BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Empire District Electric Company of Joplin, Missouri for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company	)))))	**Case No. ER-2006-0315**

RESPONSE TO NOTICE REQUIRING FILING

COMES NOW the Office of the Public Counsel and for its Response to Notice Requiring Filing states as follows:

This response uses the same numbering format as the Commission's Notice requiring Filing issued September 14, 2006. Each numbered section herein responds to the similarly-numbered question posed by Commissioner Murray.

1. For the Commission to make changes to the IEC, it would have to follow one of two paths.[1] First, it could attempt to rescind its March 10, 2005, order approving the agreement that created the Interim Energy Charge (IEC), and substitute new IEC parameters for those agreed to by the parties. That agreement, filed February 22, 2005, and entitled "Nonunanimous Stipulation and Agreement Regarding Fuel and Purchased Power Expense," in paragraphs 6 and 7 at pages 13-14, explicitly provides that the failure of the Commission to approve it exactly as submitted will render it void, and deprive the Commission of the ability to rely on it to resolve issues. The Commission cannot – a

[1] The Commission did not inquire about its ability to impose a new IEC pursuant to Section 386.266 of the Revised Statutes of Missouri (Cum. Supp. 2005). Since the Commission did not inquire, and since it appears that the Commission could not – at least at this point – *sua sponte* impose an IEC on a utility that has not requested one, Public Counsel will not discuss the possibility of a new IEC pursuant to that section, but only modification of the existing one.

year and a half after it approved the IEC – declare a mulligan and take another shot at it. No evidence was adduced and no witnesses were cross-examined with respect to the numbers in the IEC such that an evidentiary record was established in ER-2004-0570 that would support the Commission making changes to the IEC.

The second path the Commission could try to follow to make changes to the IEC would be to base those changes on the numbers in this case. As discussed below, none of the evidence in this case supports appropriate levels for the floor and cap of an IEC. But even if there was competent and substantial evidence to support a new IEC collar, imposing one without the consent of the parties would run afoul of the prohibition on retroactive ratemaking. Citing the UCCM case,[2] the Commission has itself defined the concept: "Retroactive ratemaking is the setting of rates which permit a utility to recover past losses or which require a utility to refund excess profits collected." (Lorraine Bailiff, Complainant, v. Laclede Gas Company, Respondent., Case No. GC-83-354, 26 Mo. P.S.C. (N.S.) 539). There is no question that an IEC, but for the agreement of all affected parties, would violate the prohibition against retroactive ratemaking.

None of the current Public Counsel attorneys were involved in the 2001 rate case. This pleading will not address the portion of Question 1 that seeks information about that proceeding, but will leave that portion for others more familiar with the case to address.

2. In an IEC, the utility gets to keep any fuel cost savings if its actual fuel costs are below the floor. Its shareholders absorb any fuel costs that are above the cap. The "collar" is the area between the floor and the cap. Within the collar, it recovers from

[2] State ex rel. Utility Consumers Council of Missouri v. P.S.C., 585 S.W.2d 41, 59 (Mo. Sup. Ct. en banc 1979).

ratepayers its exact cost of fuel. Neither the floor nor the cap in an IEC are equivalent to the base rate fuel cost number presented in this case. By definition, the floor is a fuel cost number that is **not** the expected level of fuel cost; nor is the cap. The floor is a negotiated amount that the parties agree will provide incentive for the utility to try to beat in order to boost earnings. It is supposed to be achievable, but a "stretch goal." Similarly, the cap is a number that parties agree that the utility can likely get under, but there is some risk that the utility will exceed it. If the floor is set too low, and the utility believes it cannot achieve it, there is no incentive. If the cap is set too high, there is no incentive, because the utility is indifferent to fuel cost as long as it is within the collar. Despite the parties' best efforts in several cases (including ER-2004-0570, in which the current Empire IEC was established), no IEC to date in Missouri has done a good job of establishing the parameters of the collar.

In this case, because no party has presented evidence about what the floor and the cap should be, there is no way for the Commission to establish a new collar. The evidence about fuel costs was presented in order to allow the Commission to establish a fuel cost in base rates that represents a reasonable expectation of what fuel costs will be during the period rates are in effect – not what levels would provide the proper incentives in an IEC. There is no competent evidence that would be useful in establishing a new IEC collar.

3. There is no way, at this point, to know what sort of compromises on other issues were made in exchange for establishing the IEC in Case No. ER-2004-0570. Thus it

would be impossible to list changes that should be made in order to craft some sort of equitable relief.[3]

4. The only collar for which any sort of a case could be made is the one already in place. Public Counsel submits that this is the collar that interested parties freely negotiated and that the Commission approved. No evidence exists to support a different one.

WHEREFORE, Public Counsel respectfully requests submits its Response to Notice Directing Filing.

Respectfully submitted,

OFFICE OF THE PUBLIC **COUNSEL**

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[3] Furthermore, the Commission has no authority to offer equitable relief. State ex rel. Cirese v. Ridge, 345 Mo. 1096 (Mo. 1940). It is a creature of statute and its powers are limited to those conferred by the legislature. While those powers are many and broad, they do not extend to creating equitable relief.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to all parties this 20th day of September 2006.

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