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July 7, 2000

**FILED<sup>2</sup>**

JUL 07 2000

Missouri Public  
Service Commission

Mr. Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, MO 65102

**Re: In the Matter of The Empire District Electric Company to Adopt  
a Shareholder Rights Plan  
Case No. EF-2000-764**

Dear Mr. Roberts:

On behalf of The Empire District Electric Company, I deliver herewith an original and eight (8) copies of Response of The Empire District Electric Company to be filed with the Commission. A copy is also being hand-delivered to the Commission General Counsel's office and the Office of the Public Counsel this date.

I have also enclosed an extra copy of the Response of The Empire District Electric Company which I request that you stamp "Filed" and return to the person delivering same to you.

Thank you for your attention in this matter.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND P.C.

By:

Paul A. Boudreau

PAB/aw  
Enclosures

cc: Mr. Bruce H. Bates, Commission General Counsel's Office  
The Office of Public Counsel

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

FILED<sup>2</sup>

JUL 07 2000

Missouri Public  
Service Commission

In the Matter of the Application of The )  
Empire District Electric Company for )  
an Order authorizing it to Renew its )  
Shareholders Rights Plan by Making a )  
Dividend Distribution to All Holders of )  
its Common Stock of Certain Rights, )  
including, among other things, the Right )  
to Purchase Additional Shares of )  
Preference and Common Stock of the )  
Company, to issue and sell such Additional )  
Shares of Stock as may be required by the )  
Exercise of such Rights. )

Case No. EF-2000-764

**RESPONSE OF THE EMPIRE DISTRICT ELECTRIC COMPANY**  
**TO STAFF RECOMMENDATION**

COMES NOW The Empire District Electric Company ("Empire"), and for its Response to the Recommendation of the Staff of the Missouri Public Service Commission ("Staff"), respectfully states as follows to the Missouri Public Service Commission ("Commission"):

1. On May 17, 2000, Empire filed its Application for Approval of its April 27, 2000, Rights Agreement made necessary by the expiration of Empire's existing shareholder rights plan on July 25, 2000. In its Application, Empire noted the dubious jurisdictional grounds for its filing, specifically, that Empire, a Kansas-chartered corporation, need not apply for or obtain Commission approval to issue stocks, bonds, notes or other evidences of indebtedness under § 393.200 RSMo. 1994. *Public Service Commission v. Union Pacific Railroad Company*, 271 Mo. 258, 179 S.W. 40 (1917); *Re Suburban Service Company*, 14 Mo. P.S.C. 114 (1923). Empire stated that the Commission's jurisdiction over the issuance, by foreign corporations, of stock, bond or scrip dividend should be viewed in the same light despite the more general language contained in § 393.210 RSMo. 1994. This is particularly so in the context of a rights dividend of the type contemplated by the shareholder rights plan because such a dividend does not involve a

capitalization of earnings or surplus involving a distribution of additional shares of stock to shareholders. See, Application ¶ 8 and 9. Nevertheless, Empire filed its Application with the Commission to ensure the validity of its Rights Agreement because of the uncertainty associated with the scope of the language of § 393.210 RSMo. 1994 with respect to a dividend of rights.

2. On or about July 3, 2000, Staff filed its Recommendation in this case. In that pleading, Staff recommends that the Commission approve the Application *only if* the Commission imposes one of two alternative conditions set out in an attached Staff Memorandum. First, Staff recommends an order approving the Application so long as Empire is not permitted to perform in accordance with the terms of the Rights Agreement without first seeking additional Commission authority. Alternatively, Staff recommends that any order approving the shareholder rights plan be expressly subject to rescission should a petition be made by a hostile tender offeror. The first recommendation, if adopted by the Commission, would render any approval meaningless. With respect to the second recommendation, Empire is dismayed to hear the Staff argue that encouraging hostile corporate takeovers of Missouri utilities is a good public policy. In any event, an order with this condition, too, would be a meaningless act. In neither circumstance would the Right Agreement remain an effective tool for providing protection to the shareholders and other constituents contemplated by Empire's Board of Directors.

3. The alternative conditions proposed by Staff are not acceptable to Empire and are clearly in excess of the Commission's statutory authority. If adopted by the Commission, either condition would unlawfully substitute the Commission's business judgment for that of Empire's Board of Directors, a position that would be accompanied by all the associated responsibilities and legal liabilities.

