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May 25, 2001

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FILED²
MAY 25 2001
Missouri Public
Service Commission

RE: Case No. ER-2001-299 – In the Matter of The Empire District Electric Company's tariff sheets designed to implement a general rate increase for retail electric service provided to customers in the Missouri service area of the Company

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and eight (8) conformed copies of a **STAFF MOTION FOR LEAVE FOR NONUNANIMOUS STIPULATION AND AGREEMENT REGARDING FUEL AND PURCHASE POWER EXPENSE TO BE RECEIVED FOR FILING AS JOINT RECOMMENDATION AND FOR LEAVE FOR STAFF TESTIMONY TO BE RECEIVED FOR FILING AS STAFF TESTIMONY IN SUPPORT OF JOINT RECOMMENDATION.**

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,

Steven Dottheim
Chief Deputy General Counsel
(573) 751-7489
(573) 751-9285 (Fax)

Enclosure
cc: Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

FILED²
MAY 25 2001
Missouri Public
Service Commission

In the matter of The Empire District Electric)
Company's tariff sheets designed to implement a)
general rate increase for retail electric service)
provided to customers in the Missouri service area)
of the Company)

Case No. ER-2001-299

**STAFF MOTION FOR LEAVE FOR NONUNANIMOUS STIPULATION
AND AGREEMENT REGARDING FUEL AND PURCHASE POWER
EXPENSE TO BE RECEIVED FOR FILING AS JOINT RECOMMENDATION
AND FOR LEAVE FOR STAFF TESTIMONY TO BE RECEIVED FOR FILING
AS STAFF TESTIMONY IN SUPPORT OF JOINT RECOMMENDATION**

Comes now the Staff of the Missouri Public Service Commission (Staff) in response to the Commission's May 24, 2001 Order Directing Filing and requests leave for the nonunanimous Stipulation And Agreement Regarding Fuel And Purchase Power Expense to be received for filing as a Joint Recommendation and leave for Staff testimony filed on May 22, 2001 to be received for filing as Staff testimony in support of the Joint Recommendation. In support thereof the Staff states as follows:

1. The Staff must first address the item "Legislation Affecting Empire District Electric Company" found at page 6 of the Commission's Order Directing Filing. The Commission has directed that the parties shall advise the Commission as to the effect, if any, of the legislation SCS/SB 387 on the instant case. The Staff first would direct the Commission to paragraph 9 in the nonunanimous Stipulation And Agreement filed by the Staff, The Empire District Electric Company (EDE) and the Office of the Public Counsel (Public Counsel) on May 14, 2001, which is now a "Joint Recommendation" and is now the Staff's position on fuel and purchase power expense. Paragraph 9 states as follows:

In consideration of the implementation of the IEC in this proceeding, and coextensive with the duration of the IEC, **Empire agrees to voluntarily forego any right it may have to request the use of or to use any other procedure or remedy, available under current Missouri statute or subsequently enacted Missouri statute, in the form of a fuel adjustment clause, a natural gas cost recovery mechanism, or other energy related adjustment mechanism to which Empire would otherwise be entitled.** This temporary and limited waiver by Empire shall not be construed to prevent Empire from filing a general rate case during the period the IEC is in use, or from seeking what is commonly referred to as "interim" or "emergency" relief to increase its Missouri rates, if in the judgment of Empire's management, such a remedy is appropriate due to extraordinary or unanticipated circumstances, such as, but not limited to, the failure of a major power plant. By approving this Agreement, the Commission is not waiving the right to determine whether Empire qualifies for "interim" or "emergency" rate relief and no party shall be deemed to have waived the right to contest whether Empire should receive such relief.

(Emphasis added).

The Staff would note that SCS/SB 387 has yet to become law. It has not been signed by the Governor, and although the Staff does not mean to indicate that it has any special knowledge, there may be a possibility that it will not be signed by the Governor. The Staff believes that SCS/SB 387 will be difficult to implement without creating an incentive for EDE to operate inefficiently. The Staff participated in the development of the nonunanimous Stipulation And Agreement Regarding Fuel And Purchase Power Expense/"Joint Recommendation" as the best approach to addressing the EDE fuel and purchase power situation. The Staff believes that the nonunanimous Stipulation And Agreement Regarding Fuel And Purchase Power Expense/"Joint Recommendation" procedure is a much superior approach to the method created by SCS/SB 387.

