

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 4th day of
December, 2007.

In the Matter of the Empire District Electric)	
Company of Joplin, Missouri for Authority)	
to File Tariffs Increasing Rates for Electric)	<u>Case No. ER-2006-0315</u>
Service Provided to Customers in the)	Tariff No. YE-2007-0488
Missouri Service Area of the Company.)	

**ORDER VACATING DECEMBER 29, 2006 ORDER GRANTING
EXPEDITED TREATMENT AND APPROVING TARIFFS,
AND ORDER APPROVING TARIFFS**

Issue Date: December 4, 2007

Effective Date: December 14, 2007

The Commission received the mandate and final opinion of the Missouri Supreme Court in Case No. SC88390 issued by the Supreme Court on November 15, 2007. According to that mandate, the Commission must “vacate its order granting expedited treatment and approving tariffs issued on December 29, 2006, and allow public counsel reasonable time to prepare and file an application for rehearing on the tariffs.” To comply with the mandate, the Commission hereby vacates its order as directed, and simultaneously re-approves the tariff sheets filed by The Empire District Electric Company on December 28, 2006.

On December 21, 2006, the Missouri Public Service Commission issued its Report and Order rejecting tariffs filed on February 1, 2006, by Empire. The Report and Order also found that the rates being charged by Empire as a result of Commission Case

No. ER-2004-0570 were no longer just and reasonable and authorized Empire to file new tariffs that complied with the substantive portions of the Report and Order.

On December 28, 2006, Empire filed revised tariff sheets with a proposed effective date of January 27, 2007, and a motion for expedited treatment requesting the Commission approve the revised tariffs to be effective January 1, 2007. Empire stated the tariff sheets were filed in compliance with the Commission's December 21, 2006 Report and Order. On December 28, 2006, the Office of the Public Counsel, Praxair, Inc., and Explorer Pipeline objected to the tariff filings arguing that expedited treatment did not provide the parties an opportunity to review the revised tariffs.

On December 29, 2006, the Staff of the Commission filed its Staff Recommendation. Staff reviewed the filed tariff sheets, which Staff found to be in compliance with the Commission's Report and Order. Staff supported expedited approval of the tariff sheets, based on certain assumptions set forth in the cover pleading of the Staff Recommendation. The Commission finds those assumptions reasonably reflect the findings and conclusions of the Report and Order.

One of the assumptions concerned a sub-issue under the Regulatory Plan Amortizations issue. The sub-issue was whether the March 31, 2006 discounted present values of the two purchased power contracts should be further adjusted by a 10% risk factor (as proposed by the OPC) or not (as proposed by the Staff). In its resolution of that issue in its Report and Order, the Commission incorrectly found and concluded that there were no remaining disputes concerning the amortizations. The Commission did find the Staff's position to be reasonable, which is the position used to evaluate the December 28, 2006 tariffs. Because the analysis reflects the Commission's finding, the conclusion that

the tariffs comply with the Report and Order is also reasonable and proper. The Report and Order was clarified on January 9, 2007, to remove language concerning a lack of dispute on this sub-issue and to clarify the meaning of “Staff’s position” to include its position on the inappropriateness of further adjustment to the March 31, 2006 discounted present values of the two purchased power contracts.

On December 29, 2006, the Commission granted Empire’s request for expedited treatment and approved its rates effective on January 1, 2007.¹ The Commission has again reviewed the proposed tariff sheets and Staff’s Memorandum and Recommendation. After considering Staff’s recommendation, the Commission continues to find that good cause exists pursuant to Section 393.140(11), RSMo 2000, for the December 28, 2006 tariff sheets to become effective on an expedited basis. The Commission concludes that the proposed tariff sheets are consistent with the Commission’s Report and Order and the January 9, 2007 order clarifying the Report and Order, and should be approved to become effective as ordered below. The Commission further concludes that the requests for delay and further suspension are not reasonable and would preclude Empire from earning the just and reasonable return as the Commission determined in the Report and Order and subsequent order clarifying.

