

BEFORE THE  
ARKANSAS PUBLIC SERVICE COMMISSION

ENTERGY ARKANSAS, LLC,	)	
Complainant	)	
	)	
v	)	DOCKET NO. 21-082-C
	)	
CITY OF MAUMELLE, ARKANSAS;	)	
MAYOR CALEB NORRIS IN HIS	)	
OFFICIAL CAPACITY; MAUMELLE CITY	)	
COUNCIL AND ITS MEMBERS IN THEIR	)	
OFFICIAL CAPACITIES: STEVE	)	
MOSLEY, KEN SAUNDERS, R.J.	)	
MAZZONI, CHAD GARDNER, TERRY	)	
WILLIAMS, MICHAEL TIERNEY, DOUG	)	
SHINN, AND JESS HOLT	)	
Respondents and Counterclaimants	)	

ANSWER AND COUNTERCLAIM

Comes the City of Maumelle, Arkansas; Mayor Caleb Norris in his Official Capacity; Maumelle City Council and its named members in their official capacities (hereinafter referred to as “the City of Maumelle” or “Respondents”) herein, by and through its City Attorney, Melissa Krebs, and for its Answer to the Complaint filed in this matter by Entergy Arkansas, LLC (hereinafter referred to as “EAL”) and Counterclaim against EAL, states as follows:

1. The City of Maumelle admits that EAL is a public utility subject to the jurisdiction of the APSC located at the address stated. The City of Maumelle is without knowledge as to the remainder of the allegations stated in paragraph 1 and therefore denies same. The Respondents affirmatively state that neither Ark. Code Ann. § 23-3-

119, nor Ark. Code Ann. § 14-200-101(c) state any jurisdiction or authority for EAL's complaint regarding Resolution 2021-17. These two statutes only provide for complaints concerning the City's actions under Ark. Code Ann. § 14-200-101 or any violation of a law, order or regulation that the APSC has jurisdiction to administer. Resolution 2021-17 was passed pursuant to Ark. Code Ann. § 14-200-110, which contains no such authorization to file a complaint with the APSC. The City Council's Resolution 2021-17 is specifically authorized by law and is not in violation of any law or regulation, nor is it claimed to be. This Resolution was passed prior to the filing of any complaint before the APSC. The City of Maumelle denies that the APSC has jurisdiction to hear EAL's complaint regarding Resolution 2021-17.

2. The City of Maumelle admits that EAL owns property for the generation of electricity to customers within the State of Arkansas. The City of Maumelle is without sufficient knowledge to either admit or deny the remainder of the statements made in paragraph 2 of EAL's Complaint.

3. The City of Maumelle admits that EAL owns property for the generation of electricity to customers within the State of Arkansas. The City of Maumelle is without sufficient knowledge to either admit or deny the remainder of the statements made in paragraph 3 of EAL's Complaint.

4. The City of Maumelle admits that it is a City of the first class, duly organized under the laws of the State of Arkansas, and as such is a political subdivision of the State of Arkansas. As such, it has jurisdiction, pursuant to Ark. Code Ann. § 14-200-101(b)(1)(A) "to determine the terms and conditions upon which the public utility

may be permitted to occupy the streets, highways, and other public places within the municipality.” Pursuant to Ark. Code Ann. § 14-200-101(b)(1)(A)(ii), any such ordinance or resolution shall be deemed prima facie reasonable. The City of Maumelle admits the remainder of the allegations stated in paragraph 4 of EAL’s Complaint.

5. The City of Maumelle admits that EAL’s Complaint concerns the City Council’s adoption of Resolutions 2021-15 and 2021-17. The City of Maumelle denies the remainder of the allegations in paragraph 5 of EAL’s complaint. The City of Maumelle affirmatively states that EAL’s facilities are currently located in the City’s right-of-way, which the City maintains. Upon information and belief, these rights-of-way were dedicated to Pulaski County, also a political subdivision of the State of Arkansas, prior to the date of the City of Maumelle’s incorporation in 1985. Thus, these rights-of-way were already held by a State entity prior to the City of Maumelle assuming those rights. Following the City’s incorporation, EAL agreed to the Franchise Agreement attached as Exhibit 1 to EAL’s Complaint, whereby it agreed that it would construct and maintain any necessary facilities within the City of Maumelle and that those facilities “shall be located so as to not unreasonably obstruct public use and travel.” Any rights EAL had in the City of Maumelle’s rights-of-way became subject to this Agreement when made.