It is not the Staff's understanding that the Commission is prohibiting consideration in this proceeding of the nonunanimous Stipulation And Agreement Regarding Fuel And Purchase Power Expense as a "Joint Recommendation" which was filed on May 14, 2001. To prohibit consideration in this proceeding of said nonunanimous Stipulation And Agreement, as for

example a "Joint Recommendation"/"change of position," would deprive parties of the opportunity to obtain approval of a specific procedure for addressing natural gas, other fuel and purchase power expense in a manner deemed, by at least some parties, to be a viable alternative to the methodology of SCS/SB 387. As stated above, the Staff believes that the nonunanimous Stipulation And Agreement Regarding Fuel And Purchase Power Expense/"Joint Recommendation" procedure is much superior to SCS/SB 387.

2. The Commission's Order Directing Filing reflects on page 1 that (a) on May 14, 2001, the Staff, EDE and Public Counsel filed a nonunanimous Stipulation And Agreement on Fuel And Purchased Power Expense; (b) on May 15, 2001, the Staff filed a proposed procedural schedule respecting the nonunanimous Stipulation And Agreement Regarding Fuel And Purchased Power Expense; (c) on May 18, 2001, Praxair Inc. (Praxair) filed a letter opposing the nonunanimous Stipulation And Agreement and requesting a hearing, and on May 19, 2001, filed a correction to its letter of May 18, 2001; and (d) on May 22, 2001 EDE and Public Counsel filed their joint Motion To Schedule Hearing On Fuel And Purchased Power Issues.

3. The Commission's Order Directing Filing states on page 4 that the joint motion filed by EDE and Public Counsel on May 22, 2001 must be denied "for the Commission cannot hold a hearing on the nonunanimous Stipulation and Agreement objected to by Praxair" and that the "Staff's proposed procedural schedule regarding the nonunanimous Stipulation and Agreement is a dead issue, for the Commission cannot hold any proceedings on it."

4. The Commission's Order Directing Filing does not reflect that the Staff and Public Counsel on May 22, 2001 filed testimony in support of the nonunanimous Stipulation And Agreement/"Joint Recommendation."

5. The Commission's Order Directing Filing states on page 3 that "[b]eing nonunanimous, the proposed stipulation and agreement is no more than the joint recommendation of the parties that signed it." Therefore, there is a "Joint Recommendation" of the Staff, EDE and Public Counsel pending before the Commission supported by the testimony filed by the Staff and Public Counsel on May 22, 2001. Also, the surrebuttal testimony of Cary G. Featherstone filed on May 17, 2001, in accordance with the Commission's January 4, 2001 Order On Procedural Schedule, addresses at pages 25 – 29 the nonunanimous Stipulation And Agreement/"Joint Recommendation" filed on May 14, 2001.

5. The Staff notes the Commission's statement at page 5 of its Order Directing Filing that "the Commission has explained that it considers an objected-to nonunanimous stipulation and agreement 'to be merely a change of position by the signatory parties from the original positions to the stipulated position.' **In the Matter of the Application of Empire District Electric Company**, Case No. EA-99-172 (Report and Order, issued December 7, 1999); **In the Matter of Missouri Public Service**, 2 Mo.P.S.C.3d 221, 223 (1993)." The first case cited by the Commission, Case No. EA-99-172, was an application for a certificate of public convenience and necessity, whereas the second case cited by the Commission, 2 Mo.P.S.C.3d 221 (1993), was a general rate increase case. At the page in its Order Granting Rehearing And Clarification in Case No. ER-93-37 cited by the Commission in its May 24, 2001 Order Directing Filing, the Commission set out a procedure to be followed in Case No. ER-93-37:

This order should clarify the procedure by which a nonunanimous stipulation is considered. When a nonunanimous stipulation is filed, the nonsignatory party must notify the Commission and the stipulating parties of the specific issues which it is disputing and must adduce evidence or testimony on those specific issues. The stipulating parties must likewise file evidence and testimony supporting settlement of the disputed issues.

The Commission considers a nonunanimous stipulation as merely a change of position by the signatory parties from their original positions to the stipulated position. The new position must still be supported . . .

6. Although the Commission in its May 24, 2001 Order Directing Filing does not quote the first paragraph above from Case No. ER-93-37, the Commission does quote from Case No. EA-99-172 in its Order Directing Filing. In said case EDE applied for a certificate of public convenience and necessity authorizing it to construct, install, own, operate, control, manage and maintain an electric transmission and distribution system to provide electric service in portions of Greene County, Missouri. In a January 13, 2001, Order Adopting Procedural Schedule, the Commission adopted the procedural schedule proposed by the parties: March 1 direct testimony to be filed by EDE, May 3 rebuttal testimony to be filed by all other parties, and July 1 surrebuttal or cross-surrebuttal testimony to be filed.

