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Service Commission

Exhibit No.
Issue: Energy Center Disallowance
Witness: Gary C. Lentz
Type of Exhibit: Rebuttal Testimony
Sponsoring Party: Empire District
Case No. ER-2006-0351

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

**REBUTTAL TESTIMONY
OF
GARY C. LENTZ**

July 2006

Empire Exhibit No. 28
Case No(s) ER-2006-0351
Date 9-05-06 Rptr PS

**REBUTTAL TESTIMONY
OF
GARY C. LENTZ
ON BEHALF OF
THE EMPIRE DISTRICT ELECTRIC COMPANY
BEFORE THE
MISSOURI PUBLIC SERVICE COMPANY
CASE NO. ER-2006-0315**

1 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

2 A. Gary C. Lentz, P.O. Box 278, Joplin, Missouri 64802.

3 **Q. BY WHOM ARE YOU EMPLOYED AND BY WHAT CAPACITY?**

4 A. I am an attorney with the law firm of Spencer, Scott & Dwyer, P.C. and have
5 represented The Empire District Company ("Empire" or "Company") in matters
6 involving Patch Construction LLC, ("Patch") as they related to the claim of loss
7 filed against Patch, as well as the bankruptcy taken by Patch both in its corporate
8 form and the individual owners of Patch, as well as Empire's attempt to locate
9 assets of the Patch corporation and Mr. and Mrs. Patch, individually ("Patches").

10 **Q. PLEASE DESCRIBE YOUR EDUCATIONAL AND WORK BACK**
11 **GROUND.**

12 A. I graduated from the University of Tulsa Law School with a Juris Doctorate in
13 December, 1977. I served as the Newton County Prosecuting Attorney from 1978
14 to mid-1985 at which time I joined the law firm of Spencer, Scott & Dwyer. I
15 have routinely represented Empire in various legal matters since that time.

16 **Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY IN THIS**
17 **CASE?**

18 A. The purpose of my testimony is to explain to the Missouri Public Service
19 Commission ("Commission") the process Empire followed to attempt to collect

1 from Patch, in its corporate capacity, and the Patches, individually, damages due
2 Empire as a result of Patch's inability to perform work under its contract with
3 Empire as part of the Empire Energy Center Units 3 and 4 construction project.

4 **EXECUTIVE SUMMARY**

5 **Q. PLEASE PROVIDE AN EXECUTIVE SUMMARY OF YOUR**
6 **TESTIMONY.**

7 **A.** This testimony supports the position that Empire pursued and exhausted all legal
8 remedies available to it to recover from Patch and from the Patches the damages
9 that resulted from Patch's failure to perform under its contract related to the
10 Empire Energy Center Units 3 and 4. My testimony will describe the lawsuit
11 filed by Empire against both Patch and the Patches, individually; the documents
12 to that lawsuit; the subsequent bankruptcy filings by Patch and the Patches; as
13 well as the efforts of both attorneys and private investigators to locate assets
14 belonging to Patch and the Patches prior to, during, and following the discharge
15 of bankruptcy. I will show that Empire's actions with respect to Patch, both
16 before and after Patch was discharged from the Energy Center project, were
17 prudent and reasonable and mitigated the effect of Patch's breach of contract.
18 Finally, I will show that the Company acted timely and diligently in pursuing its
19 legal remedies against both Patch and the Patches, but that Empire's efforts
20 ultimately were thwarted by adjudications of bankruptcy that were entered on
21 behalf of both Patch and Patches, which discharged both parties from
22 responsibility for all liabilities and obligations under the Energy Center contract.

1 **ENERGY CENTER UNIT 3 AND 4 CONSTRUCTION COSTS**

2 **Q. WHY DID EMPIRE REMOVE PATCH FROM THE EMPIRE ENERGY**
3 **CENTER CONSTRUCTION PROJECT ON JANUARY 28, 2003?**

4 **A.** Empire removed Patch from the project because Patch was unable to complete the
5 project within the contract amount, including making required payments to
6 subcontractors. Contrary to direct testimony of Commission Staff ("Staff")
7 witness Paul Harrison in this case (page 5, line 21-22), it is my opinion that
8 Empire did not act imprudently when it elected not to immediately discharge
9 Patch from the Energy Center project when Patch found it was unable to obtain a
10 performance bond, as required by its contract with the Company.

11 **Q. WHY DO YOU SAY THIS?**

12 **A.** Patch's failure to obtain a performance bond would have had no effect on the
13 Energy Center project had Patch actually performed the duties specified in its
14 contract. But Patch failed to perform these duties and it was that failure that
15 caused Empire to remove Patch from the project. As discussed more fully in the
16 rebuttal testimony of Empire's witness Blake A. Mertens, after it terminated
17 Patch's contract the Company, itself, assumed responsibility for the duties that
18 Patch was supposed to perform. The Company did so because it reasonably
19 believed that this was the best, least costly, and least disruptive option available to
20 it at the time.

21 **Q. FOLLOWING PATCH'S BREACH OF ITS CONTRACT AND THE**
22 **SUBSEQUENT TERMINATION OF THAT CONTRACT BY THE**
23 **COMPANY, DESCRIBE THE LEGAL STEPS THAT EMPIRE TOOK TO**

1 **ATTEMPT TO COLLECT DAMAGES OWED BY PATCH AND THE**
2 **PATCHES AS A RESULT OF PATCH'S INABILITY TO COMPLETE ITS**
3 **CONTRACT.**

4 A. In a letter to Empire, Patch admitted that it would be unable to complete the
5 contract. Patch was then removed upon notification, as required by the contract
6 between the parties. Empire then sued Patch and the Patches in a civil, breach of
7 contract lawsuit filed in the Circuit Court of Jasper County, Missouri in Joplin
8 (Case No. 03CV680057) on February 24, 2003.