Further stating affirmatively, EAL presented testimony to the Arkansas Public Service Commission on July 26, 2012, whereby Bernard Neumeier, their then Area Design Manager, testified that EAL had incurred \$8.4 million in costs as a result of relocations of their facilities at the direction of the Arkansas Highway and Transportation Department, as well as applicable “county or municipality regulations that mandate non-

reimbursed utility relocation.” APSC Docket No. 12-056-U, Doc. 5, Direct Testimony of Bernard Neumeier. This was the basis for a proposed rate increase at that time. In the same testimony, EAL asserted, via Neumeier, and in response to a direct question, that no part of these relocation requirements was optional. Accordingly, citizens of the City of Maumelle are already paying increased rates as a result of relocations in other municipalities and throughout the State of Arkansas. The City of Maumelle seeks to be treated fairly and equitably and to receive services equal to those provided to other municipalities within the State of Arkansas. EAL has denied the City of Maumelle any information regarding similar relocations in other municipalities and has refused to relocate its equipment upon the direction of the Mayor of the City of Maumelle or its City Council. EAL was not responsive to the City of Maumelle’s attempts to discuss the legal issues in this case prior to the City passing Resolution 2021-15.

6. The City of Maumelle admits the statements made in paragraph 6 of EAL’s Complaint.

7. The City of Maumelle admits that it is pursuing a project to widen Crystal Hill Road, a public road, for the alleviation of traffic concerns in other areas. This is a public project, not associated with any private development or developer. All other utility providers with facilities in this area have relocated their facilities at their own expense upon the request of the officials of the City of Maumelle. The City of Maumelle admits that it identified multiple poles and EAL facilities that must be relocated for the Crystal Hill Project. The City has obtained additional rights-of-way, at its own expense, to widen and improve the road. Any use of the right-of-way prior to the City of

Maumelle's incorporation in 1985 was by permission or agreement with Pulaski County, also a political subdivision of the state of Arkansas to which the City of Maumelle is a successor governing entity. The City of Maumelle is without information as to the date of construction of these facilities, as it has repeatedly requested this information, as well as passed a resolution ordering the production of the information, and EAL has refused to provide it. The City has continually maintained this right-of-way since this area was incorporated into the City.

8. The City of Maumelle admits that EAL previously informed the City that it would not relocate its facilities unless the City paid \$142,563.60 in costs for the relocation. EAL has now agreed to relocate the facilities upon receiving a signed Relocation Agreement and letter of credit from the City, whereby the City agreed to follow the findings of this Commission or a court reviewing the matter on appeal. The City states affirmatively that EAL has previously sought and received rate increases intended to compensate EAL for relocation costs. The citizens of Maumelle currently pay these higher rates in order to compensate this public utility for the cost of relocating when necessary to accommodate public transportation improvement projects. This is a public project, with public access, and will also benefit persons outside the City of Maumelle. Travel over this public right-of-way is not limited to residents of any individual municipality. The common law provides the general rule that public utilities are to relocate for public projects. "State courts have consistently recognized this distinction when commenting on the purpose of the common law rule, which is 'to

insulate government and thereby, the taxpayers, from such expenses.” *Whisenhunt v. Southwestern Bell Telephone*, 573 F.3d 565, 568 (8<sup>th</sup> Cir. 2009).

9. The City of Maumelle admits that its City Council passed Resolution No. 2021-15 on June 21, 2021. The City of Maumelle denies that any language in the Resolution concedes that the current franchise agreement does not contain an obligation for EAL to relocate its facilities upon request of the City for a public transportation project in a public right-of-way. The sentence included in paragraph 9 of EAL’s Complaint references any public project, which is not limited to a project that includes street or transportation projects. The franchise agreement already prohibits EAL from locating their facilities in a manner that will “unreasonably obstruct public use and travel.” See Ex. 1 to EAL’s Complaint in this matter, Section 3.