Public Counsel challenged the Commission’s December 29, 2006 order by extraordinary writ. On October 30, 2007, the Missouri Supreme Court made its preliminary writ issued in Case No. SC88390 peremptory and issued an opinion directing the Commission to vacate its December 29, 2006 order “and allow public counsel reasonable

¹ *Order Granting Expedited Treatment and Approving Tariffs*, issued Dec. 29, 2006, effective Jan. 1, 2007.

time to prepare and file an application for rehearing on the tariffs.” The Supreme Court also stated in footnote three of its opinion:

It should be noted that the question before this Court is *not* whether or not the December 29, 2006 order meets the two-prong test described in *State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, 585 S.W.2d 41, 47. In *Utility Consumers*, the Court evaluated the substance of a PSC order on a writ of review, finding that on “appeal, our role is to determine whether the commission’s report and order was lawful and, if so, whether it was reasonable.” . . . This standard of review does not apply in the present case, because an application for rehearing was never filed. Here, the Court does not examine the lawfulness and reasonableness of the substance of the December 29, 2006 order, but rather, whether the timing of its issuance foreclosed the possibility of rehearing.

Thus, the Supreme Court did not examine the lawfulness or reasonableness of the substance of the December 29, 2006 order. The Supreme Court only examined whether the parties had been given sufficient time to request rehearing.

Section 386.490.3, RSMo, states that “[e]very order or decision of the commission . . . shall continue in force . . . until changed or abrogated by the commission, unless such order be unauthorized by this law or any other law . . .” Furthermore, Section 393.140(11), RSMo, states:

No corporation shall charge . . . 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 shall any corporation refund or remit in any manner or by any device any portion of the rates or charges so specified . . .

Until the December 29, 2007 order of the Commission is vacated, it remains in full force and effect and Empire is required under the statute to charge only the rates in effect.

The mandate charges the Commission with two tasks: First, vacate its earlier order; and second, provide a reasonable opportunity for a request for rehearing of the

Commission's decision regarding the tariffs. Because this is an extraordinary remedy, implementing the mandate does not fit neatly into the statutory or regulatory framework of the Commission. The Commission cannot literally turn back the clock. The facts are that almost eleven months have passed, Empire has been providing service, and Empire has been charging its customers for that service.

The Commission is faced with two possibilities for implementing the second half of the Supreme Court's mandate. The first option is to issue an order making the tariffs effective on January 1, 2007. The second option is to issue an order making the tariffs effective on the effective date of this order.

Even though approving the tariff effective as of January 1, 2007, would create continuity in the rates to be charged, several legal issues arise if the tariffs are approved to be effective in the past. First, is it possible for the Commission to approve rates to be effective in the past? Even if this is not retroactive ratemaking, per se, it certainly gives the appearance of being so.² In addition, if returning the parties to the status quo means that the December 29, 2007 order never existed, it may not be possible for the Commission to comply with the Supreme Court's mandate to allow a reasonable time for rehearing prior to the tariffs becoming effective. This is because the tariffs, but for the existence of the order

² See, *State of Missouri ex rel. Associated Natural Gas Company v. Public Service Commission of the State of Missouri*, 954 S.W.2d 520, 531 (Mo. App. WD 1997). ("The filed rate doctrine also precludes a regulated utility from collecting any rates other than those properly filed with the appropriate regulatory agency. *Nantahala*, 476 U.S. at 963, 106 S.Ct. at 2355; *Arkansas*, 453 U.S. at 577, 101 S.Ct. at 2930. This aspect of the filed rate doctrine constitutes a rule against retroactive ratemaking or retroactive rate alteration. *Columbia Gas Transmission Corp. v. F.E.R.C.*, 831 F.2d 1135, 1140 (D.C.Cir.1987)."); and *Qwest Corp. v. Koppendray* 436 F.3d 859, 863 (C.A.8 (Minn.), 2006). ("The rule against retroactive ratemaking prohibits a commission from prescribing rates to recoup a utility's past losses for transactions that have already taken place.").

approving them, would have become effective by operation of law on January 27, 2007, as the Commission did not take action to prevent it.³

The second option is for the Commission to approve the tariffs to become effective on the effective date of this order. The problem with this option is that it seems to create a “gap” in the lawful rates in effect between January 1, 2007, and the effective date of this order.

The practical effect of the two options, however, is the same. For the first option the Commission would reissue its order approving the tariffs with an appropriate effective date, then the parties will be afforded a reasonable opportunity to request rehearing, and the just and reasonable rates determined by the Commission will have been in effect since January 1, 2007. This would return the parties to the position they would have been in had they been able to timely request rehearing. The tariffs would be in effect, but a challenge to them would exist.

If the Commission approves the rates to be effective on the effective date of this order, the practical effect will be the same as with the first option. That is, the parties will be returned to the status quo with regard to an opportunity to request rehearing. In addition, Section 393.140(11), requires Empire to charge the rates that are “in effect *at the time*.”⁴ Thus, the Commission concludes that if Empire charged the rates as approved in the December 29, 2007 order, it charged the correct rates. And further, those rates remain the rates “in effect at the time” until the order is vacated.⁵ After the order is vacated, the

³ Sections 393.140(11) and 393.150, RSMo.

