BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of a Proposed Rule Regarding Electric Utility Fuel and Purchased Power Cost Recovery Mechanisms.	)))	**Case No. EX-2006-0472**

COMMENTS OF
THE EMPIRE DISTRICT ELECTRIC COMPANY

Pursuant to the Notice published in the July 17, 2006, edition of the *Missouri Register*, The Empire District Electric Company ("Empire" or "Company"), by its undersigned attorneys, hereby submits the following comments to proposed rule 4 CSR 240-20.090.[1]

Through its enactment of Senate Bill No. 179, since codified as Section 386.266, RSMo, the Missouri Legislature conferred on the Missouri Public Service Commission ("Commission") the authority to entertain and approve requests by jurisdictional gas, electric, and water utilities for mechanisms to periodically adjust rates outside of general rate proceedings to reflect increases and decreases in fuel and purchased power costs. While subsection 9 of the statute authorizes the Commission to promulgate such rules as it deems necessary to govern the process by which utilities apply for energy cost recovery mechanisms, the subsection also specifically states that "[a]ny electrical, gas, or water corporation may apply for any adjustment mechanism under this section whether or not the commission has promulgated any such rules."

[1] Empire submits these comments without prejudice to its right to assert, at some later date, that Section 386.266, RSMo, authorizes the Commission to approve fuel and purchased power cost recovery mechanisms without first having adopted rules governing such mechanisms.

In subsection 16 of its proposed rule, the Commission included procedures that were intended to govern utilities' applications for energy cost recovery mechanisms during the "transitional period" before final rules are adopted. Empire's comments will focus on those transitional procedures and the changes to those procedures that the Company believes: 1) are necessary to bring the transitional procedures into compliance with Section 386.266(9), and 2) are desirable to assure that the Commission will fairly hear and adjudicate requests for energy cost recovery mechanisms that have been or will be filed prior to the adoption of final rules.

As noted earlier, Section 386.266, RSMo, authorizes any jurisdictional gas, electric, or water utility to request an energy cost recovery mechanism at any time after the effective date of that statute whether or not the Commission has promulgated final rules governing such mechanisms. As of the date of these comments, three Missouri electric utilities – Empire, AmerenUE, and Aquila – have included requests for energy cost recovery mechanisms as part of their respective general rate case filings and each of those requests is pending.

The proposed transitional procedures distinguish between requests for energy cost recovery mechanisms that are filed thirty days or more after the Commission issued a notice of proposed rulemaking and those that were filed earlier, and appear to apply different filing rules depending on when a request is filed. Requests filed thirty days or more after the Commission issued its notice of proposed rulemaking must include "rate schedules, testimony, [sic] other information required by 4 CSR 240-3.161(2) and 4 CSR 240-20.090(2) and (9)

...." By comparison, there appear to be no specific filing requirements for requests made prior to the notice of proposed rulemaking or less than thirty days thereafter. Those requests must merely be made "as part of [the utility's] general rate proceeding filing."

There does not appear to be any legal basis or practical reason for treating requests for energy adjustment mechanisms differently based on when they were filed, so Empire recommends that this distinction be eliminated in the Commission's final rules. Regardless of when the request is filed, it will have to be conformed to the final rules as soon as those rules are adopted. And it seems of little value to require that certain filings be made in accordance with portions of proposed rules – which may or may not be finally adopted – while exempting other filings from that requirement. As the Commission is aware, questions have arisen in two of the three pending rate cases that include requests for energy cost recovery mechanisms as to whether the transitional procedures included in the proposed rules can or should govern those requests. At least some of the questions that have been raised in those cases are attributable to confusion about how utilities are to file requests for energy cost recovery mechanisms prior to the adoption of final rules and what information is to be included as part of those filings.

Empire believes that the best approach is for the Commission's final rule to include a requirement that all requests for energy cost recovery mechanisms that are pending at the time the rules are adopted, regardless of when they were filed, be amended to conform to the final rule within a prescribed, reasonable

period of time. The currently proposed rules require such amendments to be filed within fifteen (15) days after the Commission issues an order adopting final rules. Empire believes that this time period is probably sufficient in most cases, but suggests that the Commission's final rules also include provisions for seeking a waiver of the filing deadline if, for good cause shown, a utility requires more time to make its conforming filing.

The currently proposed rules include language in 4 CSR 240-20.090(16)(C) that prohibits a utility from filing an amendment to conform its request to the Commission's final rules if the final rules are adopted more than one hundred sixty-five (165) days after the date of the rate case filing that includes the utility's request for an energy cost recovery mechanism.[2] Empire strongly objects to this limitation and believes it should be eliminated from the final rules. Prohibiting a utility from amending its proposal for an energy cost recovery mechanism beyond 165 days after the date of its rate case filing is both arbitrary and contrary to the legislative intent reflected in Section 386.266.

Senate Bill 179 was enacted to give Missouri utilities the legal right to seek automatic energy cost recovery mechanisms – a right they had been denied since the Missouri Supreme Court's decision in *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 SW2d 41 (1979). To assure that final rules implementing the statute were in place before or shortly

[2] The proposed rules include a provision for a waiver of the 165-day limitation, but the waiver request must also be made within 165 days from the date on which the utility filed its rate case. This putative remedy is of no value to Empire, however, because by the time the Commission adopts final rules more than 165 days will have passed since the Company filed its rate case.

after it took effect on January 1, 2006, Senate Bill 179 called upon the Commission to initiate rulemaking prior to August 28, 2005. And, to assure that companies were able to quickly avail themselves of the rights the statute conferred, the bill also specifically authorized utilities to file requests for energy cost recovery mechanisms before the Commission promulgated its final rules.

Empire and other Missouri utilities should not be penalized – and the clear intent of the legislature should not be thwarted – because they filed rate cases that included requests for energy cost recovery mechanisms before the Commission adopted final rules. But that will be the result unless the Commission eliminates from its final rules the 165-day limitation on a utility's ability to file conforming amendments. Instead of attempting to construct a one-size-fits-all rule barring conforming amendments after a certain date, the proposed rule should be amended to allow the Commission to make the determination of whether there is sufficient time to consider conforming amendments on a case by case basis. The Commission will then be able to consider a variety of issues that bear on the issue of whether sufficient time exists to consider a utility's request for an energy cost recovery mechanism but that will vary from case to case. These include: the scope of amendments required to conform the request to the final rules; the number of contested issues in the rate case; and the amount of time between the adoption of final rules and the operation of law date and how this will affect the parties' ability to conduct discovery and present their positions on the utility's request. It will also assure that the due process rights of the parties are protected by affording them the

opportunity to be heard on the issue of whether sufficient time remains in a case to fully and fairly consider the amended request.

For the reasons previously stated, Empire requests that the Commission amend its final rule governing the filing of energy cost recovery mechanisms to conform to these comments.

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