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 MOTION FOR DETERMINATION ON PLEADINGS

COMES NOW the Staff of the Missouri Public Service Commission ("Staff") and, for its Motion for Determination on the Pleadings, states:

1. In these consolidated cases The Empire District Electric Company has requested variances from its tariff and Commission Rule, and both Empire and Ozark Electric Cooperative request approval of a territorial agreement between them that is expressly conditioned on the Commission granting Empire the variances it requests. (Para. 4 of Territorial Agreement—Case No. EO-2007-0029 Application Appendix A)

2. Commission Rule 4 CSR 240-2.117(2) provides:

> (2) 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. The Staff found no time limit within which the Commission is to decide whether to grant Empire the variances it requests. 4 CSR 240-2.060. Commission authority to approve

territorial agreements between cooperatives and regulated electric utilities is found in § 394.312, RSMo. 2000. Subsection 3 of that statute includes the following sentence: "Unless otherwise ordered by the commission for good cause shown, the commission shall rule on such applications not later than one hundred twenty days after the application is properly filed with the secretary of the commission." While the Staff does not believe this 120 day requirement creates an "operation of law date," since nothing happens by operation of law if the Commission does not act within 120 days, or any extension it orders, if the Commission disagrees, the Staff requests the Commission to waive the operation of law date case limitation of CSR 240-2.117(2) for purposes of this motion.

4. 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)."

5. Subsections (1)(B), (D), (E) & (F) of 4 CSR 240-14.020 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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> (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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> (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 to a subdivision located in the territory to be allocated to it for service—The Lakes at Shuyler Ridge Subdivision—at Empire's cost, in the Staff's view all four subparts of the foregoing rule apply.

6. 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 following:

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.

7. 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.

8. 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).
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> * * * *

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.)

9. 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).

10. 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.

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:

"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.

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.
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> 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.

11. 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.)
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> (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."
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> 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. . . . .

12. In its variance requests Empire asks the Commission to give the developer of the subdivision The Lakes at Shuyler Ridge Subdivision treatment preferential to that it affords other similarly situated Empire customers. As the foregoing authorities demonstrate, the Commission simply does not have authority to grant Empire the variances it requests. Further, because Empire's territorial agreement with Ozark is expressly conditioned on the requested variances, the Commission is also without authority to approve it.

WHEREFORE, the Staff respectfully moves the Commission to determine the "operation of law date" limitation of 4 CSR 240-2.117(2) does not apply or, alternatively, waive it, and 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) because it is beyond the authority of the Commission to grant the relief Empire, and Ozark, requests.

Respectfully submitted,

/s/ 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 17th day of November 2006.

/s/ Nathan Williams