10. The City of Maumelle denies the allegations stated in paragraph 10 of EAL’s Complaint. The City of Maumelle affirmatively states that Ark. Code Ann. § 14-200-101(b)(1)(A) grants a municipality the authority to regulate the use of its rights-of-way and other property interests. Any such regulation is to be deemed prima facie reasonable. Other municipalities within the State of Arkansas, as well as the Arkansas Highway and Transportation Department, have similar policies in place that regulate the use of their rights-of-way by utility providers. EAL has not challenged those municipalities’ right to regulate their right-of-way. As such, it is engaging in unlawful preferential treatment to some municipalities and their citizen customers in violation of Ark. Code Ann. §§ 23-3-113 and 23-3-114(a)(2), which states, “No public utility shall establish or maintain any unreasonable difference as to rates or services, either as

between localities or as between classes of service.” As previously stated above, EAL has presented sworn testimony that it provides unreimbursed relocation services to other municipalities in accordance with their policies. As to EAL’s claim of property rights, EAL has no property right to any right-of-way that has been held by the State of Arkansas or any political subdivision thereof. They have provided no evidence of any other property right and have refused to provide the City of Maumelle with any evidence or documentation of such a property right. The current franchise agreement with the City of Maumelle prohibits EAL from locating their facilities in a manner that obstructs public use and travel.<sup>1</sup> Maintaining their facilities in a manner that prevents obstruction of a right-of-way for travel is their contractual responsibility.

11. The City of Maumelle admits that its City Council passed Resolution No. 2021-17 on or about July 7, 2021. The City of Maumelle denies the remainder of the allegations contained in paragraph 11 of EAL’s Complaint. Stating affirmatively, as a municipality of the State of Arkansas, the City Council of the City of Maumelle, pursuant to Ark. Code Ann. § 14-200-110, has a statutory right to order EAL to provide information related to its business. This right is not subject to any other APSC proceedings, and there is no complaint process stated. At this time, EAL is in violation of the Council’s Order to provide information, and thus in violation of Arkansas law. This statutory right does not require a municipality to seek relief or seek such

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<sup>1</sup> Although EAL states that it has an obligation to provide safe and reliable service, it has refused to relocate its facilities, which has resulted in a public safety hazard. The City Council of Maumelle passed the resolutions referenced in their Complaint as a result of the public safety concerns that resulted from their refusal to relocate their equipment, rather than relocate their equipment and seek redress from the APSC.

information from any regulatory body. As a regulated industry, EAL should be ordered to comply with Arkansas state law and provide the information it has been directed to provide. Ark. Code Ann. § 14-200-101(c) provides no authority for a complaint regarding a City's lawful Order to provide information; thus, EAL has no authority to bring any complaint before the APSC concerning Resolution No. 2021-17.

12. The City of Maumelle denies the allegations contained in paragraph 12 of EAL's Complaint. The City of Maumelle denies that either Resolution No. 2021-15 or 2021-17 is unjust, unreasonable or unlawful. The City affirmatively states that § 14-200-101(c) provides no authority for a complaint regarding a City's lawful Order to provide information pursuant to Ark. Code Ann. § 14-200-110. Further, there was no action or investigation pending before the APSC at the time either of these resolutions were passed; accordingly, Ark. Code Ann. § 14-200-101(d) is not applicable to this Complaint.

13. The City of Maumelle denies the allegations contained in paragraph 13 of EAL's Complaint. EAL has refused to provide meaningful information to the City of Maumelle in an attempt to resolve this issue. EAL has refused to have discussions of the legal issues applicable to this situation. While a few case citations were provided prior to the City of Maumelle's Resolution No. 2021-15 being passed, no meaningful response was provided to the City of Maumelle's position regarding the application of these cases.

14. The City of Maumelle denies that EAL is entitled to any of the relief stated in paragraph 14 of its complaint. The City of Maumelle prays for a finding that EAL has

no standing to bring a complaint regarding Resolution No. 2021-17, as that resolution only directs EAL to provide information to a municipality as is required by Arkansas law. Respondents also pray for a finding that Resolution No. 2021-15 is prima facie reasonable and reasonable in fact, as it is in alignment with other current policies of municipalities throughout the State of Arkansas, as previously stated in EAL's sworn testimony to this Commission.

15. The City of Maumelle denies each and every allegation not specifically admitted herein.

#### AFFIRMATIVE DEFENSES

16. The City of Maumelle states affirmatively that it has acted in good faith and pursuant to its jurisdiction to regulate its rights-of-way and request information under Arkansas law.

