BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

In the Matter of the Application of The Empire District Electric Company and Ozark Electric Cooperative for Approval of a Written Territorial Agreement Designating the Boundaries of Exclusive Service Areas for Each within Two Tracts of Land in Greene County and Christian County, Missouri.	))))))	Case No. EO-2007-0029
In the Matter of the Application of The Empire District Electric Company for a Waiver of the Provisions of Its Tariff and 4 CSR 240-14.020 with Regard to The Lakes at Shuyler Ridge Subdivision in Conjunction with a Proposed First Territorial Agreement with Ozark Electric Cooperative.	))))))	Case No. EE-2007-0030

STAFF RECOMMENDATION

COMES NOW the Staff of the Missouri Public Service Commission ("Staff") and, for its recommendation the Commission deny both the application of The Empire District Electric Company for variances from provisions of its tariff and Commission Rule 4 CSR 240-14.020 and the application of Empire and Ozark Electric Cooperative for approval of a territorial agreement, states:

1. In the attached Memorandum, which is labeled Appendix A, the Staff, for both legal and policy reasons, recommends the Missouri Public Service Commission deny both the application of The Empire District Electric Company for variances from provisions of its tariff and Commission Rule 4 CSR 240-14.020 (Case No. EE-2007-0030) and the application of Empire and Ozark Electric Cooperative for approval of a territorial agreement (Case No. EO-2007-0029).

2. In synopsis, the Staff believes the Legislature has not given the Commission authority to grant the variances Empire requests and, further, if the Commission did have

authority to grant the variances, it should not because the requested variances would be discriminatory in that they would be offered for only one development despite the fact the Empire faces competition for other developments and the costs associated with the variances would likely be borne by all of Empire's ratepayers, without any direct benefit.

3. The territorial agreement application is for two particular tracts of land located in unincorporated Greene and Christian Counties near Republic, Missouri. Under the Agreement Empire is to get exclusive rights with respect to Ozark to serve a tract of about 4.5 square miles that includes a 517 lot subdivision covering 245 acres that is undergoing development—The Lakes at Shuyler Ridge Subdivision—and Ozark is to exclusive rights with respect to Empire to serve a tract of about 4 square miles that includes another subdivision being developed—Terrell Creek. Certain Empire tariff provisions and Commission Rule 4 CSR 240-14.020 do not allow Empire to perform the agreement; therefore, Empire is requesting Commission variances from them.

4. The Staff generally supports territorial agreements that define exclusive service areas, including that aspect of the territorial agreement here; however, this territorial agreement is premised on the Commission granting to Empire variances from Empire's tariff and a Commission rule. Because it opposes the requested waivers, the Staff recommends the Commission not approve the territorial agreement.

5. In the prayer of its application for variances Empire requests variances from "4 CSR 240-14.020(1)(B) and (D), and to the extent they may be construed to apply to this situation, (1)(E) and (F), and a variance from the provisions of Empire's electric rules and regulations (PSC Mo. No. 5, Sec. 5, Sheets 17c and 17d) and rate schedules (SPL and PL)."

6. Empire specifically requests variances from 4 CSR 240-14.020(1)(B) and (D), and, if necessary (1)(E) and (F). Subsections (1)(B), (D), (E) & (F) of the rule provide:

> (1) No public utility shall offer or grant any of the following promotional practices for the purpose of inducing any person to select and use the service or use additional service of the utility:
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> * * * *
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> (B) The furnishing of consideration to any architect, builder, engineer, subdivider, developer or other person for work done or to be done on property not owned or otherwise possessed by the utility or its affiliate, except for studies to determine comparative capital costs and expenses to show the desirability or feasibility of selecting one (1) form of energy over another;
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> * * * *
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> (D) The furnishing of consideration to any dealer, architect, builder, engineer, subdivider, developer or other person for the sale, installation or use of appliances or equipment;
> (E) The provision of free, or less than cost or value, wiring, piping, appliances or equipment to any other person; provided, that a utility, engaged in an appliance merchandising sales program, shall not be precluded from conducting legitimate closeouts of appliances, clearance sales and sales of damaged or returned appliances;
> (F) The provision of free, or less than cost or value, installation, operation, repair, modification or maintenance of appliances, equipment, wiring or piping of any other person;

Because Empire is proposing to provide underground cable and decorative street lighting at The Lakes at Shuyler Ridge Subdivision at Empire's cost, in the Staff's view all four subparts of the foregoing rule apply.

