

The Staff of the Missouri Public Service Commission,
Complainant,
vs.
The Empire District Electric Company,
Respondent.

were the subjects of three prior Commission cases – Case Nos. EO-2007-0029, EE-2007-0030, and EO-2008-0043 – and further noted that the Commission’s decisions in those prior cases provide essential context for resolving the allegations. Consolidated Case Nos. EO-2007-0029 and EE-2007-0030 involved Empire’s requests for approval of: (1) waivers of certain provisions of the company’s approved tariff that govern promotional practices; and (2) a proposed territorial agreement between Empire and Ozark Electric Cooperative (“Ozark”) that, contingent on the grant of the aforementioned waivers, would transfer The Lakes as Shuyler Ridge subdivision into Empire’s service area. By its order dated January 30, 2007, the Commission, although willing to approve the proposed territorial agreement, denied both of the company’s requests because the territorial agreement was inextricably tied to the proposed tariff waivers. In Case No. EO-2008-0043, Empire requested approval of an agreement between the company and Ozark to return to Ozark customers and service facilities in The Lakes as Shuyler Ridge subdivision that had been conditionally transferred to Empire in anticipation of the Commission’s approval of the territorial agreement at issue in Case No. EO-2007-0029. The Commission approved that request by order dated March 4, 2008.

On November 5, 2008, Staff filed its Motion in the current case which asks the Commission to make a summary determination of the numerous allegations of fact, law, and regulatory and public policy in the Complaint and also to direct the Commission’s General Counsel to pursue penalties against the company in circuit court. But the Motion, as filed, does not satisfy the requirements of 4 CSR 240-2.117(2) because: (1) it does not “state with particularity in separately numbered paragraphs each material fact as to which [Staff] claims there is no genuine issue, with specific references to the pleadings, testimony, discovery, or affidavits that demonstrate the lack of a genuine issue as to such facts”; and (2) it does not include a “separate legal memorandum explaining why summary determination should be granted.” Empire believes that Staff’s failure to comply with the requirements of the rule is, alone, sufficient for the Commission to deny the Motion. In addition to those technical defects, however, the Motion should be denied because it

fails to satisfy any of the well established legal requirements for summary disposition of the numerous factual, legal, and regulatory and public policy issues raised in the Complaint.

Legal Standards Governing Motions for A Determination on the Pleadings

The legal standards that govern Staff's Motion are well established in Missouri case law and in the Commission's own decisions.

Motions for judgment on the pleadings are not favored. *Helmkamp v. Am. Family Ins. Co.*, 407 S.W.2d 559, 565 (Mo.App. 1966). Such motions should only be granted where the question before the court is strictly one of law, *Eaton v. Mallinckrodt*, 224 S.W.3d 596, 599-600 (Mo. 2007), and where the moving party is entitled to judgment as a matter of law. *Brickell v. Kansas City*, 265 S.W.2d 342, 343 (Mo. 1954).

A motion for judgment on the pleadings raises only issues of law; if an issue of fact is presented in the pleadings, the motion should be denied. *Hunter v. Delta Realty Co.*, 169 S.W.2d 936, 938 (Mo. 1943). Such a motion should not be granted where a material issue of fact exists, *Madison Block Pharmacy, Inc. v. U.S. Fid. & Guar. Co.*, 620 S.W.2d 343, 345 (Mo. 1981), and even a general denial has been held to be sufficient to put each fact alleged in the moving party's pleading at issue so that no judgment on the pleadings could be issued. *Lawson v. St. Louis-San Francisco Ry. Co.*, 629 S.W.2d 648, 650 (Mo.App. 1982).

The party moving for judgment on the pleadings admits all of the opposing party's well-pleaded facts. *Craig v. Dept. of Health*, 80 S.W.3d 457, 459 (Mo. 2002). And a court can grant a motion for judgment on the pleadings only if the facts pleaded by the moving party, together with the benefit of all reasonable inferences drawn therefrom, show that the other party cannot prevail under any legal theory. *A.R.H. v. W.H.S.*, 876 S.W.2d 687, 688 (Mo.App. 1994).

The most recent Commission case Empire could locate dealing with a motion for judgment on the pleadings is *In the Matter of the Application of Multiband, Inc. for a Certificate of Service Authority to Provide Shared Tenant Services in the State of Missouri*, Case No. ZA-2006-0346. In its July 13, 2006, order in that case the Commission determined that it would treat a motion for

judgment on the pleadings filed under 4 CSR 240-2.117 as a request for summary determination, and that in order to prevail a movant had to prove that: (1) there is no genuine issue of material fact; (2) the movant is entitled to relief as a matter of law; and (3) it is in the public interest to give summary relief. Because the Commission found in *Multiband* that there were genuine issues of material fact and of public interest presented that could not be determined on the pleadings alone, the request for judgment on the pleadings was denied.

