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

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| 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-2008-0093** |

**MOTION TO REJECT SPECIFIED TARIFF SHEETS**
**AND STRIKE TESTIMONY**

COMES NOW, Praxair, Inc. ("Praxair"), Explorer Pipeline, Inc. ("Explorer"), and General Mills, Inc. (collectively referred to as "Industrial Intervenors") in support of their Motion to Reject Specified Tariff Sheets and Strike Testimony respectfully state as follows:

1. On February 22, 2005, the Empire District Electric Company ("Empire"), the Office of the Public Counsel ("OPC"), Praxair and Explorer executed a non-unanimous stipulation ("IEC Stipulation") for the implementation of an Interim Energy Charge ("IEC"). That IEC Stipulation precludes Empire from requesting the implementation of a Fuel Adjustment Clause ("FAC") for the duration of the IEC mechanism.

> In consideration of the implementation of the IEC in this case and the agreement of the Parties to waive their respective rights to judicial review or to otherwise challenge a Commission order in this case authorizing and approving the subject IEC, ***for the duration of the IEC approved in this case Empire agrees to forego any right it may have to request the use of***, or to use, any other procedure or remedy, available under current Missouri statute or subsequently enacted Missouri statute, in the form of ***a fuel adjustment clause***, a natural gas cost recovery mechanism, or other energy

> related adjustment mechanism to which the Company would otherwise be entitled.[1]

2. That IEC Stipulation further provides that "[t]he IEC tariff or rate schedule will expire no later than 12:01 a.m. on the date that is three years after the original effective date of the revised tariff sheets authorized by the Commission in this case, Case No. ER-2004-0570, unless earlier terminated by order of the Commission."[2]

3. Consistent with the express language of the IEC Stipulation, Empire filed and the Commission approved certain tariff sheets. Empire's tariff P.S.C. Mo. No. 5, Section 4, 4th Revised Sheet No. 17 provides that "[t]his interim rider shall be in effect from March 27, 2005 through March 27, 2008."

4. Despite the express language of the IEC Stipulation, Empire subsequently sought to implement a fuel adjustment clause during the pendency of the IEC. Relying upon the unambiguous language of the IEC Stipulation, the Commission found that Empire could not seek such a fuel recovery mechanism.

> Although Empire argues that the language of the Stipulation serves only to require that it not have both an IEC and an ERC in effect simultaneously, the language of the preceding paragraph does not support this. Empire's position requires that the phrase, "to request the use of" highlighted above to be a nullity. The language following that phrase, "to use[,] any other procedure or remedy . . . under Missouri statute" clearly precludes the simultaneous use of two different kinds of fuel adjustment mechanism. The inclusion of "to request the use of" can only mean that Empire is precluded from requesting the use of another fuel adjustment mechanism during the period in which the IEC is in effect.[3]

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[1] *Nonunanimous Stipulation and Agreement Regarding Fuel and Purchased Power Expense*, Case No. ER-2004-0570, filed February 22, 2005, at page 12, Section 4 (emphasis added).
[2] *Id.* at page 4, section 1(d).
[3] *Order Clarifying continued Applicability of the Interim Energy Charge*, Case No. ER-2006-0315, issued May 2, 2006 at page 3.

5. Given the prohibition against seeking a fuel adjustment clause while the IEC was in effect, the Commission ordered Empire to "remove from its pleadings and other filings in this case the request it consented not to make."[4]

6. The clear import of the IEC Stipulation and the Commission's Order in Case No. ER-2006-0315 is that Empire is precluded from seeking a different fuel recovery mechanism while the IEC is in effect. Given Empire's request of October 1, 2007 to implement a fuel adjustment clause, the question inevitably arises as to whether it is precluded by the continued existence of the IEC.

7. Empire will undoubtedly assert that the IEC was cancelled by the Commission in Case No. ER-2006-0315. While the Industrial Intervenors do not dispute that the Commission indicated its intent to terminate the IEC, the recent decision of the Supreme Court clarifies that the Commission did not complete the action of terminating the IEC.