7. Further, 4 CSR 240-14.030 provides:

> (1) All promotional practices of a public utility or its affiliate shall be just and reasonable, reasonable as a business practice, economically feasible and compensatory and reasonably calculated to benefit both the utility and its customers.
> (2) No public utility or its affiliate, directly or indirectly, in any manner or by any device whatsoever, shall offer or grant to any person any form of promotional practice except as is uniformly and contemporaneously extended to all persons in a reasonable defined class. No public utility or its affiliate, in the granting of a

promotional practice, shall make, offer or grant any undue or unreasonable preference or advantage to any person or subject any person to any undue or unreasonable prejudice or disadvantage. No public utility or its affiliate shall establish or maintain any unreasonable difference in the offering or granting of promotional practices either as between localities or as between classes to whom promotional practices are offered or granted.

(3) The promotional practices of a public utility or affiliate shall not vary the rates, charges and rules of the tariff pursuant to which service is rendered to a customer. No new promotional practice which has not been previously filed with the commission shall be made or offered unless first filed on a tariff with the commission.

Subsection 2 of 4 CSR 240-14.030 tracks the antidiscrimination provisions of subsections 2 and 3 of § 393.130, RSMo Supp 2005, which is set out near the end of paragraph 11 below.

8. Regarding underground lines in new residential subdivisions, the Staff found the following provisions in Empire's tariff that are relevant to its application:

2. Underground:

The Company's standard construction will be overhead. However, where feasible from engineering, operational, and economic considerations, new electric service to residential and commercial customers may be installed underground. Installation of underground facilities shall be made in accordance with the following provisions:

a. Underground Primary and Secondary Distribution Facilities to Residential Subdivisions :

When application is received from a developer for an extension of electric service to a subdivision in an area not served by existing facilities, the Company shall prepare a detailed estimate of the cost to install an overhead distribution system to the subdivision, including indirect costs of construction. The Company shall also perform a detailed estimate, based on a cost/benefit analysis, to determine the cost to install an underground distribution system of the same scope as the overhead distribution system to the same subdivision, including indirect costs. ***If the underground system is more expensive than the overhead system, and the developer insists upon an underground system, the developer shall be required to pay the difference between the estimated cost of the underground system and the overhead system.*** The developer may make arrangements to pay a portion of the excess cost of the underground system by performing certain work such as trenching and backfilling. However, any work performed by the developer shall be done in accordance with Company requirements and specifications and shall be coordinated with the Company representative.

A copy of the Company's estimate of the cost of construction, including direct and indirect costs, shall be furnished to the customer upon request prior to construction.

The Empire District Electric Company Tariff MoPSC No. 5, Sec. 5 3rd revised, Sheet No. 14

(Emphasis added.)

2. Underground and Overhead:
The Company's standard construction will be overhead. However, where feasible from engineering, operational, and economic considerations, new electric service to residential and commercial customers may be installed underground. Installation of facilities shall be made in accordance with the following provisions:

a. Primary and Secondary Distribution Facilities to Residential Subdivisions:
When application is received from a developer for an extension of electric service to a subdivision in an area not served by existing facilities, the Company shall prepare a detailed estimate of the cost to install a distribution system to the subdivision, including services, transformers, and indirect costs of construction. A copy of the Company's estimate of the cost of construction, including direct and indirect casts, shall be furnished to the developer upon request prior to construction. ***The developer will make full payment of these estimated charges in advance of any construction by the company. When construction is completed, if the actual costs of the extension are less than the estimated costs, the portion of the developer contribution above the actual costs will be refunded to the customer. If actual costs are higher than the estimated costs the developer will not be required to pay more than the estimate.***

For each new permanent residential customer added during sixty (60) months following the completion of the extension, the Company will refund to the developer an amount equal to the Construction Allowance. The Construction allowance is described in the following paragraph. Refund totals will not exceed the original contribution by the developer. The developer may make arrangements to offset a portion of the cost of an underground system by performing certain work such as trenching and back-filling. However, any work performed by the developer shall be done in accordance with Company requirements and specifications and shall be coordinated with the Company representative.

