

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

In the matter of the Application of The)
Empire District Electric Company for)
authority to issue and sell under its)
existing Indenture of Mortgage and Deed)
of Trust dated as of September 1, 1944,)
as amended and supplemented, up to and)
including \$200,000,000 principal amount)
of its First Mortgage Bonds, in one or more)
series and to, among other things, execute)
and deliver a Supplemental Indenture or)
Indentures to provide for the terms of)
said Bonds.)

Case No. EF-2004-0109

**SUPPLEMENTAL RESPONSE OF THE EMPIRE DISTRICT ELECTRIC COMPANY
TO STAFF RECOMMENDATION AND STAFF REPLY**

Comes now The Empire District Electric Company ("Empire"), and for its Supplemental Response to Staff's Recommendation in the captioned matter, states as follows:

1. On May 27, 2004, Empire caused to be filed its Response to Staff's March 29, 2004 Recommendation (the "Response"). In that pleading, Empire set forth a number of comments and several objections.

2. On June 23, 2004, Staff filed its Reply to Empire's Response (the "Reply"). The Reply was amended by Staff that same day (the "Amendment").

3. After an informal discussion with Staff counsel and other representatives of the Commission's Staff prior to the filing of Staff's Reply, it was brought to the attention of the undersigned counsel that Empire's first observation (contained in paragraph 2 of its Response) was in fact a misstatement of the nature of the relief requested by Empire in this case. Staff observed, and Empire agrees, that Staff's proposed condition number 1 (i.e. that the Company be authorized to issue \$89 Million in debt securities) tracks correctly with

the relief requested in the Application that Empire, among other things, be authorized to sell and deliver additional of its First Mortgage Bonds. As noted in paragraphs 3 and 4 of Staff's Reply, there is no remaining dispute or disagreement with respect to this topic.

4. In light of the foregoing, Empire hereby withdraws the comments contained in paragraph 2 of its Response and, in that regard, Empire has no objection to an order in this case authorizing Empire "to issue the reduced amount of \$89 Million in debt securities." Empire restates, ratifies and confirms each and every other of its comments and objections set forth in the Response.

5. In its Amendment, Staff has withdrawn its proposed Condition No. 12 noting, correctly, that this is a topic currently under discussion in the context of the Commission's case efficiency workgroup. Empire agrees that the workgroup is the better forum for a discussion of the time requirements to process an application of this nature.

6. The balance of Staff's Reply is a rationalization for the Commission to impose upon Empire an unlawful restriction, that is, Staff's proposed Condition No. 5, that states, "that the company's total borrowings, including all instruments, shall, at no time, exceed its regulated rate base." (Emphasis added.) Empire reaffirms and restates its objections to this proposed condition for the reasons set forth in its Response.

7. It is significant that Staff does not dispute Empire's contention that the Commission does not have jurisdiction to regulate the issuance of unsecured indebtedness of Empire under §393.200 RSMo. This limitation on the Commission's authority over the issuance of securities of foreign-chartered corporations, like Empire, was explained by the Missouri Supreme Court in its decision *Public Service Comm'n v. Union Pacific Railroad Co.*, 197 S.W. 39 (Mo. banc. 1917). It would be very difficult indeed for Staff to dispute this point in light of the legal opinion of a former General Counsel to the Commission stating

that §393.200 RSMo only has application to domestic (i.e., Missouri) corporations.¹ Contrary to Staff's denials, imposing Condition No. 5 as a limitation on Empire's financings would exceed the Commission's statutory authority to regulate the issuance of stock and unsecured debt of non-Missouri utilities. Historically, the Commission has deferred to this authoritative legal guidance.²

8. Essentially, Staff's argument is that this proposed condition is a good thing regardless of its unlawfulness because its stated objective is to "minimize financial risk." See, Reply ¶8. This, however, is no justification for imposing conditions in this case which are beyond the statutory authority of the Commission. To the contrary, the Missouri Supreme Court expressly has rejected expediency and even necessity as rationalizations for unlawful Commission decisions.³

9. Further, there is no reasonable foundation for the condition sought to be imposed by Staff. As Staff has noted, Empire is simply requesting authority to encumber its properties as security for up to \$89 million in First Mortgage Bonds. Staff's recommendation does not suggest that the issuance of \$89 million in First Mortgage Bonds by Empire would cause it to incur an aggregate indebtedness near to or in excess of its regulated rate base. In fact, Staff sets forth no factual basis whatsoever for its stated concern about Empire's capital structure. In absence of any such fact-based concerns, the proposed condition addresses only theoretical what-if scenarios.

¹ Op. Gen. C. No. 69-17.

² *Re Suburban Service Co.*, 14 Mo.P.S.C. 114 (1923); *Re Arkansas Power & Light Co.*, Case No. EO-81-216 ["the statute regulating and requiring approval of financing transactions is restricted to Missouri corporations."]; *Re Arkansas Power & Light Company*, Case No. EF-81-271 ["Since AP&L is not a Missouri corporation, the Commission has no authority to supervise or pass upon the proposed issue of stock by AP&L, even though AP&L is permitted to do business in this State."]

³ *State ex rel. Utility Consumers Council v. Public Service Commission*, 585 S.W. 2d 41, 49 (Mo. banc. 1979); *State ex rel. Kansas City v. Public Service Commission*, 287 S.W. 462 (Mo. banc. 1923).

10. Similarly, Staff's proposed Condition No. 5 is simply beyond the scope of the relief being requested. There is no principled basis for imposing an open-ended capitalization restriction on Empire in the context of an application for very limited relief, that is, authority to issue only \$89 million of First Mortgage Bonds and to mortgage its property to secure this rather modest financial obligation. Any conditions that the Commission imposes in its order approving the Application in this case, should be limited to the subject matter presented by the Application and nothing more. Staff's request that the Commission impose some sweeping and perpetual financing restriction on Empire is premature and fails to take into account future circumstances which cannot be known at this time.

11. The Commission's order in this case should deal with the limited topic at hand and conditions that are directly relevant to the topic at hand. Staff's proposed condition no. 5 is beyond the scope of this docket, lacks any factual foundation and, also, is an attempt to encourage the Commission to impose an unlawful condition on Empire's operations. For these reasons, proposed condition no. 5 should be rejected.

WHEREFORE, Empire renews its request that its Application in this case be authorized subject to Staff's proposed conditions excluding proposed conditions 5 and 12.

Respectfully submitted,

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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, electronic mail or hand-delivered, on this 6th day of July 2004, to:

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