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

RESPONSE OF THE EMPIRE DISTRICT ELECTRIC COMPANY
TO MOTION IN LIMINE

The Empire District Electric Company ("Empire" or "Company"), by and through its undersigned counsel, hereby makes its response to the Motion In Limine that filed, Praxair, Inc., Explorer Pipeline, Inc., and General Mills, Inc. (collectively "Industrial Intervenors"), jointly filed on April 8, 2008. For the reasons stated below, Empire urges the Missouri Public Service Commission ("Commission") to deny that motion.

1. A motion in limine normally is used to exclude evidence that would be unfairly prejudicial or inflammatory in cases to be tried before a jury. *Roth v. Roth*, 176 S.W.2d 735, 738-39 (Mo. App. 2005). The propriety of a motion in limine "is to be judged by the admissibility or inadmissibility of the evidence excluded." *Guthrie v. Mo. Methodist Hosp.*, 706 S.W. 2d 938, 941 (Mo.App. 1986).

2. The Industrial Intervenors' motion satisfies none of the legal requirements for a motion in limine. The pending rate case will not be tried before a jury of impressionable laymen; instead, the regulators who will hear and decide this case are experienced, sophisticated, and knowledgeable fact-finders. The testimony sought to be excluded – the direct testimony of Dr. James H. Vander Weide, which was filed on October 1, 2007 – is not unfairly prejudicial or inflammatory. And there is no basis for the Commission to conclude that Dr. Vander Weide's testimony is inadmissible under the rules of evidence that apply to these types of proceedings.

3. The only argument the Industrial Intervenors make in support of their motion is that the return on equity that Dr. Vander Weide recommends in his direct testimony is outside a "zone of reasonableness," which they define as "100 basis points above or below the industry average" and which they claim the Commission used to determine Empire's return on equity in the Company's last two rate cases. But this argument fails to satisfy the legal requirements for a motion in limine. If, in fact, Dr. Vander Weide's testimony conflicts with a past Commission decision, that fact does not render that testimony inadmissible; at best, it speaks to the weight the Commission may choose to accord Dr. Vander Weide's recommendation. But testimony that may be unconvincing is not excludible through a motion in limine.

4. The Industrial Intervenors' motion also is afflicted with numerous other infirmities – both at law and as a matter of regulatory policy – that render it without merit. These infirmities include the following:

a. It is well established at law that the Commission is "not bound to the use of any single formula or combination of formulae in determining rates"[1]; therefore, even if the Commission has used the "zone of reasonableness in the past it is not legally required to do so in the present case;

b. The Commission never intended the "zone of reasonableness" test to be taken as an absolute rule for determining the appropriate return on equity for Empire or any other Missouri utility[2]; and

c. Even if the "zone of reasonableness" should or will be applied to determine the Company's return on equity in this case, the Commission cannot know, at this point in the proceeding, what the limits of that zone are because no testimony regarding an appropriate rate of return, in general, or the "zone of reasonableness," in particular, has yet been received into evidence.

---

[1] *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 602 (1944).

[2] In its May 17, 2007, *Report and Order* in Case No. ER-2007-0004, the Commission stated, at page 57: "The zone or reasonableness is simply a tool to help the Commission to evaluate the recommendations offered by various rate of return experts. *It should not be taken as an absolute rule that would preclude consideration of recommendations that fall outside that zone.*" (emphasis added)

5. If the Commission chooses to grant this motion and establish as the law of this case that no witness may present testimony that conflicts with a past Commission decision, Dr. Vander Weide will not be the only witness whose testimony must be excluded. One other such witnesses is Maurice Brubaker, whose testimony on behalf of the Industrial Intervenors regarding Empire's proposed fuel adjustment clause conflicts with the Commission's decision in Case No. ER-2007-0004. And if, as a result of this motion, Mr. Brubaker's testimony is excluded, that result most certainly would qualify as an example of the operation of the "law of unintended consequences."

WHEREFORE, Empire asks the Commission to deny the Industrial Intervenors' motion in limine. As argued *supra*, that motion is contrary to the law governing motions in limine, contrary to past decisions of the Commission that clearly state how the "zone of reasonableness" should and will be used to determine a utility's return on equity, and contrary to principles of sound regulatory policy. Moreover, there are no facts that the Commission can rely on to determine the bounds of the "zone of reasonableness" or to conclude that Dr. Vander Weide's recommended return on equity falls outside those bounds.

Respectfully submitted,

BRYDON, SWEARENGEN & ENGLAND, P.C.
James C. Swearengen MBE#21510
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 a true and correct copy of the above and foregoing document was sent by electronic mail, on this 17th day of April, 2008, to all parties of record.

L. Russell Mitten