BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

The Staff of the Missouri Public Service Commission,	)	
Complainant,	)	
v.	)	Case No. EC-2009-0078
The Empire District Electric Company,	)	
Respondent.	)	

STAFF'S RESPONSE

COMES NOW the Staff of the Missouri Public Service Commission ("Staff") and for its Response to Empire's Response to Staff's Motion for Determination on the Pleadings:

1. Empire **misses** the mark and erroneously responds to Staff's Motion for Determination on the Pleadings made pursuant to 4 CSR 240-2.117 **(2),** as if it is a Motion for Summary Determination, made pursuant to 4 CSR 240-2.117 **(1)**.

2. Commission rule 4 CSR 240-2.117 (2) states, in its entirety:

> Determination on the Pleadings—Except in a case seeking a rate increase or which is subject to an operation of law date, the commission may, on its own motion or on the motion of any party, 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.

3. Commission rule 4 CSR 240-2.117 (2) does not provide for the filing of a legal memorandum, et cetera, as discussed in 4 CSR 240-2.117 (1), concerning Summary Determination.

4. The standard for Determination on the Pleadings is discussed in *Stephens v. Brekke*, 977 S.W.2d 87, 92 (Mo.App. S.D.,1998):

> A motion for judgment on the pleadings should not be granted if a material issue of fact exists. *Madison Block Pharmacy v. U.S. Fidelity & Guaranty,* 620 S.W.2d 343, 345 (Mo. banc 1981). However, a motion for judgment on the pleadings should be granted if there exists no material issue of fact and the moving party is entitled to judgment as a matter of law based on the face of the pleadings. *Id.*
>
> A party moving for judgment on the pleadings admits the truth of all well-pleaded facts in the opposing party's pleadings for purposes of the motion. *Id.* "The position of a party moving for judgment on the pleadings is similar to that of a movant on a motion to dismiss, i.e., assuming the facts pleaded by the opposite party to be true, these facts are nevertheless insufficient as a matter of law." *Cantor v. Union Mut. Life Ins. Co.,* 547 S.W.2d 220, 224 (Mo.App.1977), quoted in *Madison Block Pharmacy, supra. See also Morris v. Brown,* 941 S.W.2d 835, 842 (Mo.App.1997).

5. Here, Empire has admitted in its initial pleading, and again in its Response to Staff's Motion for Determination on the Pleadings, that its charges made in connection with its business in The Lakes at Shuyler Ridge subdivision were not made pursuant to its tariff. Empire has not presented any facts that, if assumed to be true, could be sufficient as a matter of law to dispute Staff's assertion and Empire's admission that Empire failed to make all charges in connection with The Lakes at Shuyler Ridge subdivision pursuant to its tariff.

6. Empire asserts that its "desire to advance the public interest" constitutes an affirmative defense to Staff's properly pled allegations of Empire's willful failure to abide by tariffs. As stated in *Stephens v. Brekke*, 977 S.W.2d 87, 93–94 (Mo.App. S.D.,1998):

> "An affirmative defense is asserted by the *pleading of additional facts* not necessary to support a plaintiff's case which serve to avoid the defendants' legal responsibility even though plaintiffs' [sic] allegations are sustained by the evidence." *Reinecke v. Kleinheider,* 804 S.W.2d 838, 841 (Mo.App.1991). [Emphasis added.] Bare legal conclusions, ..., fail to inform the plaintiff of the facts relied on and, therefore, fail to further the purposes protected by Rule 55.08. *See Schimmel Fur Co. v. American Indemnity Co.,* 440 S.W.2d 932, 939 (Mo.1969) (rule requires notice of facts relied on so that opposing parties may be prepared on those issues). *ITT Commercial Finance v. Mid-Am. Marine,* 854 S.W.2d 371, 383 (Mo. banc 1993). Mr. and Mrs. Brekke failed to plead any facts in support of their "affirmative defenses." The affirmative defenses were deficient as a matter of law. They amount only to legal conclusions without any factual basis. A motion for judgment on the pleadings does not admit the truth of facts not well pleaded by an opponent nor conclusions of law contained in an

opponent's pleading. *Holt v. Story,* 642 S.W.2d 394, 396 (Mo.App.1982); *Helmkamp v. American Family Mut. Ins. Co., 407 S.W.2d 559, 565-66 (Mo.App.*1966)

7. Empire's "affirmative defense" is a legal theory, and is not constituted of well-pled facts giving rise to a material issue of fact. Additionally, the "public policy" argument raised by Empire has been heard before by the courts of this state, and has been rejected. As indicated in the discussions of precedent quoted below, failure to charge tariff rates is a matter of strict liability, and no defense will excuse such actions:

- When the tariff rates of a carrier are once legally established and promulgated, the shipper and all parties, in legal contemplation, have notice of the cost of carriage and of the law prohibiting discrimination under any guise or by any device. *Texas & Pacific Railway Co. v. Cisco Oil Mill*, 204 U. S. 449, 27 S. Ct. 358, 51 L. Ed. 562; *Railway Co. v. Stone Co.*, 169 Mo. App. 122, 154 S. W. 465. There is no reason apparent why the same rule of law covering interstate shipments should not apply to intrastate shipments as well, and it has been so ruled. In the case of *St. Louis Southwestern Railway Co. v. Painton*, (Mo. App.) 275 S. W. 55, 57, it is said:

  > "Following the reasoning in *Bush v. Miller*, 205 Mo. App. 38, 216 S. W. 989, and *Bush v. Keystone Driller Co.*, 199 Mo. App. 152, 199 S. W. 597, though they deal with interstate rates, we rule that plaintiff and defendant could not contract for an intrastate rate different to that contained in the tariff filed with the Public Service Commission and published according to law. **One of the chief evils sought to be remedied by the Public Service Act, so far as it pertains to railroad rates, was the abolition and prevention of favoritism and discrimination**, and we fully concur in the suggestion in plaintiff's brief that the reasoning followed by the federal courts, dealing with interstate rates, is applicable to intrastate rates in this state." [emphasis added]

Mellon v. Stockton & Lampkin, 35 S.W.2d 612, 613 (Mo.App. 1931)

- An almost identical situation was presented in the case of *Davis, Director General of Railroads, v. Moody*, 203 Ky. 203, 261 S. W. 1101. The case involved an intrastate shipment in Kentucky wherein, by mistake, the agent of the Director General collected less than the legal tariff rate. Practically the same plea was made by defendant as that made in the instant case. It was held that to permit the defense of estoppel would be

> only another way of evading the provisions of the Constitution and statutes of the state and would be an aid to the practice of discrimination rather than a prevention of it as required by law. It was further held, in effect, **that upon proof of the legal rate and the difference between it and the rate actually charged, the court should have given a peremptory instruction to find for the plaintiff**. [emphasis added]
>
> Defendants make bitter complaint of the hardship and injustice which would result to them if required to pay the full amount of the legal rate under the facts in evidence. **We cannot translate sympathy to mean law or permit the one to supplant the other**. The law of this case is written and obedience is required without evasion of jot or tittle. [emphasis added]

Mellon v. Stockton & Lampkin, 35 S.W.2d 612, 613 -614 (Mo.App. 1931)

8. Similar pronouncements are found in the Missouri Supreme Court's treatment of the above-cited case, *Mellon v. Stockton & Lampkin*, 326 Mo. 129, 132, 30 S.W.2d 974, 975-976 (Mo.1930):

> This statute [the Public Service Commission Act] has been construed by our courts on numerous occasions, **and it appears to be the settled law of this state, "that a carrier cannot, by contract or otherwise, by estoppel or waiver, directly or indirectly, increase or decrease the duly established freight rates**, and that the shipper must make good any deficiency not collected regardless of the cause." *Lancaster & Wright v. Schreiner*, 202 Mo. App. 459, 212 S. W. 19, 21; *Dunne & Grace v. Railroad*, 166 Mo. App. 372, 377, 148 S. W. 997; *Cicardi Bros. v. Pennsylvania Co.*, 201 Mo. App. 609, 624, 625, 213 S. W. 531; *Chicago & Eastern Illinois R. R.* Co. v. Lightfoot, 206 Mo. App. 436, 232 S. W. 176; **976 *Mobile & Ohio R. R. Co. v. Southern Saw Mill Co.*, 212 Mo. App. 117, 251 S. W. 434; *Davis v. Moody*, 203 Ky. 203, 261 S. W. 1101; *Illinois Central Ry. Co. v. Henderson*, 226 U. S. 441, 33 S. Ct. 176, 57 L. Ed. 290. [emphasis added]

9. Finally, as succinctly recapitulated in *Wabash R. Co. v. Berg*, 318 S.W.2d 504, 509-510 (Mo.App.1958) "[a] ruling of the Supreme Court of Missouri in *Baldwin v. Scott County Milling Co.*, 343 Mo. 915, 122 S.W.2d 890, that equitable considerations might affect the duty of the railroad to collect the tariff freight rates in an interstate shipment was reversed by the United States Supreme Court in *Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 59 S.Ct.

943, 83 L.Ed. 1409." Although this action was decided under the Interstate Commerce Act, the public policy considerations are in parity with Missouri's own Public Service Commission Act.

10. The Commission, in Case No. ZA-2006-0346 applied the following standard to a Motion for Determination on the Pleadings:

> (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.

In brief:

> (1) In its "affirmative defense" Empire admits that it did not abide by applicable tariffs in connection with its activities concerning The Lakes at Shuyler Ridge Subdivision.
>
> (2) Empire's affirmative defense is not cognizable, and failure to abide by a lawfully promulgated tariff has been recognized by the courts of this state as a matter of strict liability (see discussion above).
>
> (3) The prompt authorization of suit in this matter is in the public interest, as due to several lengthy cases concerning these transactions, excessive time has elapsed since Empire's willful violation of its tariffs.

11. Because the above responds to the relevant portions of Empire's suggestions, the Staff elects not to respond to other statements and arguments Empire makes in its suggestions, but by choosing not to respond to them, the Staff does not concede there is any merit to any of them.

WHEREFORE, the Staff moves the Commission to, based solely on the pleadings filed in this matter, pursuant to 4 CSR 240-2.117 **(2),** direct its General Counsel to pursue penalties against Empire in the Circuit Courts of this State.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 20th day of November, 2008.

/s/ Sarah L Kliethermes