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

EMPIRE'S RESPONSE TO THE APPLICATIONS FOR REHEARING REGARDING THE COMMISSION'S REPORT AND ORDER

COMES NOW The Empire District Electric Company ("Empire" or "Company"), by and through counsel, and for its Response to the Applications for Rehearing of the Office of the Public Counsel ("Public Counsel") and Praxair, Inc., Explorer Pipeline, General Mills, Inc., Wal-Mart Stores, Inc., and Enbridge Energy, L.P. (collectively, the "Industrials"[1]), filed herein on August 8, 2008, Empire respectfully states as follows to the Missouri Public Service Commission (the "Commission"):

1. On July 30, 2008, the Commission issued its *Report and Order* herein, bearing an effective date of August 9, 2008. Timely applications for rehearing were filed by Public Counsel and the Industrials. These applications for rehearing should be denied by the Commission, as nothing presented in these documents merits further consideration by the Commission, nor do they present any cognizable legal argument that could provide sufficient reason to grant rehearing pursuant to RSMo. §386.500.

2. According to their Application for Rehearing, the Industrials take issue with (1) a Commission finding that implementation of the terms of the *Report and Order* is to increase Empire's revenues by $22,040,395, (2) the Commission's return on equity ("ROE") decision, (3)

[1] Three of the Industrials, Praxair, Explorer Pipeline, and General Mills, were granted intervention in this matter by the Commission's Orders of October 29 and November 5, 2007, while two of the Industrials, Wal-Mart Stores and Enbridge Energy, are not intervening parties in this proceeding.

the authorization of a fuel adjustment clause ("FAC") for Empire, and (4) a grant of additional amortization pursuant to Empire's regulatory plan. The Public Counsel also takes issue with the authorization of an FAC for Empire and the Commission's ROE decision. Public Counsel also asserts that the Commission erred in establishing a tracking mechanism for vegetation management costs.

Comments Regarding the Application for Rehearing of the Industrials

3. **Commission Findings.** To begin, the Industrials assert that the *Report and Order* is unlawful because the Commission, without evidentiary support, finds that the *Report and Order* increases Empire's revenues by $22,040,395 and that an average residential customer's bill will increase by approximately $6.13 per month. Contrary to the assertions of the Industrials, however, the Commission made no such "findings." Instead, the Commission made numerous factual findings on various issues and numerous conclusions with regard to the legal issues, all as set out in the *Report and Order*. If one "does the math" with regard to these individual findings and conclusions, then one may conclude that Empire's revenues are to increase by $22,040,395 and that an average residential customer's bill will increase by approximately $6.13 per month. These conclusions are noted in the summary section of the *Report and Order*. These conclusions are not lacking in evidentiary support, as they are clearly based upon the Commission's own findings and conclusions, and there is no indication that the Commission relied upon an extra-record information in reaching any of its decisions in this case.

4. **Rate of Return.** Next, the Industrials assert that the *Report and Order* is unlawful due to the Commission's decision to authorize a 10.8 percent ROE for Empire. Numerous allegations are made in conclusory fashion, but the crux of the Industrials' argument appears to be that the Commission arrived at its own ROE number and did not adopt, in total,

any particular party recommendation. Contrary to the assertion of the Industrials, the *Report and Order* contains an adequate basis for a reviewing court to determine how and why the Commission selected this particular return, and this ROE decision is well supported by the evidence. Of particular interest in this regard is the fact that the Courts have consistently held that this Commission is not bound by stare decisis, that each rate case must be determined on its own facts, that the Commission is free to believe none, part, or all of a party's testimony, that public utility commissions are not bound to the use of any single formula or combination of formulae in determining rates, and, quite notably, that ratemaking "involves the making of pragmatic adjustments." *See State ex rel. Missouri Gas Energy v. Public Service Commission*, 186 S.W.3d 376 (Mo.App. W.D. 2005). The Commission considered all evidence, including the various expert recommendations, made certain pragmatic adjustments, and lawfully and reasonably authorized an ROE of 10.8 percent for Empire.