This response will show that: (1) numerous genuine issues of material fact and law remain in contention this case; (2) the issues of law that are presented in the Complaint are muddy, at best, making it impossible for the Commission to conclude from the pleadings alone that Staff is entitled, as a matter of law, to the relief requested in its Complaint; and (3) there are public and regulatory policy issues presented by this case that can only be resolved by the Commission after careful consideration of both a fully developed evidentiary record and written briefs that discuss all of the legal and policy issues raised by Staff's Complaint.

Genuine Material Issues of Fact and Law Exist in this Case

Because of the way the Complaint was presented, it is difficult to tell what facts and law Staff relies on for its allegations that Empire's actions in connection with the installation of underground facilities and street lights in The Lakes at Shuyler Ridge subdivision constitute violations of the Company's tariff, the Commission's rules, and applicable statutes. This is due, in part, to the fact that Staff's Complaint never specifically states what portions of Empire's tariff, the Commission's rules, or applicable statutes the company is alleged to have violated. For example, Paragraph 61 of Staff's Complaint alleges Empire violated Section 393.130, RSMo. There are six separate subsections of that statute, yet the Complaint never states which of those subsections Empire is alleged to have violated. The specificity and clarity lacking in the Complaint can only be remedied through a process that includes discovery, the filing of written testimony, and a formal evidentiary hearing.

Staff's Motion continues – or even compounds – this lack of clarity and specificity because, contrary to the requirements of 4 CSR 240-2.117(B), the Motion fails to “*state with particularity* in separately numbered paragraphs *each material fact* as to which the movant claims there is no genuine issue” (emphasis added) However, Staff's decision to ignore the dictates of the Commission's rule may have been strategic, because, based on the denials in Empire's Answer, it would be impossible to compile such a list. Indeed, based on Empire's Answer, it is clear that **most or all** of the material facts and legal arguments alleged or made in Staff's Complaint remain at issue. As stated earlier in this Response, under applicable law a motion for determination on the pleadings cannot be granted where material issues of fact or law remain in contention.

Taking together Staff's Complaint and Empire's Answer, the material issues of fact and law that remain in dispute in this case include, but are by no means limited to, the following:*

- Did Empire charge the developer of The Lakes and Shuyler Ridge subdivision less than the applicable prepayment amounts due under the company's tariff for underground facilities and decorative street lighting? (Paragraph 11)
- Did Empire fail to collect from the developer of The Lakes and Shuyler Ridge subdivision applicable prepayment amounts due under the company's tariff for underground facilities and decorative street lights? (Paragraph 12)
- Did Empire violate its tariff by not charging the developer of The Lakes and Shuyler Ridge subdivision amounts required for the installation of underground facilities? (Paragraph 21)
- Did Empire violate its tariff by not requiring the developer of The Lakes and Shuyler Ridge subdivision to pay the company amounts required for the installation of underground facilities before Empire began providing electric service to customers in that subdivision? (Paragraph 23)
- Did Empire abide by the provisions of its tariff governing the manner in which underground primary and secondary distribution facilities are extended to and within residential subdivisions with regard to The Lakes and Shuyler Ridge subdivision? (Paragraph 26)
- Did Empire charge for the installation of underground distribution facilities in The Lakes and Shuyler Ridge subdivision in a manner that violates Chapter 14 of the Commission's rules? (Paragraph 28)
- Did Empire violate Chapter 14 of the Commission's rules when it began providing electric service in The Lakes and Shuyler Ridge? (Paragraph 34)

* Paragraph references following each of the issues listed in this Response are to allegations in Staff's Complaint that were denied, in whole or in part, in Empire's Answer.

- Did Empire's actions with respect to the developer of The Lakes and Shuyler Ridge subdivision constitute an undue or unreasonable preference toward that developer? (Paragraph 35)
- Did Empire's actions with respect to The Lakes and Shuyler Ridge subdivision constitute a violation of Section 393.130, RSMo? (Paragraphs 36 and 38)
- Did the developer of The Lakes and Shuyler Ridge subdivision fail to prepay for the installation of non-standard street lights as required by Empire's tariff? (Paragraph 44)
- Does each day that has elapsed from the time Empire extended service to each lot in The Lakes and Shuyler Ridge subdivision constitute a separate and distinct violation of the company's tariff, Commission rule, and/or Missouri statute for which penalties can be assessed under Sections 386.570 and 386.590, RSMo? (Paragraph 63)
- Does each day that has elapsed from the time non-standard street lights were installed in The Lakes and Shuyler Ridge subdivision constitute a separate and distinct violation of the company's tariff, Commission rule, and/or Missouri statute for which penalties can be assessed under Sections 386.570 and 386.590, RSMo? (Paragraph 65)

