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-2008-0093**

APPLICATION FOR REHEARING

COMES NOW, Praxair, Inc., Explorer Pipeline, Inc., General Mills, Inc., Wal-Mart Stores, Inc., and Enbridge Energy, L.P., (collective referred to as the "Industrial Intervenors"), either collectively or as individual entities, pursuant to Section 386.500 RSMo., and applies for rehearing of the Commission's July 30, 2008 Report and Order ("Order") on the following grounds:

1. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record, is contrary to the competent and substantial evidence that is on record, is arbitrary and capricious and is an abuse of discretion in that the Commission makes a finding that the Order increases Empire's revenues by "$22,040,395." The Commission further finds that "the average residential customer's monthly bill will increase by 6.7%, or approximately $6.13 per month." Despite the obvious importance of such information, there is no evidence to support such a finding. Rather, since this information is contained solely in Staff's Financial Scenario, filed July 30, 2008, in response to the Commission's Order Requesting Scenario, it is apparent that the Commission has relied upon extra-record information in reaching its decision. The reliance upon extra-record information

violates the Commission's constitutional and statutory duty to reach its decision based solely upon "competent and substantial evidence upon the whole record."[1] While the Industrial Intervenors do not dispute the need for the Commission to consider such information, it is incumbent on the Commission to hold an evidentiary hearing and provide for the due process rights contained in Section 536.070 prior to considering such information.

RETURN ON EQUITY

2. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is on record, is arbitrary and capricious and is an abuse of discretion in that the Order fails to provide a legally sufficient explanation of the manner by which the Commission determined that a 10.8% return on equity was appropriate. There is no basis by which a reviewing court can determine how the Commission selected this return. For judicial review to have any meaning, the Commission's Order must "make sense to the reviewing court."[2] In regards to Return on Equity, the Commission's Order makes no sense.

3. The Commission's decision is arbitrary and capricious, unreasonable and unlawful in making decisions concerning, among other things, the following

- Zone of Reasonableness: The Commission acted arbitrarily in its use and calculation of what it characterizes as an "appropriate zone of reasonableness."

[1] Mo. Const. Art. V, Section 18 and Section 386.510 RSMo.
[2] *State ex rel. Lake Lotawana v. Public Service Commission*, 732 S.W.2d 191, 195 (Mo.App.W.D. 1971).

● Effect of Zone of Reasonableness: The Commission acted arbitrarily in its determination of the implications of a recommendation that falls outside the "zone of reasonableness."

● Importance of Expert Witnesses: The Commission acted arbitrarily in its stated need for expert return on equity witnesses and testimony.

● Size of Comparable Company Group: The Commission acted arbitrarily in its finding of the particular size of comparable company group that is sufficient.

● Return on Equity Methodologies: The Commission acted arbitrarily in its reliance on particular return on equity methodologies.

● Appropriate DCF Methodology: The Commission acted arbitrarily in its acceptance or rejection of certain forms of the DCF methodology.

● DCF Growth Rate: The Commission acted arbitrarily in the manner by which it determined the appropriate growth rate for inclusion in a DCF methodology.

● Isolated Adjustments: The Commission acted arbitrarily in the manner by which it considered isolated adjustments to the authorized return on equity.

4. The Commission's Order is arbitrary, capricious, unreasonable and unlawful in that the Commission has arbitrarily rejected its long-standing reliance on expert return on equity testimony in lieu of its own unqualified return on equity analysis and by attempting to substitute its own unsupported return on equity approach or analysis thereby denying the parties of their due process rights. Section 536.070 provides certain fundamental rights guaranteed in all contested cases including the right to cross examine and call opposing witnesses.

5. The Commission's Order is unlawful, unjust and unreasonable and is arbitrary and capricious and lacks support of competent and substantial evidence in that it makes numerous findings without any evidentiary support. For example, and not in limitation of the generality of the foregoing, the Commission finds that "the record establishes that Empire is, in fact, a riskier investment than most of its peers." The Commission fails to provide any support for this claim and fails to clarify whether this statement refers simply to financial, operational or total company risk. Furthermore, the Commission claims that "the evidence in this case indicated Gorman tended to round to the lowest number whenever convenient," again without evidentiary support of any kind.

6. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is on record, is arbitrary and capricious and is an abuse of discretion in that the Commission finds that "Gorman's DCF analyses further understates an appropriate return on equity for Empire because he uses a smaller proxy group of comparable companies for his DCF analysis."[3] There is no evidence to support a finding that the use of different comparable company groups has any effect on the DCF analysis. In fact, the record evidence readily reveals that the comparable company groups have no effect on the DCF and return on equity analysis.[4]

7. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is on record, is

[3] Order at page 19.
[4] Ex. 504, pages 17-19.

arbitrary and capricious and is an abuse of discretion in that the Commission found that "integrated electric utilities are generally more risky than wires-only electric utilities because integrated electric utilities are currently making large investments in electric generation plant, while wires-only utilities do not need to make such investments." In making such a finding the Commission ignored evidence regarding the elevated financial risk associated with wires-only companies. The evidence indicates that based on a total profile risk basis (operational and financial risk), wires-only companies can have both higher or lower risk profiles.

