimate of the cost to install a distribution system to the subdivision, including services, transformers, and indirect costs of construction. A copy of the Company's estimate of the cost of construction, including direct and indirect costs, shall be furnished to the developer upon request prior to construction. The developer will make full payment of these estimated charges in advance of any construction by the company. When construction is completed, if the actual costs of the extension are less than the estimated costs, the portion of the developer contribution above the actual costs will be refunded to the customer. If actual costs are higher than the estimated costs the developer will not be required to pay more than the estimate.

For each new permanent residential customer added during sixty (60) months following the completion of the extension, the Company will refund to the developer an amount equal to the Construction Allowance. The Construction allowance is described in the following paragraph. Refund totals will not exceed the original contribution by the developer. The developer may make arrangements to offset a portion of the cost of an underground system by performing certain work such as trenching and back-filling. However, any work performed by the developer shall be done in accordance with Company requirements and specifications and shall be coordinated with the Company representative.

As a Construction Allowance for residential subdivisions, the Company will calculate at the beginning of each calendar year the value of 225 feet of overhead single phase primary conductor, one (1) forty foot wood pole and necessary fixtures, one (1) down guy and anchor, one (1) fifteen (15) KVA transformer, transformer ground rod, one hundred (100) feet of overhead service conductor and related connectors, and one (1) two hundred (200) amp meter.

**Exhibit B**  
**Page 2 of 2**

DATE OF ISSUE December 28, 2006  
ISSUED BY Kelly S. Walters, Vice President, Joplin, MO

DATE EFFECTIVE January 27, 2007  
December 14, 2007

ER-2006-0315

**Filed**  
Missouri Public  
Service Commission

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

Michael and Paula Sexton,

Complainant,

v.

The Empire District Electric Company,

Respondent.

Case No. EO-2008-0254

**AFFIDAVIT OF JAMES KETTER**

STATE OF MISSOURI

COUNTY OF COLE

)  
) ss  
)

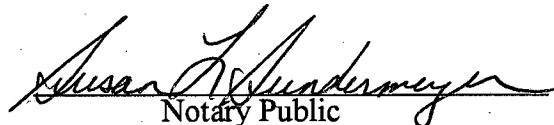
James Ketter, of lawful age, on oath states: that he participated in the preparation of the foregoing Staff Recommendation in memorandum form, to be presented in the above case; that the information in the Staff Recommendation was provided to him; that he has knowledge of the matters set forth in such Staff Recommendation; and that such matters are true to the best of his knowledge and belief.

  
James Ketter

Subscribed and sworn to before me this 20<sup>th</sup> day of May, 2008.



SUSAN L. SUNDERMEYER  
My Commission Expires  
September 21, 2010  
Callaway County  
Commission #06942086

  
Notary Public