8. On October 30, 2007, the Supreme Court, in response to a Petition for Writ of Mandamus filed by OPC, found that the Commission had "abused its discretion" in Case No. ER-2006-0315 and ordered the Commission "to vacate its order granting expedited treatment and approving tariffs issued on December 29, 2006." Neither the Commission, nor Empire, filed for rehearing of the Supreme Court's opinion, and the Court subsequently issued its mandate on November 15, 2007.

9. Given the Supreme Court's opinion, it is important to understand what is meant by "vacate" a decision.

> There is a marked and clearly recognized distinction between the vacation of a judgment and the opening of a judgment. **A judgment which is vacated is destroyed in its entirety** upon the entry of the order that the

[4] *Id.* at page 3.

> judgment be vacated, while **a judgment which is merely opened does not lose its status as a judgment**, but is merely suspended so far as concerns the present right to maintain further proceedings based upon it. In the latter case, if the party who obtained the opening of the judgment is afterwards defeated in his attempt to obtain relief, the result is to restore the judgment to full force and effect, while if he prevails in his attempt, the judgment is then vacated and a new judgment entered.[5]

10. In addition to the requirement that the order be destroyed, another critical aspect of a "vacated" order is that the parties are returned to their status at that point where the vacated order was entered. As *Corpus Juris Secundum* indicates:

> Where a judgment is vacated or set aside by a valid order or judgment, **it is entirely destroyed and the rights of the parties are left as though no such judgment had ever been entered**. No further steps can be legally taken to enforce the vacated judgment. The original judgment is not susceptible to appeal and cannot become a final judgment from which an appeal can be taken. The action, however, is left still pending and undetermined, and further proceeding may be had and taken therein.[6]

The notion that the parties' status be returned to the *status quo ante* has been repeatedly adopted by Missouri Courts. "The general rule is that when an order or judgment is vacated ***the previously existing status is restored*** and the situation is the same as though the order or judgment had never been made. The matters in controversy are left open for future determination."[7]

11. The Supreme Court chose to use the word "vacate" in reference to the Commission's Order Granting Expedited Treatment and Approving Tariffs. Neither the Commission nor Empire sought reconsideration of the Supreme Court's opinion. Neither the Commission nor Empire sought to clarify that the Supreme Court really meant to

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[5] *Krummel v. Hintz*, 222 S.W.2d 574, 578 (Mo.App. E.D. 1949) (citing to 49 C.J.S., Judgments, § 306, p. 558; 31 Am.Jur., Judgments, secs. 713, 793) (emphasis added).
[6] 49 C.J.S. Judgments §357. (emphasis added).
[7] *Buchanan v. Cabiness*, 245 S.W.2d 868, 873 (Mo. 1951) (emphasis added). See also, *Ball v. Shannon*, 975 S.W.2d 947 (Mo.App.S.D. 1998) ("The general rule is that when an order or judgment is vacated the previously existing status is restored and the situation is the same as though the order or judgment had never been made.") (citing to *State ex rel. Seiser's Estate v. Lasky*, 565 S.W.2d 792 (Mo.App.E.D. 1978)).

have the Commission "open" its judgment. Therefore, the Supreme Court's opinion is final and the Commission has been ordered to "destroy" its December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs and return the parties to their "previously existing status."

12. Despite the clear direction of the Supreme Court, the Commission, while paying lip-service to the Court's order to "vacate," instead merely reaffirmed its previous decision implementing rates effective January 1, 2007.