Staff's posture in its Motion notwithstanding, there are indications that suggest that Staff, itself, knows that there are genuine issues of material fact and law remaining to be resolved in this case. For example, Staff did not object to the Commission's order requiring it to file a proposed procedural schedule. Staff's proposed schedule includes three rounds of pre-filed testimony – direct testimony for Staff, rebuttal for Empire, and surrebuttal for Staff – as well as a formal evidentiary hearing. None of that would be necessary if there were no genuine, material issues of fact or law remaining. In addition, Staff has proposed to Empire that the parties enter into a joint stipulation of facts that would be presented to the Commission prior to its decision. If Staff truly believed that all material issues of fact and law could be determined based on the pleadings alone, the stipulation proposed by Staff would not be necessary. By these two actions, however, Staff has all but admitted that there are not sufficient facts available to the Commission, based on the pleadings alone, to sustain the summary disposition of the Complaint that Staff seeks in its Motion.

Staff Has Not Shown It Is Entitled to Relief as a Matter of Law

Staff's Motion also must be denied because Staff has failed to show that it is entitled to a judgment on the pleadings as a matter of law or that Empire cannot prevail under any legal theory. Had Staff been able to make this showing, Empire believes Staff would have done so in the

memorandum of law that, under 4 CSR 240-2.117(B), is supposed to accompany any motion for summary determination. But Staff's motion included no such memorandum of law, which strongly suggests Staff knew that it could not successfully carry its legal burden. But regardless of the reason Staff failed to satisfy its burden of showing why it is entitled to a summary disposition of its complaint as a matter of law, the Motion, as filed, provides no basis for the Commission to grant the relief that Staff is seeking.

In addition, the affirmative defense that Empire pleaded in its Answer – that the company and the developer of the Lakes at Shuyler Ridge never entered into a contract for service to the subdivision because conditions precedent to formation of that contract never were satisfied – raises factual and legal issues that were not addressed in Staff's Complaint and that can only be resolved through a process that includes both an evidentiary hearing and the filing of written briefs.

Regulatory and Public Interest Considerations Preclude Summary Disposition

This case presents regulatory and public interest issues that are fundamental to the authority that Staff ultimately seeks through its Complaint – the ability to seek penalties in circuit court. Those issues primarily concern whether Empire's actions, considered in the context of the three prior cases described earlier in this Response: (1) constitute a violation of applicable law, and (2) justify or warrant the imposition of penalties. Those issues cannot – and should not – summarily be decided on the pleadings alone. Instead, the Commission must allow the parties to fully vet those issues through a fully developed evidentiary record and through the filing of written briefs that discuss the legal and policy issues raised by Staff's Complaint. Empire's involvement with The Lakes at Shuyler Ridge subdivision started not as a result of the company's unilateral actions but, instead, in response to a request from the City of Republic, Missouri, to negotiate a territorial agreement that could resolve various public interest and safety issues that would be created by multiple electric providers serving one small subdivision. Under such circumstances, Empire's actions, which were motivated by the company's desire to advance the public interest, do not warrant the imposition of penalties even if those actions are found to constitute technical violations

of the company's tariff, the Commission's rules, or certain statutes. But regardless of what conclusion the Commission ultimately reaches on that issue, the Commission cannot legitimately decide the issue summarily based solely on the pleadings.

There also are other important regulatory policy and public interest issues raised by Staff's Complaint, such as whether it is in the public interest to force a developer who needs electric service into a "Catch-22" situation of either (1) bringing his development activities to a halt while months are spent waiting on a ruling from an administrative agency, or (2) having to put up a substantial sum of money that may have to be later refunded depending on how the administrative agency rules. These issues, too, cannot be adequately considered or decided on the pleadings alone.

WHEREFORE, for the reasons stated above, Empire respectfully requests the Commission to issue an order denying Staff's Motion for Determination on the Pleadings.

Respectfully submitted,

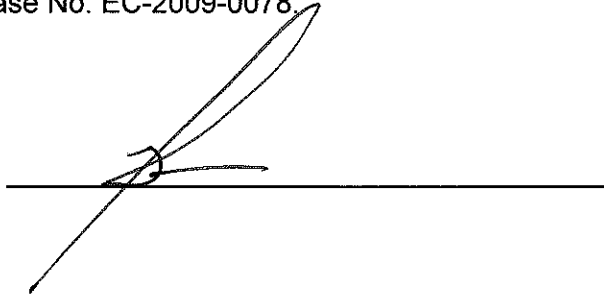


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ATTORNEYS FOR THE EMPIRE DISTRICT
ELECTRIC COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent by first class mail, electronic mail, or hand delivery on this 17th day of November, 2008, to each party to Case No. EC-2009-0078.

A handwritten signature, consisting of a stylized 'Z' or 'S' shape with a loop, is written over a solid horizontal line.