

**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 TO STRIKE TESTIMONY

The Empire District Electric Company ("Empire" or "Company"), by and through its undersigned counsel and in accordance with the *Order Setting Deadline to Object to Prefiled Testimony*, which was issued on April 9, 2008, as well as 4 CSR 240-2.080, hereby files this motion to strike portions of the pre-filed direct testimony of Barbara A. Meisenheimer regarding revenue requirement issues, which was filed with the Missouri Public Service Commission ("Commission") on February 22, 2008, on behalf of the Office of the Public Counsel ("OPC"). As discussed below, the majority of Ms. Meisenheimer's pre-filed direct testimony constitutes an unlawful collateral attack on the *Report and Order* and the *Report and Order Upon Reconsideration* that the Commission issued in Case No. ER-2006-0315; accordingly, the testimony should be stricken and/or prohibited from being received into evidence in the current case.

1. In the summary that appears at pages 1-2 of the pre-filed testimony here at issue, Ms. Meisenheimer describes the primary purpose of her testimony, and the premises upon which that testimony is based, as follows:

I have been advised by Public Counsel's legal counsel that the tariff sheets that established base rates and the Interim Energy Charge (IEC) in Case No. ER-2004-0570 were lawfully effective tariffs for the Empire District Electric Company (Empire or Company) at the time this case was filed and that the terms of the Stipulation and Agreement in Case No. ER-2004-0570 with respect to Fuel and Purchased Power expenses applied. Therefore, the primary purpose of my direct revenue requirement testimony is to review the conditions to which the Company and Public Counsel agreed to in the Stipulation in Case No. ER-2004-0570 related to recovery of fuel and purchased power expenses through base rates and

an IEC . . . During the period the IEC was in effect, the terms of the Stipulation and Agreement in Case No. ER-2004-0570 prohibited the Company from requesting alternative fuel recovery mechanisms, to rebase rates or to adjust the IEC rate in order to recovery additional fuel and purchased power expenses. The Company's recovery of fuel and purchased power expense in this case should be limited to an annual recovery in base rates of \$102,994,356 and an additional annual amount of up to \$8,249,000 recovered through the IEC until the IEC expires on March 26, 2008.

2. In Empire's last general rate case, several parties, including the OPC, argued, *inter alia*, that the Stipulation and Agreement entered into and approved by the Commission in Case No. ER-2004-0570 required the Company to continue an IEC in place until March 26, 2008. But, after due consideration, the Commission rejected that argument. At pages 43-44 of its December 21, 2006, *Report and Order* and pages 50-51 of its March 26, 2008, *Report and Order Upon Reconsideration*, the Commission found that "the 2005 Stipulation does not allow sufficient recovery of Empire's prudently incurred fuel and purchased power costs," and also concluded, "[t]his Commission cannot abrogate its duty to both the utility and its customers simply because some of the parties have previously reached a Stipulation and Agreement . . . Given our statutory mandate, the Commission must ignore the Stipulation and Agreement as it pertains to fuel cost recovery . . ."

3. Acting in accordance with those findings and conclusions, the Commission terminated the IEC then in place for Empire and ordered the Company to file tariffs, which the Commission subsequently approved, that allowed Empire to recover its prudently incurred costs of fuel and purchased power through base rates.

4. Several parties, including the OPC, have appealed various aspects of the Commission's December 21st *Report and Order* in Case No. ER-2004-0315. But while those appeals are pending, the *Report and Order* and all findings and conclusions made therein remain in full force and effect.

5. Section 386.270, RSMo, provides that all orders and actions of the Commission are “prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.” Moreover, Section 386.520.1 states that “[t]he pendency of a writ of review shall not of itself stay or suspend the operation of the order or decision of the commission during the pendency of such writ . . .” And although Section 386.520.1, RSMo, provides a means for them to do so, no appellant has sought or obtained a stay or suspension of the Commission’s *Report and Order* in Case No. ER-2006-0315.

6. In light of the facts stated above and the legal consequences of those facts, it is obvious that the majority of Ms. Meisenheimer’s pre-filed direct testimony proceeds from a fundamentally false premise: that the IEC approved for Empire in Case No. ER-2004-0570 remains in effect and that the Company is thereby prohibited from seeking a fuel adjustment clause in the current case. As stated above, in its *Report and Order* and *Report and Order Upon Reconsideration*, the Commission terminated the IEC that it had previously approved in Case No. ER-2004-0570. As a result of that termination, the Commission removed any impediment that may have existed to Empire’s request for a fuel adjustment clause in the current case.

7. But beyond the lack of any factual basis for opinions expressed by Ms. Meisenheimer in her pre-filed direct testimony, that testimony also is unlawful because it constitutes an improper collateral attack on the Commission’s *Report and Order* in Case No. ER-2006-0315. Section 386.550, RSMo, states that “[i]n all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive.” Courts interpreting this statute have found it to be indicative of the law’s desire that judgments be final,¹ and have required parties who want to ask the Commission to determine if a prior ruling is still in the public interest to assert a

¹ *State ex rel. Harline v. Pub. Serv. Comm’n.*, 343 S.W.2d 177, 184 (Mo. App 1960).

significant change in circumstances.² Otherwise, the collateral challenge to the previous ruling is considered to be an unlawful.

8. The arguments articulated in Ms. Meisenheimer's pre-filed direct testimony are the same arguments that the OPC made in Case No. ER-2006-0315 and that the Commission rejected there. Such arguments, which merely re-cycle arguments made and rejected in a prior case, clearly constitute a collateral attack on the findings and conclusions that the Commission reached in that prior case. And, because the OPC has not alleged – or can it – that its circumstances have significantly changed from Empire's last rate case to this one, the limited exception to the law prohibiting collateral attacks of Commission orders is not available to the OPC. The fact that the OPC is dissatisfied with the Commission's previous order, or that the findings and conclusions stated in that order prevent the OPC arguing that Empire is prohibited from requesting a fuel adjustment clause in the current case, are not sufficient to meet the requirements of the law's limited exception.

9. The OPC currently is challenging the Commission's previous order through an appeal – as is its legal right. But unless and until an appellate court determines that the *Report and Order* in Case No. ER-2006-0315 unlawful, the findings and conclusions contained therein continue to be lawful and in full force and effect. But Ms. Meisenheimer's pre-filed direct testimony treats the Commission's findings and conclusions as if they do not exist and in so doing disparages both the Commission and its lawful authority.

WHEREFORE, for the reasons stated herein, Empire moves the Commission to grant the Company's request; to find that the following portions of the pre-filed direct testimony of Barbara A. Meisenheimer – page 1, line 3 through page 2, line 7 and page

² *State ex rel. Ozark Border Electric Cooperative v. Pub. Serv. Comm'n.*, 924 S.W.2d 597, 601 (Mo.banc 1996).

4, line 1 through page 14, line 8 – are improper and unlawful; and to order that such testimony be stricken and/or prohibited from being received into evidence in the current case.

Respectfully submitted,



BRYDON, SWEARENGEN & ENGLAND, P.C.

James C. Swearengen MBE 21510

Diana Carter MBE 50527

L. Russell Mitten MBE 27881

312 East Capitol Avenue

P.O. Box 456

Jefferson City, MO 65102

(573) 635-7166

(573) 635-7431 (facsimile)

lrackers@brydonlaw.com

ATTORNEYS FOR THE EMPIRE DISTRICT
ELECTRIC COMPANY

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 6th day of May, 2008.

/s/ L. Russell Mitten