As a Construction Allowance for residential subdivisions, the Company will calculate at the beginning of each calendar year the value of 225 feet of overhead single phase primary conductor, one (1) forty foot wood pole and necessary fixtures, one (1) down guy and anchor, one (1) fifteen (15) KVA transformer, transformer ground rod, one hundred (100) feet of overhead

service conductor and related connectors, and one (1) two hundred (200) amp meter.

The Empire District Electric Company Tariff MoPSC No. 5, Sec. 5, Sheet No. 17c to Sheet no. 17d.

9. Regarding street lighting in new residential subdivisions, the Staff found the following provisions in Empire's tariff that are relevant to the facts presented by the application:

COMPANY OWNERSHIP - FACILITIES USAGE CHARGE:

> When, by ***agreement with the Municipality, the Company shall install, own, operate and maintain street lights served under this schedule or is required to provide special or excessive electric facilities to serve Municipality owned street lighting systems served under this schedule***, a separate agreement shall be executed by and between the Municipality and the Company setting forth the investment in such street lighting facilities and a ***Facilities Usage Charge in the amount of .75% per month of such investment***. The Facilities Usage Charge shall be payable by the Municipality to the Company in the manner prescribed in the aforementioned separate agreement and in addition to the Annual Street Lighting Charge as set forth herein.

MINIMUM:

> The total annual net amount of the Annual Street Lighting Charge, plus the Facilities Usage Charge, shall not be less than an amount equal to twelve times the total of charges to the Municipality for street lighting service for the calendar month prior to the date of the contract.

The Empire District Electric Company Tariff MoPSC No. 5, Sec. 3, 5th Rev. Sheet No. 1a. (Emphasis added.)

AVAILABILITY:

> This schedule is available for ***outdoor lighting service to any retail Customer***.
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> * * * *
>
> For installations requiring a large expenditure for additions to, or rearrangements of existing facilities, the ***total additional charge may be computed at 1.5% of the estimated installed cost thereof per month***. Such estimated installed cost excludes the estimated installed cost of materials required for standard construction (see Conditions of Service, No. 1, below).

* * * *

CONDITIONS OF SERVICE:

1. ***Standard Street Light Construction will consist of a Standard Company Streetlighting Fixture with a lamp, ballast, bracket, control device, wire and hardware mounted on existing poles and on existing secondary circuits***.
2. Standard Floodlighting Construction will consist of a Standard Company Floodlighting Fixture with a lamp, ballast, bracket, control device, wire and hardware mounted on an existing pole and on existing secondary circuits.
3. All lamps will burn every night from dusk to dawn, subject to a time allowance of three work days after notice is given to Company for maintenance and lamp renewals.
4. ***The facilities installed by the Company will remain the property of the Company***.
5. The term of service for Standard Construction will not be less than one (1) year. Intermittent or seasonal service will not be provided.
6. Where addition or rearrangement of facilities are required, the service may be terminated after one year by the payment of an amount equal to the investment in these facilities less 20 percent of the monthly charges already paid by the Customer to the Company. After five years' service, no termination charge will be required.
7. Bills for service will be rendered monthly.
8. The Company Rules and Regulations, P.S .C . Mo. No . 5, Section 5, are a part of this schedule.

The Empire District Electric Company Tariff MoPSC No. 5, Sec. 3, 16th Rev. Sheet No. 2 to 7th Rev. Sheet no. 2a. (Emphasis added.)

10. The purpose of the Public Service Commission Act is primarily to protect the public from utilities. *State ex inf. Barker v. Kansas City Gas Company*, 254 Mo. 515, S163 S.W. 854, 857-58 (1914).

11. In *State ex rel. St. Louis Gas Co. v. Public Service Commission*, 315 Mo. 312, 286 S.W. 84 (1926), the Missouri Supreme Court held that the Commission, while it had authority to change tariff provisions, did not have authority to waive them to allow new customers to pay less

than the tariff rate for extension of a gas line to serve them, such being discriminatory. In its opinion the Court stated:

> A schedule of rates and charges filed and published in accordance with the foregoing provisions acquires the force and effect of law; and as such it is binding upon both the corporation filing it and the public which it serves. It may be modified or changed only by a new or supplementary schedule, filed voluntarily, or by order of the commission. Such is the construction which has been universally put upon analogous provisions of the Interstate Commerce Act, being U. S. Comp. St. s 8563 et seq. (Louisville, etc., Ry. Co. v. Maxwell, 237 U. S. 94, 35 S. Ct. 494, 59 L. Ed. 853, L. R. A. 1915E, 665; Gulf, etc., Ry. Co. v. Hefley, 158 U. S. 98, 15 S. Ct. 802, 39 L. Ed. 910); and we have so ruled with respect to similar provisions of our Public Service Commission Law relating to telegraph companies (State v. Public Service Commission, 304 Mo. 505, 264 S. W. 669, 671, 672, 35 A. L. R. 328). If such a schedule is to be accorded the force and effect of law, it is binding, not only upon the utility and the public, but upon the Public Service Commission as well.
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> The general purpose of the statutory provision above referred to is to compel the utility to furnish service to all the inhabitants of the district which it professes to serve at reasonable rates and without discrimination. The methods by which these results are to be obtained are clearly and definitely prescribed:
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> "Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such * * * corporation * * * are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished." Rev. St. 1919, § 10478.
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> The rules and regulations of the St. Louis Gas Company as to extensions are integral parts of its schedule of rates and charges. If they are unjust and unreasonable, the commission, after a hearing, as just referred to, may order the schedule modified in respect to them. But it cannot set them aside as to certain individuals and maintain them in force as to the public generally. The gas company cannot--
>
> "extend to any person or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances."

Neither can the Public Service Commission.

The statutory language cited in the opinion is presently found at §§ 393.130.1 (RSMo Supp 2005), 393.140(2) and 393.140(12), RSMo 2000, and applies equally to electric corporations. Further, subsections two and three of § 393.130, RSMo Supp 2005, provide:

> 2. No gas corporation, electrical corporation, water corporation or sewer corporation shall directly or indirectly by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for gas, electricity, water, sewer or for any service rendered or to be rendered or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.
>
> 3. No gas corporation, electrical corporation, water corporation or sewer corporation shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

12. In the 1937 case *May Department Stores Company v. Union Electric Company*, 341 Mo. 299, 107 S.W.2d 41, the Missouri Supreme Court, in the context of rates, stated the following:

> If all consumers similarly situated are to be treated alike, a contract dealing with one on a different basis from others cannot be recognized. If one consumer by reason of a contract pays less for or gets more service for his money than others, he pays less than it is worth (because the commission is directed to fix just and reasonable rates) and others would have to pay more than their service is worth in order to make up the difference it would cost the utility to give the one consumer special treatment. [See *State ex rel. Empire District Electric Co. v. Public Service Comm., 339 Mo. 1188, 100 S. W. (2d) 509;* see, also, 1 Pond's Public Utilities, chap. 13, secs. 270-295.] The purpose of providing public utility regulation was to secure equality in service and in rates for all who needed or desired these services and who were similarly situated. Of course, this required classification for rates and service on the basis of location, amount used, and other reasonable considerations, but this does not give public utilities and their customers the right to fix their own classifications by contract without regard to the rest of the public. Likewise, any such classifications they did make before the act was passed, when they had the right to do so, was subject to reclassification by the commission.

Thus it is settled beyond question that the provisions of the contract involved here, as to rates and service, could not stand against any action by the commission in conflict therewith.

This brings up this further question: Were public utilities which had fixed rates and classifications of service with consumers prior to the act required to thereafter obtain approval of and authority to continue rates and classifications then in effect? We think that affirmative action for this purpose was intended; that it made no difference whether such rates had previously been fixed by contract or otherwise; and that not only were prior agreements as to rates and service subject to reclassification and change, but that it was clearly the intention of the act that they should be reclassified (or the commission's approval of the existing rates and classifications obtained) within a reasonable time after it became effective. Otherwise, how could equality in rates and service be established? Could it have been intended that every individual consumer's private arrangements with any utility should remain as it was until the commission discovered it by investigation and specifically ordered that it be abandoned?

Section 5189, Revised Statutes 1929, provides concerning electrical corporations as follows:

"1. . . . *Every electrical corporation, . . . shall* furnish and *provide such service* instrumentalities and facilities *as shall be* safe and *adequate. . . . All charges* made or demanded . . . *shall be just and* reasonable *and not more than allowed by law or by order or decision of the Commission. . . . Every . . . charge . . . in excess of that allowed by law or by order or decision of the commission is prohibited*.