⁴ Emphasis added.

⁵ Section 393.140, RSMo. *See also, State of Missouri ex rel. Associated Natural Gas Company v. Public Service Commission of the State of Missouri*, 954 S.W.2d 520 (Mo. App. WD 1997).

current order approving the tariffs will become effective and once again, Empire will be required to charge the just and reasonable rates as determined by the Commission in its Report and Order and clarifying order. The parties will still be in the position of having effective tariffs with an outstanding challenge. Thus, the just and reasonable rates as determined in the Commission's Report and Order and clarifying order will have been the rates being charged continuously since January 1, 2007. The Commission concludes that since the practical effect of the two options is the same, and the latter option allows the Commission to most clearly comply with the mandate of the Supreme Court, it is more appropriate to approve the tariffs to become effective in the future, rather than in the past.

With this order the Commission reiterates its earlier finding that Empire's December 28, 2006 tariff sheets comply with the December 21, 2006 Report and Order. This order fully complies with the Supreme Court's mandate to vacate its previous order and to provide the parties with the opportunity to seek rehearing if they choose to do so. Thus, the Commission concludes that it shall vacate its December 29, 2007 order, approve the December 28, 2006 tariffs, and allow ten days before the order becomes effective so that the parties have ample opportunity to request rehearing.

IT IS ORDERED THAT:

1. The Order Granting Expedited Treatment and Approving Tariffs issued on December 29, 2006, is vacated.
2. The proposed electric service tariff sheets submitted under Tariff File No. YE-2007-0488 on December 28, 2006, by The Empire District Electric Company for the purpose of increasing rates for retail electric service to customers are hereby approved for service on and after December 14, 2007. The specific sheets approved are:

P.S.C. Mo. No. 5, Section A

21st Revised Sheet No. 1, Canceling 20th Revised Sheet No. 1

P.S.C. Mo. No. 5, Section B

2nd Revised Sheet No. 1, Canceling 1st Revised Sheet No. 1

1st Revised Sheet No. 2, Canceling Original Sheet No. 2

1st Revised Sheet No. 3, Canceling Original Sheet No. 3

1st Revised Sheet No. 4, Canceling Original Sheet No. 4

1st Revised Sheet No. 5, Canceling Original Sheet No. 5

1st Revised Sheet No. 6, Canceling Original Sheet No. 6

1st Revised Sheet No. 7, Canceling Original Sheet No. 7

1st Revised Sheet No. 7a, Canceling Original Sheet No. 7a

1st Revised Sheet No. 8, Canceling Original Sheet No. 8

P.S.C. Mo. No. 5, Section 1

13th Revised Sheet No. 1, Canceling 12th Revised Sheet No. 1

10th Revised Sheet No. 2, Canceling 9th Revised Sheet No. 2

6th Revised Sheet No. 3, Canceling 5th Revised Sheet No. 3

P.S.C. Mo. No. 5, Section 2

12th Revised Sheet No. 1, Canceling 11th Revised Sheet No. 1

1st Revised Sheet No. 1a, Canceling Original Sheet No. 1a

12th Revised Sheet No. 2, Canceling 11th Revised Sheet No. 2

1st Revised Sheet No. 2a, Canceling Original Sheet No. 2a

12th Revised Sheet No. 3, Canceling 11th Revised Sheet No. 3

7th Revised Sheet No. 3a, Canceling 6th Revised Sheet No. 3a

13th Revised Sheet No. 4, Canceling 12th Revised Sheet No. 4

8th Revised Sheet No. 4a, Canceling 7th Revised Sheet No. 4a

12th Revised Sheet No. 5, Canceling 11th Revised Sheet No. 5

12th Revised Sheet No. 6, Canceling 11th Revised Sheet No. 6

12th Revised Sheet No. 7, Canceling 11th Revised Sheet No. 7

5th Revised Sheet No. 7a, Canceling 4th Revised Sheet No. 7a

6th Revised Sheet No. 8, Canceling 5th Revised Sheet No. 8

8th Revised Sheet No. 9, Canceling 7th Revised Sheet No. 9

5th Revised Sheet No. 9a, Canceling 4th Revised Sheet No. 9a

6th Revised Sheet No. 9b, Canceling 5th Revised Sheet No. 9b

5th Revised Sheet No. 10, Canceling 4th Revised Sheet No. 10

5th Revised Sheet No. 10a, Canceling 4th Revised Sheet No. 10a

3rd Revised Sheet No. 11, Canceling 2nd Revised Sheet No. 11

3rd Revised Sheet No. 11a, Canceling 2nd Revised Sheet No. 11a

3rd Revised Sheet No. 12, Canceling 2nd Revised Sheet No. 12

3rd Revised Sheet No. 12a, Canceling 2nd Revised Sheet No. 12a

7th Revised Sheet No. 13, Canceling 6th Revised Sheet No. 13

4th Revised Sheet No. 14, Canceling 3rd Revised Sheet No. 14

4th Revised Sheet No. 14a, Canceling 3rd Revised Sheet No. 14a

4th Revised Sheet No. 14b, Canceling 3rd Revised Sheet No. 14b

4th Revised Sheet No. 14c, Canceling 3rd Revised Sheet No. 14c
4th Revised Sheet No. 14d, Canceling 3rd Revised Sheet No. 14d
4th Revised Sheet No. 14e, Canceling 3rd Revised Sheet No. 14e

P.S.C. Mo. No. 5, Section 3

13th Revised Sheet No. 1, Canceling 12th Revised Sheet No. 1
6th Revised Sheet No. 1a, Canceling 5th Revised Sheet No. 1a
17th Revised Sheet No. 2, Canceling 16th Revised Sheet No. 2
8th Revised Sheet No. 2a, Canceling 7th Revised Sheet No. 2a
12th Revised Sheet No. 3, Canceling 11th Revised Sheet No. 3
1st Revised Sheet No. 3a, Canceling Original Sheet No. 3a
12th Revised Sheet No. 4, Canceling 11th Revised Sheet No. 4
4th Revised Sheet No. 5, Canceling 3rd Revised Sheet No. 5
2nd Revised Sheet No. 6, Canceling 1st Revised Sheet No. 6
1st Revised Sheet No. 7, Canceling Original Sheet No. 7
1st Revised Sheet No. 8, Canceling Original Sheet No. 8
1st Revised Sheet No. 9, Canceling Original Sheet No. 9

P.S.C. Mo. No. 5, Section 4

4th Revised Sheet No. 1, Canceling 3rd Revised Sheet No. 1
11th Revised Sheet No. 2, Canceling 10th Revised Sheet No. 2
9th Revised Sheet No. 3, Canceling 8th Revised Sheet No. 3
9th Revised Sheet No. 4, Canceling 8th Revised Sheet No. 4
5th Revised Sheet No. 4a, Canceling 4th Revised Sheet No. 4a
3rd Revised Sheet No. 4b, Canceling 2nd Revised Sheet No. 4b
3rd Revised Sheet No. 4c, Canceling 2nd Revised Sheet No. 4c
3rd Revised Sheet No. 5, Canceling 2nd Revised Sheet No. 5
14th Revised Sheet No. 6, Canceling 13th Revised Sheet No. 6
6th Revised Sheet No. 7, Canceling 5th Revised Sheet No. 7
3rd Revised Sheet No. 8, Canceling 2nd Revised Sheet No. 8
1st Revised Sheet No. 8a, Canceling Original Sheet No. 8a
2nd Revised Sheet No. 8b, Canceling 1st Revised Sheet No. 8b
2nd Revised Sheet No. 8c, Canceling 1st Revised Sheet No. 8c
4th Revised Sheet No. 9, Canceling 3rd Revised Sheet No. 9
3rd Revised Sheet No. 10, Canceling 2nd Revised Sheet No. 10
3rd Revised Sheet No. 11, Canceling 2nd Revised Sheet No. 11
3rd Revised Sheet No. 12, Canceling 2nd Revised Sheet No. 12
3rd Revised Sheet No. 13, Canceling 2nd Revised Sheet No. 13
3rd Revised Sheet No. 14, Canceling 2nd Revised Sheet No. 14
4th Revised Sheet No. 15, Canceling 3rd Revised Sheet No. 15
5th Revised Sheet No. 16, Canceling 4th Revised Sheet No. 16
5th Revised Sheet No. 17, Canceling 4th Revised Sheet No. 17
1st Revised Sheet No. 18, Canceling Original Sheet No. 18
1st Revised Sheet No. 19, Canceling Original Sheet No. 19
1st Revised Sheet No. 20, Canceling Original Sheet No. 20
2nd Revised Sheet No. 21, Canceling 1st Revised Sheet No. 21

