

**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)	Case No. ER-2008-0093
Service Provided to Customers in the)	
Missouri Service Area of the Company)	

MOTION FOR CLARIFICATION,
OR, IN THE ALTERNATIVE, MOTION FOR RECONSIDERATION

COMES NOW The Empire District Electric Company (“Empire” or the “Company”), by and through counsel, and respectfully requests clarification from the Missouri Public Service Commission (the “Commission”) with regard to its Notice Regarding Pending Motion to Reject Specified Tariff Sheets and Strike Testimony issued herein on May 1, 2008. The requested clarification, as set out below, is necessary in order for Empire (and presumably other parties) to properly prepare for the evidentiary hearing scheduled to begin on Monday, May 12, 2008.

1. On April 11, 2008, a Motion to Reject Specified Tariff Sheets and Strike Testimony was filed herein by Praxair, Inc., Explorer Pipeline, Inc, and General Mills, Inc. (collectively, the “Industrial Intervenors”). The Industrial Intervenors allege that certain tariff sheets should be rejected and certain testimony stricken because of the impact of the Missouri Supreme Court’s opinion and mandate issued in SC88390 (a writ proceeding initiated by the Office of the Public Counsel with regard to an order approving tariffs issued by the Commission in Empire’s prior rate case, Case No. ER-2006-0315).

2. Pointing to a provision of the Interim Energy Charge (“IEC”) stipulation entered into by certain parties and approved by the Commission in Commission Case No. ER-2004-0570, the Industrial Intervenors, in effect, argue that Empire may not seek a fuel adjustment clause (“FAC”) in this proceeding because (1) the IEC was in place when Empire initiated this

rate case and/or (2) the IEC is currently in place. On April 21, 2008, Empire filed its Suggestions in Opposition in response to the Motion of the Industrial Intervenors explaining why the Motion should be denied. No other parties filed in support of or in opposition to the Motion of the Industrial Intervenors.

3. On May 1, 2008, a Notice was issued herein stating that the Motion of the Industrial Intervenors would be “taken up as part of the case” instead of being ruled upon in advance of the evidentiary hearing. The Notice further reads (with emphasis added) as follows:

. . . the parties shall be prepared to fully litigate **any and all issues related to the testimony and tariffs identified in the Industrial Intervenors’ April 11th Motion.**

It is this statement on which Empire seeks clarification from the Commission.

4. At the request of counsel for the Industrial Intervenors, the “non-binding” List of Issues filed herein by the parties lists as the following a question to be answered by the Commission in this proceeding:

Is Empire barred by the terms of the Stipulation and Agreement in Case No. ER-2004-0570 from requesting a fuel adjustment clause while an interim energy charge is pending?”

Empire, however, believes this question presented by the Industrial Intervenors is both improper and wholly irrelevant to the case at hand and should not be acted upon by the Commission.

5. Empire takes the above-quoted statement from the Commission’s May 1st Notice to mean that all parties should be prepared to fully litigate whether or not an FAC should be authorized for Empire as part of this proceeding pursuant to the provisions and requirements of RSMo. §386.266 and the Commission’s FAC rules, but *not* that the parties are directed (or even authorized) to present testimony and/or argument regarding whether or not Empire is precluded from requesting an FAC because of the IEC stipulation approved in Commission Case No. ER-2004-0570.

6. On December 21, 2006, the Commission issued its Report and Order addressing all contested issues in Commission Case No. ER-2006-0315, to be effective December 31, 2006.

The Commission noted (with emphasis added) as follows:

One of the many issues in the present matter is **whether the language in the 2005 Stipulation precludes Empire from seeking a different fuel adjustment clause**, precludes Empire from seeking to terminate the IEC and recover all of its fuel and purchased power expenses through its permanent rates, or precludes the Commission from terminating the IEC *sua sponte* and including all of the fuel and purchased power expenses in Empire's permanent rates.

The Commission concluded that Empire could not request an FAC with the IEC in place, but that the Commission could terminate the effects of the IEC stipulation. The Commission further held (with emphasis added) as follows:

To the extent that the 2005 Stipulation limits recovery of Empire's prudently incurred fuel and purchased power expenses, then it attempts to limit one of the "factors which determine rates" and is overcome by the Commission's exercise of the police power granted to it. . . . **The Commission concludes that Empire may recover the prudently incurred fuel and purchased power costs at the level determined above in base rates.**

7. Empire filed compliance tariffs pursuant to the Report and Order issued in Case No. ER-2006-0315 (Tariff File No. YE-2007-0488). On January 1, 2007, Empire began providing service and charging customers pursuant to the compliance tariffs authorized by the Report and Order. Empire has been providing a service, and in exchange for that service, has been unconditionally collecting the tariffed rate in reliance upon the orders of the Commission. The tariffs which took effect on January 1, 2007, do not provide for the IEC.

8. At no time was the effectiveness of the ER-2006-0315 compliance tariffs stayed by the Commission or by any court. Further, as of today, no court has examined the lawfulness or reasonableness of the substance of the Commission's orders approving the compliance tariffs, nor has any court reviewed the lawfulness or reasonableness of the ER-2006-0315 Report and Order and/or the underlying tariffed rates. No court has declared, as unlawful and/or

unreasonable, the Commission's findings with regard to Empire's ability to seek an FAC and/or the Commission's ability to terminate the effects of the IEC stipulation approved in ER-2004-0570.

9. Any attack on the Commission's findings in Case No. ER-2006-0315 with regard to the termination of the effects of the 2005 IEC stipulation approved in Case No. ER-2004-0570 would be an impermissible collateral attack on a Commission order pursuant to RSMo. §386.550 ("In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive."). There has been no change in circumstances which would justify such a collateral attack. *See State ex rel. Ozark Border Electric Cooperative v. Public Service Commission*, 924 S.W. 2d 597, 601 (Mo. banc 1996).

10. In the event the Commission's May 1st Notice was intended to reflect that it is the position of the Commission that it is relevant, in this current rate case proceeding, whether or not Empire would be precluded from requesting an FAC with the IEC in place because of the IEC stipulation approved in Commission Case No. ER-2004-0570, Empire requests that the Commission reconsider its decision. Further, in the event the Commission's May 1st Notice was intended to reflect that it is the position of the Commission that the parties should be prepared to fully litigate, in this current rate case proceeding, the effect of the Missouri Supreme Court's opinion and mandate issued in SC88390 with regard to the effectiveness of Empire's filed tariffs, Empire requests that the Commission reconsider its decision. The arguments of Empire in this regard are summarized in its Suggestions in Opposition which were filed herein on April 21, 2008.

WHEREFORE, The Empire District Electric Company respectfully requests an order of the Commission clarifying that the Notice issued on May 1, 2008, does not direct or authorize

the parties hereto to present testimony or argument regarding whether or not Empire is precluded from requesting an FAC because of the IEC stipulation approved in Commission Case No. ER-2004-0570 and/or to otherwise collaterally attack the Commission's findings in Commission Case No. ER-2006-0315. In the alternative, in the event the Commission did intend to authorize the presentation of testimony regarding whether Empire may request an FAC with the IEC in place, Empire respectfully requests that the Commission reconsider its decision in this regard. Empire requests such other and further relief as the Commission deems just and proper under the circumstances.

Respectfully submitted,

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By:

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Certificate of Service

I hereby certify that the foregoing has been sent by United States mail, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record on the 5th day of May, 2008.

/s/ Diana C. Carter