"2. *No . . . electrical corporation . . . shall* directly or indirectly by any special rate, rebate, drawback or other device or methods, charge, demand, collect or *receive from any person* or corporation *a greater or less compensation* for gas, electricity . . . or *for any service rendered* or to be rendered in connection therewith, . . . *than it* charges, demands, collects or *receives from any other person* or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions.

"3. *No . . . electrical corporation, . . . shall* make or *grant any* undue or *unreasonable preference or* advantage *to any person*, corporation or locality, *or to any particular description of service* in any respect whatsoever." (As to heating companies see Section 5228, R. S. 1929.)

Some of the commission's powers to determine these matters and enforce its findings stated in Section 5190, Revised Statutes 1929, are as follows:

"1. Have general supervision of all . . . electrical corporations. . . .

"2. . . . Have power to order such reasonable improvements as will best promote the public interest, . . . and protect those using . . . electricity . . . and have power to order reasonable improvements and extensions of the works, wires, poles, pipes, lines, conduits, ducts and other reasonable devices.

"12. Have power *to require every . . . electrical corporation, . . . to file with the commission* and to print and keep open to public inspection schedules showing *all rates and charges made*, established or enforced or to be charged or enforced, *all forms of contract or agreement* and all rules and regulations relating to rates, charges or service used or to be used, *and all general privileges and facilities granted or allowed. . . . No corporation . . . shall charge*, demand, collect or receive a *greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable* to such services as specified *in its schedule filed* and in effect at the time; . . . *nor to extend to any person* or corporation *any form of contract or agreement . . . or any privilege or facility, except such as are regularly and uniformly extended to all* persons and corporations under like circumstances." (All italics ours.)

(Sec. 5249.) "The commission shall ascertain, determine and fix for each kind of public utility suitable and convenient standard commercial units of service, product or commodity."

These provisions mean that a public utility may by filing schedules suggest to the commission rates and classifications which it believes are just and reasonable, and if the commission accepts them they are authorized rates, but the commission alone can determine that question and make them a lawful charge. The first Public Service Commission construed the act as requiring its affirmative approval of all rates, because it did make an order requiring "every electrical corporation . . . not later than October 15, 1913, to have on file . . . schedule of all rates, rentals and charges of whatever nature made by such . . . corporation . . . for each and every kind of service which it renders as were in force on April 15, 1913, together with proper supplements covering all changes. . . . .

13. In its variance requests Empire is asking the Commission to treat the developer of the subdivision The Lakes at Shuyler Ridge Subdivision differently than any other similarly situated customer. The Staff concludes the Commission is without authority to do so; therefore, the Staff recommends the Commission deny Empire's variance requests because they are unlawful. Further, if the Staff is wrong and the Commission has the power to grant the relief requested by Empire, it should not because the requested variances would be discriminatory in that they would be offered for only one development despite the fact the Empire faces competition for other developments and the costs associated with the variances would likely be borne by all of Empire's ratepayers, without any direct benefit.

14. Should the Commission disagree with the Staff and decide to grant the applications, the Staff recommends the Commission include in its ordered paragraphs language that makes it clear the Order has no ratemaking effect.

WHEREFORE, the Staff respectfully recommends to the Commission that it deny both the application of The Empire District Electric Company for variances from provisions of its tariff and Commission Rule 4 CSR 240-14.020 (Case No. EE-2007-0030) and the application of Empire and Ozark Electric Cooperative for approval of a territorial agreement (Case No. EO-2007-0029); and if the Commission grants the applications, it include the language following as an ordered paragraph:

> That nothing in this order shall be considered as a finding by the Commission of the reasonableness of the expenditures herein involved or of the value for ratemaking purposes of the properties herein involved or as an acquiescence in the value placed upon said properties by the Empire District Electric Company.

Respectfully submitted,

/s/ Nathan Williams
Nathan Williams
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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 10th day of October 2006.