P.S.C. Mo. No. 5, Section 5

5th Revised Sheet No. A, Canceling 4th Revised Sheet No. A
4th Revised Sheet No. 1, Canceling 3rd Revised Sheet No. 1
5th Revised Sheet No. 2, Canceling 4th Revised Sheet No. 2
2nd Revised Sheet No. 2a, Canceling 1st Revised Sheet No. 2a
5th Revised Sheet No. 3, Canceling 4th Revised Sheet No. 3
4th Revised Sheet No. 4, Canceling 3rd Revised Sheet No. 4
3rd Revised Sheet No. 5, Canceling 2nd Revised Sheet No. 5
3rd Revised Sheet No. 6, Canceling 2nd Revised Sheet No. 6
4th Revised Sheet No. 7, Canceling 3rd Revised Sheet No. 7
4th Revised Sheet No. 8, Canceling 3rd Revised Sheet No. 8
5th Revised Sheet No. 9, Canceling 4th Revised Sheet No. 9
6th Revised Sheet No. 10, Canceling 5th Revised Sheet No. 10
5th Revised Sheet No. 11, Canceling 4th Revised Sheet No. 11
2nd Revised Sheet No. 11a, Canceling 1st Revised Sheet No. 11a
7th Revised Sheet No. 12, Canceling 6th Revised Sheet No. 12
5th Revised Sheet No. 13, Canceling 4th Revised Sheet No. 13
4th Revised Sheet No. 14, Canceling 3rd Revised Sheet No. 14
4th Revised Sheet No. 15, Canceling 3rd Revised Sheet No. 15
4th Revised Sheet No. 16, Canceling 3rd Revised Sheet No. 16
4th Revised Sheet No. 17, Canceling 3rd Revised Sheet No. 17
1st Revised Sheet No. 17a, Canceling Original Sheet No. 17a
1st Revised Sheet No. 17b, Canceling Original Sheet No. 17b
1st Revised Sheet No. 17c, Canceling Original Sheet No. 17c
1st Revised Sheet No. 17d, Canceling Original Sheet No. 17d
1st Revised Sheet No. 17e, Canceling Original Sheet No. 17e
1st Revised Sheet No. 17f, Canceling Original Sheet No. 17f
5th Revised Sheet No. 18, Canceling 4th Revised Sheet No. 18
3rd Revised Sheet No. 19, Canceling 2nd Revised Sheet No. 19
3rd Revised Sheet No. 20, Canceling 2nd Revised Sheet No. 20
3rd Revised Sheet No. 21, Canceling 2nd Revised Sheet No. 21
5th Revised Sheet No. 22, Canceling 4th Revised Sheet No. 22
5th Revised Sheet No. 23, Canceling 4th Revised Sheet No. 23
2nd Revised Sheet No. 23a, Canceling 1st Revised Sheet No. 23a
5th Revised Sheet No. 24, Canceling 4th Revised Sheet No. 24
4th Revised Sheet No. 25, Canceling 3rd Revised Sheet No. 25
6th Revised Sheet No. 26, Canceling 5th Revised Sheet No. 26
5th Revised Sheet No. 27, Canceling 4th Revised Sheet No. 27
5th Revised Sheet No. 28, Canceling 4th Revised Sheet No. 28
5th Revised Sheet No. 29, Canceling 4th Revised Sheet No. 29
3rd Revised Sheet No. 30, Canceling 2nd Revised Sheet No. 30
3rd Revised Sheet No. 31, Canceling 2nd Revised Sheet No. 31
1st Revised Sheet No. 32, Canceling Original Sheet No. 32
1st Revised Sheet No. 33, Canceling Original Sheet No. 33
1st Revised Sheet No. 34, Canceling Original Sheet No. 34

**1st Revised Sheet No. 35, Canceling Original Sheet No. 35
2nd Revised Sheet No. 36, Canceling 1st Revised Sheet No. 36
2nd Revised Sheet No. 37, Canceling 1st Revised Sheet No. 37
2nd Revised Sheet No. 38, Canceling 1st Revised Sheet No. 38
2nd Revised Sheet No. 39, Canceling 1st Revised Sheet No. 39
2nd Revised Sheet No. 40, Canceling 1st Revised Sheet No. 40
1st Revised Sheet No. 41, Canceling Original Sheet No. 41**

3. This order shall become effective on December 14, 2007.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, Appling,
and Jarrett, CC., concur.
Clayton, C., dissents.

Dippell, Deputy Chief Regulatory Law Judge