4. The fundamental problem with the Staff's Recommendation is that there is no

statutory basis for the Commission to impose the recommended conditions. The conditions would place the Commission in the role of managing the company's enterprise and the Commission clearly has no authority to assume this role. The law on this topic is compelling. Empire's Board of Directors has the corporate responsibility and fiduciary duty to exercise its business judgment in acting on matters of this nature. The Commission's authority to regulate certain aspects of the operations and practices of a public utility *does not include* the right to dictate the manner in which the company conducts its business. *State ex rel. Kansas City Transit v. Public Service Commission*, 406 S.W.2d 5, 11 (Mo. banc 1966). In *State ex rel. Harlan v. Public Service Commission*, 343 S.W.2d 177 (Mo. App. 1960), the Court of Appeals stated that the Commission's powers do not:

“clothe the Commission with the general power of management incident to ownership. The utility retains the lawful right to manage its own affairs and conduct its business as it may choose, as long as it performs its legal duty, complies with lawful regulation and does no harm to the public welfare.”

*Id.* at 182. This language applies with particular significance to a public utility's conduct of its corporate affairs. It would be inappropriate for this Commission to adopt its Staff's Recommendation that the Commission become directly involved in deciding whether or not Empire should enter into an Agreement of Merger with one particular bidder as opposed to another. Were the Commission to attempt to conduct such an auction process, it would be substituting its business judgment for that of Empire's Board of Directors. It is well beyond the Commission's statutory authority to attempt to reverse the Board of Directors' determination that a hostile bidder's proposal is unfair.

5. In arguing for an unlawful and unwarranted extension of the Commission's involvement in corporate affairs on the basis of its perceived need for greater control, Staff ignores an important and appropriate role the Commission plays under Missouri law in determining whether

a particular merger agreement is detrimental to the public interest, as it is now engaged in doing in Case No. EM-2000-369<sup>1</sup>. There is no legal basis for extending its involvement into pre-merger agreement discussions. Empire is not aware of any other state or federal regulatory agency ever inserting itself into the business dealings of any enterprise to the degree suggested by Staff. Were the Commission to take this unprecedented step into areas exclusively reserved to management prerogative, it may subject itself to lawsuits by shareholders who may claim to have been denied a superior deal by virtue of the Commission's assumption of the fiduciary duties of the company's Board of Directors to the shareholders. Surely the Commission does not wish to expose itself to this potential significant legal liability.

6. Staff also misapplies the standard for approval of the Application. Staff contends that the Application should not be approved because the Commission needs to be able to determine whether another offer would provide a greater *benefit* to the public. However, the Commission's job is not to ensure maximum public benefit. In *State ex rel. City of St. Louis v. Public Service Commission*, 73 S.W.2d 393 (Mo. 1934), the Missouri Supreme Court identified the appropriate standard to be used.

"To prevent injury to the public, in the clashing of private interest with public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be *benefitted*, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public *detriment*. 'In the public interest,' in such cases, can reasonably mean no more than 'not detrimental to the public.'" (Emphasis supplied.)

*Id.* at 400. In rejecting the idea that the Commission must affirmatively find that the purchase was

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<sup>1</sup> *In the matter of the Joint Application of UtiliCorp United Inc. and The Empire District Electric Company to merge The Empire District Electric Company with and into UtiliCorp United Inc. and, in connection therewith, certain other related transactions.*

in the public interest, the Court instead stressed the importance of the property rights of the utility's shareholders. The Court, in applying the "not detrimental to the public" standard, stated:

"[t]he owners of this stock should have something to say as to whether they can sell it or not. To deny them that right would be to deny to them an incident important to ownership of property . . . A property owner should be allowed to sell his property unless it would be detrimental to the public." (Citations omitted.)

*Id.* The Commission has recognized and applied this standard time and time again. See e.g. *Re Union Electric*, EM-83-248, December 15, 1983; *Re Western Resources, Inc.*, GM-94-40, December 29, 1993; and *Re Missouri Gas Co.*, GM-94-252, October 12, 1994. None of these cases provide any authority which would permit the Commission to decide at the outset which merger proposals should be pursued by Empire.