> Thus, the Commission concludes that if Empire charged the rates as approved in the December 29, 2007 (sic – should be 2006) order, it charged the correct rates. And further, those rates remain the rates "in effect at the time" until the order is vacated. After the order is vacated, the 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.[8]

13. Because the Commission did not act in conformance with the clear mandate of the Supreme Court, OPC filed a subsequent Petition for Writ of Mandamus to compel compliance with the October 30 Supreme Court decision. Based on the Petition and the answers filed by Empire and the Commission, the Supreme Court issued its Alternative Writ Of Mandamus on April 4, 2008. In its Writ, the Supreme Court ordered:

> NOW, THEREFORE, you, the said Public Service Commission, are COMMANDED to file a written return to the petition in this Court on or before April 9, 2008, and show cause, if any you have, why a writ of mandamus should not issue requiring you to comply completely with the mandate and opinion of this Court in cause No. SC88390, directing you to vacate your order of December 29, 2006, in Cause No. ER-2006-0315 entitled 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.

[8] *Order Vacating December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs, and Order Approving Tariffs*, Case No. ER-2006-0315, issued December 4, 2007 at pages 6-7.

14. At this point, it is abundantly clear, that despite its legal machinations, the Commission has been ordered to "destroy in its entirety" the December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs. Importantly, since the replacement tariffs have been vacated, the previously existing tariffs, those implemented in Case No. ER-2004-0570, must necessarily continue in existence as the only lawful authority by which Empire can collect rates. Included in the ER-2004-0570 tariffs that have continued existence is the IEC tariff approved by the Commission. Because of the continued existence of the IEC tariff, and given the clear language of the IEC Stipulation as well as the Commission's May 2, 2006 Order Clarifying Continued Applicability of the Interim Energy Charge, Empire is precluded from requesting a fuel adjustment clause.

15. Therefore, in compliance with the express terms of the IEC Stipulation and the Commission's May 2, 2006 Order Clarifying Continued Applicability of the Interim Energy Charge, the Industrial Intervenors ask that the Commission immediately reject the following tariff sheets filed in this case on October 1, 2007:

1. P.S.C. Mo. No. 5, Section 4 6th Revised Sheet No. 17.

16. In addition, the Industrial Intervenors request that the Commission strike the following testimony:

1. Direct Testimony of W.L. Gipson:
   Page 4, lines 6-9;
   Page 5, lines 21-22;
   Page 6, lines 1-17;
   Pages 6, line 22 through page 7 line 2.

2. Direct Testimony of W.Scott Keith:
   Page 3, lines 8-9;
   Page 6, lines 12-15;
   Page 11, lines 19-21;
   Page 20, lines 7-15;
   Page 21, line 3 through page 29, line 14;

Schedules WSK-3 through WSK-5

3. Direct Testimony of Todd W. Tarter
Page 2, line 10 through page 3, line 17;
Page 13, lines 15-17;
Schedules TWT-1 through TWT-5

4. Direct Testimony of Blake A. Mertens
Page 3, lines 7-9;
Page 17, line 7 through page 19, line 11

5. Direct Testimony of H. Edwin Overcast
Page 2, lines 9-14 and lines 21-25;
Page 3, lines 3-10;
Page 3, line 22 through page 27, line 19;
Page 39, lines 7-23.
Schedules HEO-2 through HEO-13

17. Moreover, Empire should be ordered to substitute revised versions of certain accounting schedules that form the basis of Empire's compliance with the Commission's minimum filing requirements which are now incorrect as a result of Empire's attempted elimination of the IEC and implementation of the FAC.

18. The Industrial Intervenors note that there has been additional testimony filed by other parties, including the Industrial Intervenors, in response to Empire's request for a fuel adjustment clause. The Industrial Intervenors recognize that such testimony, to the extent that it discusses Empire's improper request to implement a fuel adjustment clause, should also be stricken.

WHEREFORE, the Industrial Intervenors respectfully request that the Commission: (1) reject the tariffs specified in this Motion; (2) strike the testimony previously referenced in this pleading; and (3) order Empire to revise certain schedules that are inconsistent with the Commission's previous order.

Respectfully submitted,

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ATTORNEY FOR THE INDUSTRIAL INTERVENORS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the forgoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.

David L. Woodsmall

Dated: April 11, 2008