

**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.	)	

**REPLY TO STAFF RESPONSE  
CONCERNING PROPOSED PROCEDURAL SCHEDULE**

Comes now Respondent, The Empire District Electric Company (hereinafter "Empire"), by and through its counsel, and respectfully states as follows:

1. This pleading is pursuant to the Commission's "Order Establishing Time to Reply to Staff's Response to Empire's Proposed Procedural Schedule" issued and effective on November 5, 2008, stating the Commission would accept replies to the Staff's response by November 7, 2008.

2. Empire and Staff filed different proposed procedural schedules in this case on November 3, 2008, because they were unable to agree on all of the dates for a proposed schedule. Empire explained the reasons for its proposal in its filing, which in the interest of brevity is incorporated here by reference. Basically, Staff was allowed to pick whatever date it was comfortable with to file its prepared direct. It picked November 26, the day before Thanksgiving. Empire expected some degree of reciprocity in being able to pick its filing date, but was met with the insistence that Empire file on a very short schedule just after the Thanksgiving, Christmas and New Year holidays, resulting in a Staff-proposed hearing date in the first week of February,

2009. Empire tried unsuccessfully to persuade the Staff that Staff was being less than reasonable in trying to “jam” Empire into dealing with Staff’s prepared testimony over a holiday-filled period for no apparent reason.

3. As stated in Empire’s proposal, it was merely seeking a reasonable period of time -- without the interference and complications of the holidays -- in which to analyze Staff’s direct testimony, perform discovery on that as needed, and prepare its case in defense to whatever allegations might be revealed in Staff’s direct testimony. As Empire pointed out, as far as this Complaint is concerned, there is no customer going without service, no customer complaining about service, no claim that Empire owed someone money, or any other allegation that there was a need to act in a hurry; and thus no *apparent* reason for a rush to trial that would jeopardize Empire’s ability to adequately prepare its defense. Empire’s proposal only resulted in moving the proposed hearing dates to early May 2009, approximately 90 days after what Staff proposed. Under either proposal, Empire would only get *one* opportunity to file prepared testimony in response to the Staff’s case.

4. The Staff filed its Response to Empire’s proposal on November 5, 2008. For the first time, Staff divulges the apparent reason it was unwilling to afford Empire a reasonable amount of time. In paragraph 4, Staff claims “Empire has an interest in delaying these proceedings is (sic) to allow it to argue the Statute of Limitations found at section 516.390 RSMo as a defense to a Commission-ordered suit for penalties in the circuit court.” This is followed by the argument in paragraph 5 that the Commission needs to adopt Staff’s accelerated schedule “so that Empire does not garner the benefit of unduly delaying these proceedings.”

5. How did this happen? As Empire noted in its Answer filed on October 9, 2008, the Staff announced to the Commission in a brief filed on February 8, 2008, that it was preparing a complaint regarding this matter. Staff, however, did not file that complaint until September 2, 2008, some *seven months* after it publicly said it was preparing it. So the Staff *itself* created this statute of limitations concern it has now decided to divulge. And it is now clear that the Staff that is trying to benefit from its own delay by trying to force Empire into an unreasonably short and constrained response period given the number and type of alleged violations.

6. Staff is now trying to use a situation it created to disadvantage Empire's ability to defend itself. Staff has offered no explanation as to why it took seven months prepare its complaint. Empire had no part in that delay.

7. All Empire was attempting to do in proposing its schedule was obtain a reasonable time to prepare a defense given the constraints of holidays and prior commitments of its witnesses and counsel.

8. Staff includes in paragraph 6 of its Response a mention of procedural schedule intervals in rate and territorial agreement cases, apparently in an attempt to justify the need to force Empire into an unreasonably short response period. A procedural schedule in a territorial agreement case bears no similarity to a complaint case in that one of the parties in a territorial agreement case is not attempting to defend itself against a substantial amount of claimed penalties. The outcome of a typical territorial agreement case is merely the granting or denial of the request. In a rate case, though, a utility makes a filing of its case-in-chief, including data-intensive minimum filing requirements *and* its direct testimony at the same time. The Staff is then typically

given *several months* to conduct its audit and prepare its testimony. In this case, Empire finds itself essentially, but not quite, in the position of the Staff in a rate case. Instead of minimum filing requirements and direct testimony, Staff filed its conclusion-filled and fact-scarce complaint to initiate the case. Because no direct testimony was filed with the Complaint, Empire must conduct discovery to discern the basis of Staff's case until the Staff's case is presumably made clearer through its direct testimony. Empire must then try to present its defense in a manner that the Commission can understand and evaluate in the light of applicable statutes, rules, laws and specific tariff provisions.

9. Under the Commission's preferred procedure of prepared testimony, that calls for the Staff to present its case-in-chief in direct. At this time, as Empire has previously noted, Empire is not aware of what witnesses Staff will use or the content of the testimony. Empire does not know what factual representations will be made by Staff, and therefore does not know what witnesses or facts Empire may need to develop in its prepared testimony. A recent Staff response to one of Empire data requests indicates, in fact, that the Staff is still developing its position as to at least one issue in its case, that being whether Staff believes that there was any impact on ratepayers as a result of the transactions that are the subject of this case. This would necessarily involve the use of expert witnesses to address that subject.

10. Further, since there has been involvement of a municipality and outside parties in the underlying facts, Empire may need to contact those other entities in regard to the preparation of responsive testimony. Those other entities may or may not be willing to provide prepared testimony, which could mean Empire would have to

subpoena witnesses and schedule depositions to obtain the equivalent. This will not be particularly easy, especially if it has to be accomplished in December -- essentially before Christmas -- under the Staff's proposed schedule. Empire has not asked for an inordinately long period to prepare its case. Empire has served Staff with discovery requests, and intends to do more even before Staff files its direct, so Empire is not waiting until the last minute to start defense preparations. The time Empire has proposed is reasonable.


### **Summary**

11. Therefore, the facts are that the Staff chose to take a particularly leisurely approach to statute of limitation issues in this case. It now wants to use that for a tactical advantage by claiming it is Empire's fault the clock has been ticking, and therefore Empire should be forced into slapping together a defense at the last minute to prepared testimony that it is not going to be able to see for another 19 days. The Staff should not be allowed to benefit from the situation it created. The fundamental due process right of Empire to have sufficient time to prepare its defense to a penalty action cannot be compromised under these circumstances.

WHEREFORE, Empire respectfully requests that the Commission issue its order

approving the procedural schedule proposed by Empire.

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 served by electronic mail this 7<sup>th</sup> day of November, 2008, on:

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