17. The City of Maumelle reserves the right to plead further as the matter proceeds and further investigation reveals additional claims or defenses available to the City of Maumelle.

18. The City of Maumelle affirmatively states the defense of legislative immunity.

#### COUNTERCLAIM

The City of Maumelle, pursuant to its authority under Ark. Code Ann. § 23-3-119, and pursuant to its Resolution 2021-15, attached as EAL Complaint- Exhibit 3, hereby states the following Counterclaim against Entergy Arkansas, LLC:

19. EAL has refused to provide information as required by Ark. Code Ann. § 14-200-110, and is currently in violation of that statute, despite the lawful order of the Maumelle City Council to do so. This refusal has deprived the City of Maumelle of any meaningful opportunity to evaluate sufficient information to determine whether it could be required to pay relocation costs under current state law.

20. EAL has violated Ark. Code Ann. § 23-4-103, which requires that all rules of a utility provider be just and reasonable. While it has provided sworn testimony to the APSC that it honors relocation policies for Arkansas municipalities, it has ruled that the City of Maumelle is not subject to the same rules as other municipalities.

21. EAL has violated Ark. Code Ann. § 23-3-113, which requires that it maintain adequate and efficient facilities to provide for the health, safety, and comfort of its customers without any unjust discrimination or preference. (“Every person, firm, or corporation engaged in a public service business in this state shall establish and maintain adequate and suitable facilities, safety appliances, or other suitable devices and shall perform such service in respect thereto as shall be reasonable, safe, and sufficient for the security and convenience of the public and the safety and comfort of its employees, and, in all respects, just and fair, and without any unjust discrimination or preference.”) The facilities in question are currently not safe. Crystal Hill Road has been left in an unsafe condition, and construction could not proceed due to EAL’s refusal to relocate their facilities from their unsafe locations.

22. EAL has violated Ark. Code Ann. § 23-3-114, which requires that EAL provide service without any preference as to one locality over another. While EAL has

admitted that other municipalities have been provided relocation services, this has not been extended to Maumelle. Further, EAL has not contested relocation policies in other municipalities before the APSC, even when virtually identical to the ordinance currently pending before the Maumelle City Council. Upon information and belief, this is the first APSC Complaint EAL has filed against any municipality.

23. EAL has violated Ark. Code Ann. § 23-3-115 and 116 by failing to “keep, erect, or use due diligence to maintain reasonably adequate facilities to be able to carry out contractual obligations” to the City of Maumelle. EAL has not maintained this equipment in a reasonably safe manner. As such, it is subject to the statutory penalties provided in Ark. Code Ann. § 23-3-116.

24. The City of Maumelle respectfully requests that the Commission order EAL to relocate its equipment in compliance with the City of Maumelle’s reasonable request to regulate utilities located in its right-of-way, order EAL to comply with the Maumelle City Council’s order to provide information concerning its business, pursuant to Ark. Code Ann. § 14-200-110, and deny EAL’s complaints as no action by the City Council of Maumelle, Arkansas has been unreasonable, unjust, or unlawful. The City of Maumelle requests that the APSC impose statutory penalties on EAL pursuant to Ark. Code Ann. § 23-3-116.

25. In addition to named counsel, the City Attorney of Maumelle, Arkansas, the City of Maumelle also requests that the following official be included on the service list in this proceeding:

Mayor Caleb Norris  
City of Maumelle

550 Edgewood Drive.  
Maumelle, Arkansas 72113  
Telephone: (501) 851-2500  
[calebnorris@maumelle.org](mailto:calebnorris@maumelle.org)

WHEREFORE, for the reasons stated above, the City of Maumelle prays that the Commission enter an order granting the relief requested in paragraph 24 above and all other appropriate relief to which the City of Maumelle may be entitled.

Respectfully Submitted,

The City of Maumelle, Arkansas,  
Mayor Caleb Norris, and  
The members of the Maumelle City Council  
In their official capacities

By: /s/ Melissa C. Krebs  
Melissa C. Krebs, Ark. Bar. No. 98129  
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#### CERTIFICATE OF SERVICE

This is to certify that I, Melissa C. Krebs, on this 29th day of July, 2021, have served all registered parties' representatives by electronically filing the foregoing pleading with the APSC's electronic filing system.

/s/ Melissa C. Krebs  
Melissa C. Krebs