Furthermore, in reaching its decision to ignore the evidence regarding higher risk wires-only companies, the Commission summarily rejected evidence examples of high-risk wires-only utilities operating in Illinois. Without any evidence to support such a finding, the Commission found that "the high level of risk in Illinois is attributable to political circumstances unique to that state."[5]

FUEL ADJUSTMENT CLAUSE

8. The Order is unlawful in that it prematurely terminates an incentive or performance based plan in direct contravention of Section 386.266.8.

9. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is on record, is arbitrary and capricious and is an abuse of discretion in that the Order incorrectly suggests that the Commission, through its Report and Order in Case No. ER-2006-0315, terminated the Interim Energy Charge; and in failing to find that Empire was in direct violation of that Report and Order through its continued collection of the Interim Energy

[5] Order at page 23.

Charge for a period of time between the issuance of the Report and Order and the implementation of new rates; and in failing to find that the Interim Energy Charge stays in effect until terminated through the approval of lawful replacement tariffs in December 2007 and were, thus, in effect on October 1, 2007 when Empire filed this case.

10. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is on record, is arbitrary and capricious, is an abuse of discretion and represents an unlawful collateral attack on a previous Commission Order in that the Commission finds that

> Even if the Commission's previous decision to terminate the Interim Energy Charge is found not to be effective, the Commission still concludes that the possible continued existence of the 2005 Interim Energy Charge does not preclude the Commission from ordering Empire to implement a fuel adjustment clause in this case.[6]

On May 2, 2006, the Commission issued its Order Clarifying Continued Applicability of the Interim Energy Charge in Case No. ER-2006-0315. In that Order, the Commission found that:

> 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.***[7]

[6] Order at page 31.

[7] *Order Clarifying continued Applicability of the Interim Energy Charge*, Case No. ER-2006-0315, issued May 2, 2006 at page 3. (emphasis added).

That Order is final and, pursuant to the terms of Section 386.550, is conclusive.[8] This Commission cannot, merely based some unsupported notion of "public interest,"[9] change its mind and the findings / conclusions of that Order. As such, the Commission's finding in the current Report and Order is unlawful, unreasonable, arbitrary and capricious and not supported by competent and substantial evidence on the whole record.

11. The Order is unlawful and unreasonable in that the Commission has authorized a fuel adjustment clause which, contrary to the express provisions of Section 386.266 provides for the pass through of increases and decreases in fuel and purchased power costs that result from imprudent utility decisions. Section 386.266.1 provides the Commission with the authority to implement rate adjustments outside of general rate proceedings "to reflect increases and decreases in its ***prudently incurred*** fuel and purchased power costs, including transportation." (emphasis added). The adjustment mechanism authorized by the Commission clearly contemplates that the prudence review will occur after the costs have already passed through the adjustment clause. By relying upon after-the-fact prudence reviews, the Commission cannot ensure, contrary to the express provisions of Section 386.266.1, that imprudent costs are not passed through the adjustment mechanism.

12. The Commission's Order is unlawful, unjust and unreasonable in that it makes numerous findings without any evidentiary support. For instance, the Commission finds "that mainstream of regulation recognizes that it is ***impossible*** for a utility to earn its allowed return on equity in a rising cost environment without a fuel adjustment

[8] In its Order the Commission recognizes its previous finding. "In its Report and Order in Empire's last rate, ER-2006-0315, the Commission accepted that the stipulation and agreement precluded Empire from requesting a fuel adjustment clause at that time." Order at page 32.
[9] Order at page 33.

clause."[10] There is no evidentiary basis to support a claim that mainstream regulation find it "impossible" for a utility to earn its authorized return without a fuel adjustment clause.

REGULATORY PLAN AMORTIZATION

13. The Order is unlawful, unjust and unreasonable in that it grants an increase in rates based on the costs of construction in progress of an electric plant before it is fully operational and used for service in direct contravention of Section 393.135 RSMo.

WHEREFORE, prior to the implementation of new rates that would necessarily result in the denial of the issues detailed in this Application, the Commission should order rehearing of its Report and Order and a new Order consistent with governing law, commission precedent and based exclusively upon the evidence herein should be issued.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.

Stuart W. Conrad, MBE #23966
David L. Woodsmall, MBE #40747
3100 Broadway, Suite 1209
Kansas City, Missouri 64111
(816) 753-1122 Ext. 211 (Telephone)
Facsimile: (816) 756-0373
Internet: stucon@fcplaw.com

ATTORNEYS FOR THE INDUSTRIAL INTERVENORS

[10] Order at page 34. (emphasis added).

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: August 8, 2008