5. **Fuel Adjustment Clause.** The Industrials also assert that the *Report and Order* is unlawful on the basis that the Commission authorized an FAC for Empire. The Industrials' arguments in this regard are nothing more than a regurgitation of prior arguments which have been heard and rejected by this Commission. Empire sees no need to further respond on this point.

6. **Regulatory Plan.** Lastly, the Industrials, two of which – Praxair and Explorer – were signatories to Empire's original regulatory plan stipulation, assert that the *Report and Order* is unlawful with regard to regulatory plan amortizations. No factual or legal support is provided for the Industrials' conclusory statement in this regard. A supplemental filing by three of the Industrials – General Mills, Wal-Mart, and Enbridge – titled "Response to August 11

Order", also fails to cite to any evidence in the record or to otherwise provide any meaningful support for the conclusory allegation of error.

7. The Commission-approved Stipulation and Agreement in Case No. EO-2005-0263, which authorizes the regulatory plan amortizations, contains a provision that the signatory parties (including Praxair and Explorer) "shall cooperate in defending the validity and enforceability of this Agreement and the operation of this Agreement according to its terms." In fact, counsel for Praxair and Explorer stated in his opening statement in Case No. EO-2005-0263 (Empire's regulatory plan case): "We support this package." (Hearing Vol. 1, p. 18, ln. 19)

8. Although the Industrials have failed to provide any support for the conclusory statement, placed under the heading of "Regulatory Plan Amortization", that the *Report and Order* in this case grants an increase in rates based on the costs of construction in progress in contravention of RSMo. §393.135, Empire will address the issue briefly. The additional amortizations contemplated by the regulatory plan and authorized by the *Report and Order* are a form of accelerated depreciation in which Empire exchanges rate base for additional cash flow in order to enhance certain credit metrics; there is no resulting rate increase in this case based on the costs of construction in progress.

9. The amortizations are managed to maintain Empire's financial integrity in a manner similar to tax normalization and accelerated depreciation which have been found to be proper tools of ratemaking by the Courts. *See State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 606 S.W.2d 222, 224-26 (Mo.App. W.D. 1980) (approving Commission's use of the normalization of taxes which provided utility with substantial tax benefits of accelerated depreciation).

Comments Regarding Public Counsel's Application for Rehearing

10. **ROE and FAC.** Public Counsel fails to raise any new or noteworthy issues in its Application for Rehearing with regard to ROE and/or the FAC authorized for Empire. As such, Empire will make no further response on these issues.

11. **Tracking Mechanism.** Like the Industrials with regard to CWIP, Public Counsel makes only a conclusory statement with regard to the tracking mechanism for Empire's costs to comply with the Commission's newly-enacted vegetation management rules. Public Counsel alleges that a tracker "is clearly unlawful retroactive ratemaking" and cites a portion of the Court's decision in *State ex rel. Utility Consumers Council v. Public Service Commission*, 585 S.W.2d 41 (Mo. 1979). Public Counsel fails to provide any factual or legal support explaining why Public Counsel believes the authorized tracking mechanism is retroactive ratemaking, but Empire respectfully notes that the *Report and Order* does not authorize the collection at this time of any past revenues or expenses. The decision in this regard pertains to future expenditures.

12. Further, the Public Counsel asserted in a prior case that the PGA process constituted improper retroactive ratemaking, based upon the allegation that it improperly permits the rate charged to be changed to include past unrecovered fuel costs. The Court, of course, found this argument to be without merit. *State ex rel. Midwest Gas Users' Association v. Public Service Commission*, 976 S.W.2d 470, 477, 480-481 (Mo.App. W.D. 1998). The Court specifically held that, under Missouri law, although the Commission may not redetermine rates already established, the Commission may consider past excess recovery insofar as it is relevant to the determination of what rate is necessary to provide a just and reasonable return in the future and to avoid further excess recovery. *Id.* at 480-481 (internal citations omitted).

WHEREFORE**,** The Empire District Electric Company respectfully submits this response with regard to the Applications for Rehearing of Public Counsel and the Industrials**.**

Respectfully submitted,

____/s/ _____

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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 20th day of August, 2008.

____/s/ Diana C. Carter_____