7. Staff makes the claim, but does not explain how the public interest would be directly and presently harmed by the implementation of Empire's new Rights Agreement. It is a particularly peculiar argument in light of the fact that the April 27, 2000, Rights Agreement is nearly identical to Empire's existing Rights Agreement which the Commission found to be not detrimental to the public interest in its August 10, 1990, Order Granting Application to Adopt a Shareholder Rights Plan in Case No. EF-91-21 (*Application*, Appendix 2). Staff's claim is based on the faulty premise that Empire is more "in play" now that it was in 1990 when it put in place its current Rights Agreement. To the contrary, Empire is committed under its merger agreement with UtiliCorp not to entertain any other merger proposals now that Empire's shareholders have approved that agreement.

8. Ultimately, Staff's Recommendation appears to be nothing more than a criticism of the Agreement and Plan of Merger between Empire and UtiliCorp United Inc. ("UtiliCorp"), which is the subject of Case No. EM-2000-369 and which is currently under active consideration by the

Commission. (See second to last paragraph in Staff Memorandum). The fact that Staff has taken the position in that other case that the Empire/UtiliCorp merger would be detrimental to the public interest has no relevance at all to the Application for approval of the Rights Agreement in this case. It is not appropriate for Staff to recommend crippling and unlawful conditions in this case because it is opposed to the UtiliCorp/Empire merger. As explained in prior pleadings, the purpose of the shareholder rights plan is not, as Staff contends, to preclude another company from making a proposal to acquire control of Empire. It simply provides Empire's Board of Directors a widely used tool of recognized value that affords the Board with leverage to negotiate directly with a prospective hostile acquirer to ensure that any deal is fair to all affected interests. The ultimate goal of the Rights Agreement is to provide Empire's Board the time and means to fulfill its statutory fiduciary duties and ensure that a potential acquirer (particularly a hostile acquirer) provides the best terms to Empire's shareholders and other affected interests.

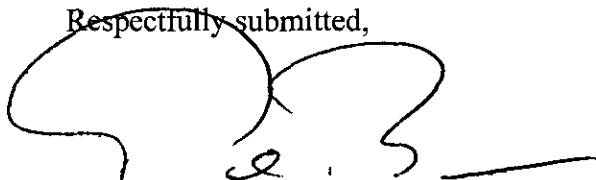
9. Finally, Staff's proposed conditions are inappropriate because they would unfairly discriminate against Empire. The Staff did not recommend, and the Commission has not imposed, any similar conditions upon Laclede Gas Company when it initially filed for approval of its shareholder rights plan (Case No. GF-86-131) or, thereafter, when its initial rights plan expired and a new plan was adopted (Case No. GF-96-309). The same is true of St. Joseph Light & Power Company when its Rights Agreement was initially approved by the Commission (Case No. EF-87-56) and, thereafter, when the initial plan expired and a new rights plan was approved (Case No. EF-97-114). Finally, the Commission imposed no such conditions when it approved UtiliCorp's shareholder rights plan in its Case No. EF-97-202. It would be unfair and inappropriate to treat Empire any differently or more restrictively than these other companies have heretofore been treated by the Commission. In that regard, Empire is willing to accept the same conditions to approval of

its Application as were imposed by the Commission on approval of UtiliCorp's Application in Case No. EF-97-202.

10. Staff's effort to thrust the Commission into the role of direct management of Empire's business is both unlawful and unwise. Staff's proposal which would have the Commission holding an auction to deal Empire to the hostile bidder which the Commission believes promises to provide "the most benefit to the public" would be alarming regulatory overreach. Accordingly, the Staff's proposed alternative conditions to approval of the Application should be rejected. Empire's Application should be approved by the Commission with nothing more than the customary conditions that have been imposed on rights plans filed by other utilities in this state.

WHEREFORE, for the reasons aforesaid, Empire requests that the Commission issue an order approving Empire's Rights Agreement subject only to customary conditions to approval and that the Commission reject both of Staff's proposed alternative conditions contained in its July 3, 2000, Recommendation.

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 U.S. Mail, postage prepaid, or hand-delivered, on this 7<sup>th</sup> day of July, 2000, to:

Missouri Public Service Commission  
General Counsel's Office  
ATTN: Mr. Bruce H. Bates  
Truman State Office Building  
Room 530  
P.O. Box 360  
Jefferson City, MO 65102

Office of the Public Counsel  
Truman State Office Building  
Room 250  
P.O. Box 7800  
Jefferson City, MO 65102-7800

A handwritten signature in black ink, appearing to be "R. B.", is written over a horizontal line.