/s/ Nathan Williams
Nathan Williams

M E M O R A N D U M

TO: Missouri Public Service Commission Official Case File
Case Nos. EO-2007-0029 and EE-2007-0030
Territorial Agreement near Republic Missouri and Variances from Tariff and Rule to allow Promotional Practices to Serve The Lakes at Shuyler Ridge Subdivision

FROM: Dan Beck, Engineering Analysis Section of the Energy Department

/s/ Warren Wood 10-10-06	/s/ Nathan Williams 10-10-06
Utility Operations/Date	General Counsel's Office/Date

SUBJECT: Staff Recommendations to Deny Variances and Territorial Agreement

DATE: October 10, 2006

On July 18, 2006, Empire District Electric Company (Empire) and Ozark Electric Cooperative (Ozark) filed a Joint Application requesting approval of a Territorial Agreement in Case No. EO-2007-0029. This agreement appears to promote orderly expansion of services to new customers in the area that is South and Southwest of Republic, Missouri with each utility serving 4 to 5 square miles. Within each of these exclusive service territories, there is currently one subdivision that is expected to be developed in the near future.

However, Empire also filed an Application for Variance in Case No. EE-2007-0030 regarding subdivision extensions and street lighting facilities. Empire stated that these two filings are "interdependent" and therefore "mutually dependent". The Variance would specifically apply to the The Lakes at Shuyler Ridge subdivision (The Lakes) which is the subdivision that is expected to be developed in the near future in Empire's proposed service area. The Lakes subdivision would be comprised of 517 lots on approximately 245 acres which is approximately one-twelfth of the 4.5 square miles that would be Empire's proposed service area as a result of the territorial agreement.

The Application and its Appendices provide several scenarios that deal with the plan to develop the The Lakes in phases, makes different assumptions about Republic annexing this subdivision and separate the costs. While these scenarios reflect the reality that development of subdivisions is not certain, it also confuses the basic request. Therefore, the Staff will discuss the scenario where the Application is approved, the development takes place at a rate of 80 homes per year, and will discuss the costs that are directly related to the variance request.

Based on a review of the Empire's filings, an invoice from Ozark, and discussions with the Empire personnel, the Staff would quantify the requested variance as a cost to Empire (its shareholders and/or its ratepayers) as follows:

1a.) $187,453.74 that normally would be contributed by the developer
1b.) Interest free loan of approximately $300,000 for 7 years

1c.) Ratepayers forfeit the opportunity of collecting $2,679 per undeveloped lot if development doesn't take place within 5 years of installation of facilities.

2) $163,500 for 109 decorative street lights

It should be noted that during discussions between the Staff and Empire, there was a typographical error discovered in Appendix B of the filing. On the page labeled "Data & Assumptions" of Appendix B of the filing, the cost for "Ozark Electric CO-OP facilities" was shown as $117,921.74 in the application, however, the correct value is $177,921.74 value that is contained in the application. This correction affects several other values that are shown on this page. It should also be noted that the Application refers to "two specific aspects to Empire's current tariff provisions" which the Staff believes correspond to items 1 and 2 as quantified above.

From the contractor's perspective, these benefits resulting from the above costs are no different than the offer conveyed by Ozark. However, Ozark typically collects its investment in street lighting by collecting a surcharge from the homeowners while Empire does not have such a provision. Instead, each of the 517 homeowners would receive approximately $315.00 in free equipment for a total benefit of $163,500.

The Staff maintains that the requested variance would be discriminatory and therefore should not be granted. However, the Staff notes the Commission granted waivers for extensions of services to three subdivisions in the early 1990s. In the approximately 15 years since those waivers were granted, Empire has faced competition for serving subdivisions many times, but chose not to request variances and lost serving some of those subdivisions to competition. The fact that Empire did not request the same variances for any developments during that 15 year period, but is offering these incentives to the developer in this case reflects the discriminatory aspects of this request. In addition, if these costs were included in rate base, all of Empire's ratepayers would be required to pay for these benefits, but would not have received them.

In one of the waiver requests from the early 1990s, Case No. EO-91-75, the Staff's Recommendation contained the following language "The Staff has a continuing interest in the impact of attracting new loads for the utility and the cost of meeting long range capacity needs." Since that time, Empire has had at least five different rate increases, most of which were associated with the addition of new generation. It would not appear to be reasonable to compete for new load like The Lakes subdivision when the need for generation capacity is consistently increasing the cost to serve customers. Since the proposed variances discriminate between similarly situated customers and appears to be unreasonable when the need for generation capacity is consistently increasing the cost to serve customers, the Staff recommends the Commission not grant the requested variances.