In a June 30, 1999 Order Modifying Procedural Schedule in Case No. EA-99-172, the Commission related that various parties filed a nonunanimous Stipulation And Agreement regarding the issues in the case on June 25. The Commission explained that the City of Springfield, by and through the Board of Public Utilities (City Utilities) and Public Counsel were not parties to the nonunanimous Stipulation And Agreement, and on June 29, City Utilities filed a request for hearing and for extension of time to at least July 8 to file cross-surrebuttal testimony responsive to the nonunanimous Stipulation And Agreement. The Commission in its June 30 Order Modifying Procedural Schedule, moved the date for the filing of surrebuttal or cross-surrebuttal testimony to July 8. The Commission did not grant City Utilities' request for an extension of time greater than to July 8 because to do so would have required the Commission to extend other procedural dates that had already been set.

As previously noted, a paragraph from the December 7, 1999 Report And Order in Case No. EA-99-172 is quoted on page 5 of the May 24, 2001 Order Directing Filing in the instant case. The paragraph in the December 7, 1999 Report And Order which precedes the paragraph quoted at page 5 of this Commission's May 24, 2001 Order Directing Filing follows:

City Utilities did not join in the stipulation and agreement and indeed strenuously opposed its provisions. Therefore, the Commission will consider the non-unanimous stipulation and agreement to be merely a change of position by the signatory parties from their original positions to the stipulated position. *See, In the Matter of Missouri Public Service*, 2 MPSC 3rd 221, 223 (1993). In this case, the effect of the Agreement is to amend Empire's application to change the areas in which it is seeking certification. The Agreement does not change Empire's obligation to qualify for the certificates of convenience and necessity that it seeks.

The last paragraph in the Commission's conclusions of law section in the Case No. EA-99-172 Report And Order states as follows:

Based upon the Commission's review of the applicable law, Empire's Application as modified by the non-unanimous stipulation and agreement, and its findings of fact, the Commission concludes that Empire's Application should be granted.

7. Starting with the last word on page 2 and continuing through the first several lines on page 3 of the Commission's May 24, 2001 Order Directing Filing, the Commission states that "[i]n fact, the hearing cannot be limited in scope to the nonunanimous stipulation and agreement. **State ex rel. Fischer v. Public Service Commission**, 645 S.W.2d 39 (Mo. App., W.D. 1982), *cert. den.*, 464 U.S. 819, 104 S.Ct. 81, 78 L.Ed.2d 91 (1983)." It has not been the intention of the Staff to suggest to the Commission that during the evidentiary hearings scheduled for May 28 to June 8, the Commission, on the fuel and purchase power expense issue, should hold hearings solely on the nonunanimous Stipulation And Agreement Regarding Fuel And Purchase Power filed on May 14, 2001. The Staff has sought to indicate that the hearing to be held should be on the nonunanimous Stipulation And Agreement/"Joint Recommendation" and all issues relating to fuel and purchase power expense. The Staff is not contending that the Commission is precluded

from approving anything in this case but the nonunanimous Stipulation And Agreement/"Joint Recommendation."

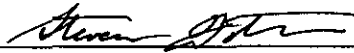
The Court stated in *Fischer* that "the Commission ruled prior to the hearing that the only issue that it would consider was whether or not the stipulation and agreement would be accepted or rejected, and a full and contested hearing would be held only in the event the Commission rejected the agreement." *Id.* at 41. The Court found that procedure to be a violation of due process. The Staff is not proposing that this Commission follow the procedure that the Western District Court of Appeals found to be unlawful in *Fischer*. Also, the Staff notes that it does not read the Court of Appeal's decision in the *Fischer* case to preclude the Commission from considering nonunanimous Stipulations And Agreements/"Joint Recommendations."

8. The testimony filed by the Staff on May 22, 2001 was denominated by the Staff as testimony in support of the nonunanimous Stipulation And Agreement. The Staff hereby asks leave of the Commission for this testimony be deemed to be testimony in support of the "Joint Recommendation." Should the Commission desire that the Staff refile this testimony with references to the "Joint Recommendation" substituted for references to the nonunanimous Stipulation And Agreement, the Staff will do so. The Staff would not make any changes to the substance of the testimony, should the Commission order this testimony to be refiled.

Wherefore the Staff requests leave for the nonunanimous Stipulation And Agreement Regarding Fuel And Purchase Power Expense to be received for filing as a Joint Recommendation and leave for Staff testimony filed on May 24, 2001 to be received for filing as Staff testimony in support of the Joint Recommendation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 25th day of May 2001.



**Service List for
Case No. ER-2001-299
Verified: May 22, 2001 (ccl)**

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