9 Empire's Petition for Breach of Contract was against Patch and also against the
10 Patches, individually, because the Patches stood as guarantors of the contract.
11 The Company's lawsuit alleged, among other grounds, that Patch failed to abide
12 by the contract in doing the work described and was unable to meet its
13 obligations. The lawsuit prayed for damages of \$3 million against all of the
14 defendants, plus attorney's fees and expenses.

15 **Q. DID PATCH OR THE PATCHES RESPOND TO THE LAWSUIT?**

16 A. Yes, Patch and the Patches were served on May 12, 2003, by process servers in
17 Texas. Patch was initially represented by an attorney from Texas who was not
18 licensed in the State of Missouri. That attorney's answer was not accepted by the
19 Circuit Court in Jasper, County, upon a motion filed by Empire. Initially, the
20 court also granted a default judgment in favor of Empire, but prior to damages
21 being assessed by the court, Patch and the Patches hired a local attorney who filed
22 a valid answer on their behalf. On June 25, 2003, the court set aside the default
23 judgment and allowed the case to proceed. Subsequently, Patch and the Patches

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REBUTTAL TESTIMONY

1 failed to provide answers to Empire's discovery requests and their Joplin attorney
2 was allowed to withdraw. Ultimately, on April 1, 2004, the court ordered
3 judgment in favor of Empire against both Patch and the Patches in the amount of
4 \$3 million plus attorney's fees of \$25,000, with both amounts accruing interest at
5 9% from the date the Petition was filed which was February 24, 2003.

6 **Q. WHAT ATTEMPTS WERE MADE TO COLLECT THE MONIES FROM**
7 **THE PATCH ENTITIES?**

8 A. Investigators were hired both in Missouri and Texas to determine what assets
9 might be held by the Patch entities, both corporately and individually. Empire
10 spent \$3,933.05 toward asset investigations in Missouri, Texas, Arkansas, as well
11 as Massachusetts to locate assets. Additionally, I personally searched for assets in
12 Arkansas where Patch had an office and where the Patches had relatives. Both
13 the investigators and I were unable to locate assets on which to execute Judgment.
14 Patch filed for bankruptcy on November 11, 2003. The Patches, individually and
15 as guarantors of the contract with Empire, filed for bankruptcy on June 2, 2004,
16 two months after the Judgment for \$3,025,000.00 was granted against them in
17 favor of Empire. In August 2004, the bankruptcy Court granted relief to Patch and
18 the Patches, discharging both parties from bankruptcy.

19 **Q. IS IT YOUR OPINION THAT EMPIRE DID EVERYTHING WITHIN ITS**
20 **POWER TO RECOVER MONIES FROM PATCH AND THE PATCHES**
21 **PERSONALLY?**

22 A. Yes.

1 **Q. WHAT EFFECT DID PATCH NOT PROVIDING A PERFORMANCE**
2 **BOND HAVE ON THE COST OF THE PROJECT?**

3 A. Since neither Patch nor the 2nd lowest bidder, Sega, which has given written
4 testament that they would have likely been unable to obtain a performance bond
5 (refer to Schedule BAM-4 of Blake Mertens' Rebuttal Testimony in this case),
6 would have been able to obtain a performance bond, Empire would have had to
7 rely upon the 3rd lowest bidder. The difference in the Patch bid and the 3rd lowest
8 bid, which was provided by Bibb-Kiewitt, was \$2,463,000. The work related to
9 the Patch contract would have cost at least \$2,463,000 more than the Patch bid
10 had the lowest bidder who would have likely been able to obtain a performance
11 bond been awarded the Contract.

12 **Q. IF PATCH HAD BEEN ABLE TO PROCURE A PERFORMANCE BOND,**
13 **IS IT LIKELY THE PERFORMANCE BOND WOULD HAVE**
14 **GUARANTEED THAT THE CONSTRUCTION COSTS WOULD NOT**
15 **EXCEED THE ADJUSTED CONTRACT AMOUNT?**

16 A. No. In my experience, a bond does not guarantee prompt nor willing payment of
17 claims. Litigation may be required to collect monies from the bonding company
18 and in some cases amounts less than the claimed overage are collected.

19 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

20 A. Yes.

AFFIDAVIT OF GARY C. LENTZ

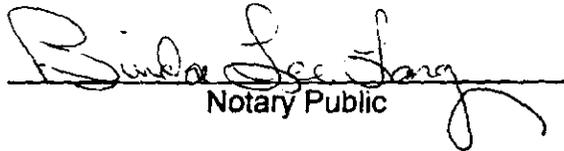
STATE OF MISSOURI)
) ss
COUNTY OF JASPER)

On the 27th day of July 2006, before me appeared Gary C. Lentz, to me personally known, who, being by me first duly sworn, states that he is an Outside Legal Counsel Representing The Empire District Electric Company and acknowledges that he has read the above and foregoing document and believes that the statements therein are true and correct to the best of his information, knowledge and belief.



Gary C. Lentz

Subscribed and sworn to before me this 27th day of July, 2006.



Notary Public

My commission expires