Recognizing the Commission has granted similar variances in the past, the Staff also suggests that under no circumstances here the Commission should not approve the requested variance regarding decorative street lighting. Although it searched the Staff was unable to find any previous instance where the Commission granted a promotional practices variance for decorative street lighting. In the paragraph below, the Staff discusses the case that Empire raised in its pleading, Case No. EO-94-254. That Case was clearly not related to decorative street lighting

and does not reflect the same concerns about payback period and related economic reasonableness. In addition, in Case No. EO-91-398, which is described in more detail below, street lighting was being offered by the Cooperative, but Empire only requested a variance for underground service extensions. Further, while it is clear that any investment to provide decorative street lighting has an extremely long payback, it is not clear why someone in Branson or Joplin would want to help a customer at The Lakes pay for decorative street lighting when decorative street lighting was not an option that was offered to them when their home was built.

In paragraph 15 of the Application for Variance, Empire states the following:

> The Commission in the past has recognized the need of regulated public utilities to meet unregulated competition by granting requests similar in nature to this. See Case No. EO-94-254 and the Order Approving Variance and Tariff issued March 18, 1994.

A review of the Order in Case No. EO-94-254, which is attached to this Memorandum, the Staff determined that the Commission granted variances that allowed 1) a payment for part of the installation cost of a ground source heat pump; 2) a free satellite dish antenna; 3) free installation of light poles/fixtures for the main athletic field and the sale of those light poles at Company's cost; 4) four free light poles for the softball field and 4) free facilities for temporary service for construction. Item number 1 was valued at $45,000 and the other three items appear to be worth significantly less than $45,000. The Staff notes that the current Variance request is significantly different than the request in Case No. EO-94-254, which was made by the former St. Joseph Light and Power (SJLP). The most notable difference between these two cases is that in Case No. EO-94-254, the amount of inducements is below the tariffed 2 year revenue test used to determine the level of customer required contributions for line extensions for non-residential customers. Since this new school facility did not require significant line extension costs, the cost of the inducements and the line extension was also less than the 2 year revenue test. In contrast, for the current request, inducements totaling $350,954, when combined with $1,530,039 in costs for line extensions, results in a total electric facilities expense of $1,880,992. When compared with Empire's revenue projections, the current request does not meet a 2 year revenue test. In addition, although a residential subdivision is not considered a non-residential customer, Empire's current tariffs do not allow for a 2 year test as SJLP's did but instead provide for a 1 year revenue test which makes it even more difficult for any inducements to meet Empire's non-residential revenue test.

If one just compares the lighting aspects of Case No. EO-94-254 and the current Application, the differences are also distinct. In Case No. EO-94-254 the cost of all light fixtures was paid for by the customer and the only free consideration, other than installation, was four light poles for the softball field. The customer was required to pay for all of the poles for its main athletic field. In the current application, the developer would receive $163,500 towards the cost of 109 decorative street lights that would normally be paid by the developer under Empire's tariffs, and the developer would only be required to pay $10,900 (the equivalent of 7 decorative street lights). Given the size of the lighting benefit, the revenue collected from lighting would require a 23.5 year revenue payback, if one assumes that electricity is free and that the lighting will not require any maintenance. The estimate of a 23.5 year payback is based on Empire's estimate of lighting

revenues for the first 10 years at $60,264.24 and $7,664.88 for each year thereafter. It also appears that the $163,500 does not include the installation, but the Staff has no estimate of the value of the installation of the lighting.

The Staff maintains that there are other relevant cases that should be considered. Specifically, the Staff has reviewed the three "EO" cases that are referenced on Section 4, Sheet No. 8 of Empire's tariff. These three cases, Case Nos. EO-91-398; EO-91-75; and EO-90-320, were requests to waive the fees normally collected from developers to fund the difference between installing overhead versus underground distribution facilities. The Commission approved Empire's requests with a common requirement that the Commission reserved the right to consider rate making treatment in any later proceeding. However, none of these requests allowed the additional cost of street lighting that Empire requests in the current case. In fact, the Staff Recommendation in Case No. EO-91-398 specifically states that the Cooperative was offering "to install all underground utilities and furnish street lights free of charge," but street lighting was not even mentioned in the Commission's Order in that case. Based on a review of these cases, the Staff maintains that the benefit related to the $163,500 was clearly not an inducement offered in these three previous cases.

