

LAW OFFICES  
**BRYDON, SWEARENGEN & ENGLAND**

PROFESSIONAL CORPORATION

312 EAST CAPITOL AVENUE

P.O. BOX 456

JEFFERSON CITY, MISSOURI 65102-0456

TELEPHONE (573) 635-7166

FACSIMILE (573) 635-3847

E-MAIL: DCOOPER@BRYDONLAW.COM

DAVID V.G. BRYDON  
JAMES C. SWEARENGEN  
WILLIAM R. ENGLAND, III  
JOHNNY K. RICHARDSON  
GARY W. DUFFY  
PAUL A. BOUDREAU  
SONDRA B. MORGAN  
CHARLES E. SMARR

DEAN L. COOPER  
MARK G. ANDERSON  
GREGORY C. MITCHELL  
BRIAN T. MCCARTNEY  
BRIAN K. BOGARD  
DIANA C. FARR  
JANET E. WHEELER

OF COUNSEL  
RICHARD T. CIOTTONE

May 13, 2002

Mr. Dale Hardy Roberts  
Public Service Commission  
P. O. Box 360  
Jefferson City, MO 65102

**RE: Empire District Electric Company - Case No. ET-2002-1058**

Dear Mr. Roberts:

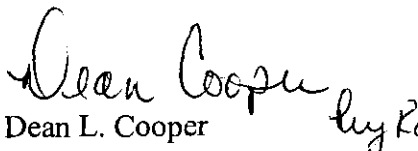
Enclosed for filing in the above-referenced proceeding please find an original and eight copies of a Response to Public Counsel's Motion of Reject Tariff. Please stamp the enclosed extra copy "filed" and return same to me.

If you have any questions concerning this matter, then please do not hesitate to contact me.  
Thank you for your attention to this matter.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND P.C.

By:

  
Dean L. Cooper

DLC/rhg

Enclosures

cc: Office of General Counsel  
Office of the Public Counsel

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

In the matter of The Empire District Electric	)	
Company's Proposed Changes to Extension	)	Case No. ET-2002-1058
Rules and Charges to New Customers.	)	

**RESPONSE TO PUBLIC COUNSEL'S  
MOTION TO REJECT TARIFF**

Comes Now The Empire District Electric Company ("Empire" or "Company"), and, in response to the Motion to Reject Tariff filed by the Office of the Public Counsel ("Public Counsel"), states as follows to the Missouri Public Service Commission ("Commission"):

**SUMMARY**

Public Counsel's Motion to Reject Tariff is in essence a "motion to dismiss" Empire's tariff filing. In this posture, the Commission must assume that all facts in support of Empire's tariff filing to be true. Because case law is clear that the single-issue rate making concept does not prohibit all changes in charges or rates outside a general rate case, the Commission should not reject Empire's tariff as it does not have sufficient facts to support such a conclusion.

**BACKGROUND**

1. On April 17, 2002<sup>1</sup>, Empire filed a proposed tariff revision concerning its line extension rule. The involved tariff sheets contained a proposed effective date of May 17, 2002. On May 6, 2002, the Public Counsel filed its Motion to Reject Tariff wherein it suggested the tariff be rejected on the theory that if it was allowed to become

---

<sup>1</sup> The Commission's Order Setting Time for Response erroneously indicated that the tariff had been filed on May 6, 2002.

effective without consideration within a full rate case, the action would constitute prohibited single-issue rate making.

2. This proposed change in Empire's line extension rule arose from the Company's review of its existing policy. As a result of this review, it was determined that Empire's tariff did not necessarily properly reflect the principle that costs should be paid by the cost causer. Accordingly, after discussing this matter with the Commission Staff, Empire through its filing, has proposed changes which would more closely assess costs on the persons and entities actually causing line extension costs. This is consistent with the Commission's pronouncement on line extension rules as recently as July 29, 1999, in Case No. ET-99-126, a case in which the Commission approved a line extension tariff outside the context of a general rate case.

### DISCUSSION

3. The Public Counsel seeks to have the Commission reject Empire's tariff filing out of hand. In essence, Public Counsel is raising a motion to dismiss for failure to state a claim. Therefore, the Commission must assume that all facts in support of Empire's tariff filing to be true:

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It ***assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.***<sup>2</sup>

---

<sup>2</sup> *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 464 (Mo. banc 2001) (emphasis added).

4. The Public Counsel summarizes its argument as follows:

The changes proposed by [Empire] would certainly increase the amounts charged to new customers requiring an extension for electric service. Furthermore, if the Commission approves this tariff, the increased charges would be approved in violation of the prohibition against single-issue rate making. *State ex rel. Utility Consumer Council of Missouri v. PSC*, 585 S.W.2d 41 (Mo.banc 1979).

5. The theory of single-issue rate making, however, has its limitations and merely stating that an action may "increase the amount charged to customers" does not necessarily invoke its prohibitions. Tariff sheets are changed almost daily by the Commission outside full blown rate cases. Many tariff sheets that do not purport to change the dollar amount of a charge, have at a minimum, an indirect revenue impact on either the utility or a customer. The permissibility of these changes is well established by custom and practice. In fact, historically line extension tariff changes have been accomplished in this fashion. (See *In the Matter of Tariff Sheets Filed by Missouri Public Service to Modify its Electric Line Extension Rule*, Case No. ET-99-126 (July 15, 1999); also see Empire's existing line extension rules which were changed in 1997 outside a rate case).

