

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office in  
Jefferson City on the 25<sup>th</sup> day of  
November, 2008.

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

**Case No. EC-2009-0078**

**ORDER DENYING STAFF'S MOTION FOR DETERMINATION ON THE  
PLEADINGS**

Issue Date: November 25, 2008

Effective Date: November 25, 2008

The Commission's Staff filed a complaint against The Empire District Electric Company on September 2, 2008. The complaint alleges that Empire failed to collect line extension and decorative street light charges from a real estate developer in violation of its tariffs, Commission Rules, and Missouri statutes. Empire filed a timely answer to Staff's complaint on October 9. On November 5, Staff filed a motion asking the Commission to determine the complaint in Staff's favor based on the pleadings. Empire responded to Staff's motion on November 17. Staff filed a reply to Empire's response on November 20.

Staff's motion contends that in its answer to the complaint, Empire acknowledged installing facilities at less-than-tariff rates, and operating facilities that had been installed at

less-than-tariff rates. On that basis, Staff asks the Commission to find in its favor and to direct Staff to pursue penalties against Empire in circuit court.

Commission Rule 4 CSR 240-2.117(2) allows the Commission to “dispose of all or any part of a case on the pleadings whenever such disposition is not otherwise contrary to law or contrary to the public interest.” The Missouri Supreme Court has described the standard for when a determination on the pleadings is appropriate as follows:

the party moving for judgment on the pleadings admits, for purposes of the motion, the truth of all well pleaded facts in the opposing party’s pleadings. ... A trial court properly grants a motion for judgment on the pleadings if, from the face of the pleadings, the moving party is entitled to a judgment as a matter of law.<sup>1</sup>

Furthermore, the Supreme Court has indicated, “a judgment on the pleadings should not be sustained where a material issue of fact exists.”<sup>2</sup>

Staff’s complaint alleges that Empire knowingly violated its tariffs and applicable regulations and statutes by giving a preference to the developer of a certain subdivision by undercharging the developer for installation of underground electric facilities and decorative street lighting. Empire, in its answer, specifically denies that allegation of Staff’s complaint. Empire’s answer then offers an extensive explanation of its dealings with the developer, the subdivision, Ozark Electric Cooperative, and the City of Republic, Missouri. Empire asserts as an affirmative defense that even if Empire has technically violated a provision of its tariff, a regulation, or a statute, the Commission should exercise its discretion to not authorize the pursuit of penalties against Empire because the company was acting with pure motives in its dealings.

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<sup>1</sup> *State ex rel. Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122, 134 (Mo. banc 2000).

<sup>2</sup> *Madison Block Pharmacy, Inc. v. U.S. Fid. & Guar. Co.*, 620 S.W.2d 343, 345 (Mo. banc 1981).

Looking only at the face of the pleadings, as it must when considering a motion for determination on the pleadings, the Commission concludes that factual issues remain for determination regarding the question of whether Empire granted an illegal preference to the developer and whether, if a preference was given, penalties should be sought for such a violation. Empire's answer specifically denies any violation of its tariffs in its dealings with the developer, and nothing in its asserted defense constitutes an admission of wrongdoing. In dealing with a motion for judgment on the pleadings, the Commission cannot simply presume that Staff's factual allegations of a tariff violation are correct.

In its reply to Empire's response, Staff cites a 1931 case<sup>3</sup> for the proposition that a utility's failure to charge the rates mandated by its tariff is a matter of strict liability for which no equitable defense may be asserted. There are two problems with Staff's position. First, as previously indicated, Empire has not admitted to any violation of its tariff and the Commission cannot presume such a violation based only on the allegations in Staff's complaint. Second, the cited case concerns an action by a railroad to collect the balance due under its transportation tariff. The case holds that a defense of estoppel based on an alleged agreement to charge a lower transportation rate could not be raised to prevent collection of the tariffed rate. It does not stand for the proposition that there can be no equitable defense against a complaint seeking the imposition of substantial monetary penalties.

Staff has failed to establish that it is entitled to judgment as a matter of law, and therefore, the Commission will deny Staff's motion for determination on the pleadings.

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<sup>3</sup> *Mellon v. Stockton & Lampkin*, 35 S.W.2d 612 (Mo. App. 1931).

**THE COMMISSION ORDERS THAT:**

1. Staff's Motion for Determination on the Pleadings is denied.
2. This order shall become effective immediately upon issuance.

**BY THE COMMISSION**

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written in a cursive style.

Colleen M. Dale  
Secretary

( S E A L )

Davis, Chm., Murray, Clayton, Jarrett,  
and Gunn, CC., concur.

Woodruff, Deputy Chief Regulatory Law Judge