In the course of its review of cases relevant to this filing, the Staff noted that the following language is included in the Commission's Orders in Case Nos. EO-91-75 and EO-91-398 (Similar although slightly different language was included in Case Nos. EO-90-320 and EO-94-254):

> That nothing in this order shall be considered as a finding by the Commission of the reasonableness of the expenditures herein involved or of the value for ratemaking purposes of the properties herein involved or as an acquiescence in the value placed upon said properties by the Empire District Electric Company.

The Staff would recommend that any Commission order regarding this case should also include the above language. In addition, if the Commission grants the requested waiver, Empire should submit revised tariffs that reflect the waiver and the new territorial agreement.

Although the Staff opposed the requested waivers, the Staff would like to take this opportunity to point out several things that the Staff believes Empire has done well regarding territorial agreements and promotional practices waiver requests. Specifically, the Staff continues to maintain that territorial agreements are good for all concerned parties in the long run if the utilities have the facilities to serve the service areas. In addition, the Staff would note that since the Commission's Order in Case No. EO-91-398, Empire did not file a request for an unregulated competition waiver. It appears to the Staff that Empire shared similar concerns to those expressed by the Staff and chose to pursue new customers only to the extent that the tariffs allowed. The current filing does not appear to reflect a change in Empire's new customer strategy but instead appears to be a unique exception that was prompted by the events surrounding the territorial agreement and variance request.

As discussed in the Application, the Territorial Agreement and the need for a variance are the result of a meeting between Empire, Ozark, the City of Republic and two different sets of developers on March 23, 2006. While the resulting applications may be acceptable to the

attendees of this meeting, the obvious party missing from those discussions were anyone representing the interests of the ratepayers of Empire that do not reside in Republic. If the applications are approved as filed, it is likely that all of Empire's ratepayers could end up paying for the decorative street lights.

Finally, the Staff would offer the following suggestions:

1) Ozark could serve new customers inside the City of Republic provided there was a territorial agreement with Empire that allowed them to serve that portion of Republic.
2) Under Ozark's original offer, the homeowners at The Lakes were going to pay for the decorative street lights through a month surcharge. Nothing prohibits the developer from collecting this surcharge or including these costs in the initial cost of the lot.
3) The Staff is not aware of any previous territorial agreement that included costs that were not customer-specific distribution costs. In cases where customer-specific distribution costs were included, these were related to the transfer of customers which is not occurring in this case. The Staff is concerned that future territorial agreements could include additional considerations even more costly than the decorative street lighting proposed in this case.

In the Staff's view, the territorial agreement is acceptable if it is not tied to the variance request. However, the variance request regarding the developer contributions of approximately $187,453.74 should not be granted despite the fact that it is consistent with past Commission Orders from the early 1990s. In addition, the Staff maintains that the Commission should not grant a variance for the decorative street lights amounting to $163,500 since this has not been part of past practice and is clearly not just and reasonable since decorative street lighting is a promotional practice that has no been available to any other customer and the Staff believes that it is unlikely that it will be offered in the future. Since Empire states that the two filings are interdependent, the Staff recommends that the application for variance and the territorial agreement be rejected.

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

In the Matter of the Application of The Empire District Electric Company and Ozark Electric Cooperative for Approval of a Written Territorial Agreement Designating the Boundaries of Exclusive Service Areas for Each within Two Tracts of Land in Greene County and Christian County, Missouri.	))))))	Case No. EO-2007-0029
In the Matter of the Application of The Empire District Electric Company for a Waiver of the Provisions of Its Tariff and 4 CSR 240-14.020 with Regard to The Lakes at Shuyler Ridge Subdivision in Conjunction with a Proposed First Territorial Agreement with Ozark Electric Cooperative.	))))))	Case No. EE-2007-0030

AFFIDAVIT OF DANIEL I. BECK

STATE OF MISSOURI)
) **ss**
COUNTY OF COLE)

Daniel I. Beck, of lawful age, on oath states: that he has participated in the preparation of the foregoing written Memorandum, consisting of five pages to be presented in the above case; that he has knowledge of the matters set forth in such report; and that such matters are true to the best of his knowledge and belief.

Daniel I Beck

Subscribed and sworn to before me this 10th day of October, 2006.

ROSEMARIE RIEDL
MY COMMISSION EXPIRES June 1, 2009
NOTARY SEAL
#05509538
COLE COUNTY
NOTARY PUBLIC STATE OF MISSOURI

Rosemarie Riedl
Notary Public

My commission expires June 1, 2009