6. Even where tariff changes will directly impact rates to be paid by customers, the changes in certain instances have been deemed to not be prohibited by single-issue rate making. For example, the Court of Appeals recently upheld the validity of the Commission's use of the purchase gas adjustment ("PGA") clause, a process calling changes something less than a utility's full range of rates. *State ex rel. Midwest Gas Users' Association v. Public Service Commission*, 976 S.W.2d 470 (Mo.App W.D. 1998). In *Midwest Gas Users'*, the Court of Appeals rejected arguments

that the PGA process constituted single-issue rate making. In doing so, the Court stated in part as follows:

. . . the PSC is not required to treat all items of cost and expense in exactly the same way. The taxes to be passed on though the [Tax Adjustment Clause in *Hotel Continental v. Burton*, 334 S.W.2d 75 (Mo. 1960)] were different in kind from the other expenses of the utility and could not be offset by other savings. . . . By contrast, the [Fuel Adjustment Clause in *Utility Consumers' Council*] was just a formula stuck into the utilities' rate schedules. The companies could substitute new numbers in the formula and begin charging them without PSC oversight or approval.

*Midwest Gas Users* at p. 480.

7. The Court found that the PGA process was not single-issue rate making and could be treated differently from other components of the rate because "it is different." It was not a formula "stuck into posted rates," rather a specific rate posted in rates, and the PSC conducts a prudence review of the PGA and the actual cost adjustment.

8. Similarly, Empire proposes here that specific capital expenditure items associated with a unique event, line extension, be reviewed by the Commission and that the resulting rules for extension be posted in Empire's tariffs. Line extension policies are a unique aspect of the operations of an electric company. The policies do not so much set rates, as establish responsibilities for the cost of such extensions. The "charges" referred to by the Public Counsel do not have a return on equity built into them. The charges, as they exist today, and as they are proposed, merely apportion the COSTS of extension between the existing rate payers and those seeking an extension of the Company's lines.

9. This is the type of unique event which the courts have indicated is not

unlawful single-issue rate making. Line extension is an event which involves very specifically the apportionment of costs between the utility and its existing customers and the developer of land. The decision as to how to apportion these costs is very specific to this situation in terms of both the utility's costs to extend its line and the policy implications of the resulting apportionment. It does not concern the other issues, such as rate base, return, capital structure, etc., which would be relevant to Empire's base rates.

10. Moreover, it is difficult if not impossible to ascertain what import, if any, the new line extension rule will have on Empire's costs or revenues. For example, if it deters the hooking up of new customers, it will have a negative impact on the Company's customer growth and, thus, revenues. The most obvious change is that in Empire's next rate case its rate base should be less than it otherwise would be.<sup>3</sup>

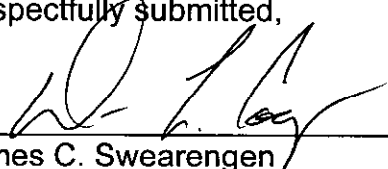
11. In this case, Empire believes all factors relevant to the line extension policy can be examined and assessed. However, even if the Commission thinks at this time single-issue rate making will be an issue, it cannot dismiss this matter based upon that conclusion until such time as it can make appropriate factual findings. At this stage of the litigation the Commission must assume facts in Empire's favor to be true. The Commission's choices are thus two fold – deny the Motion to Reject and allow the tariff to become effective; or, deny the Motion to Reject and suspend the tariff for further proceedings to assess the underlying facts.

---

<sup>3</sup> Empire's investment in lines for new customers becomes a part of its rate base. To the extent this investment is lessened through line extension rules, a change should be seen in the level of rate base in the first rate case "after" the new rules have been in effect.

**WHEREFORE,** Empire respectfully requests the Commission deny the Public Counsel's Motion to Reject Tariff.

Respectfully submitted,



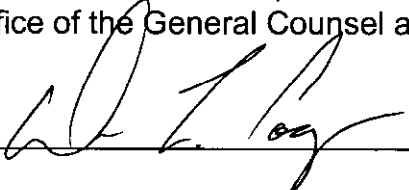
---

James C. Swearengen #21510  
Gary W. Duffy #24905  
Dean L. Cooper #36592  
Brydon, Swearengen & England P.C.  
P.O. Box 456  
Jefferson City, MO 65102  
Telephone (573) 635-7166  
Facsimile (573) 635-0427  
Email: [Duffy@brydonlaw.com](mailto:Duffy@brydonlaw.com)

ATTORNEYS FOR THE EMPIRE DISTRICT  
ELECTRIC COMPANY

**Certificate of Service**

The undersigned certifies that a true and correct copy of the foregoing document was either hand delivered or placed with the U.S. Postal Service, first class postage prepaid, this 13<sup>th</sup> day of May, 2002, to the Office of the General Counsel and the Office of the Public Counsel.



---