

**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)	<u>Case No. ER-2008-0093</u>
Service Provided to Customers in the Missouri)	
Service Area of the Company.)	

PUBLIC COUNSEL’S RESPONSE TO MOTION TO STRIKE

COMES NOW the Office of the Public Counsel and for its Response to Motion to Strike states as follows:

1. On February 22, 2008, Public Counsel filed the Direct Testimony (Revenue Requirement) of Barbara Meisenheimer. On April 9, the Commission issued an order establishing May 6 as the deadline to file objections to prefiled testimony, and May 9 as the deadline to reply to such motions. On May 6, The Empire District Electric Company filed a motion to strike most of Ms. Meisenheimer's Direct Testimony. Pursuant to the Commission's April 9 order, Public Counsel now files this response in opposition to Empire's motion to strike.

2. Empire's motion to strike Ms. Meisenheimer's Direct Testimony reads very much like a pleading it filed in this case on May 5 entitled “Motion for Clarification, or, in the Alternative, Motion for Reconsideration.” The gist of Empire's motion to strike is that, according to its interpretation of the Report and Order issued in Case No. ER-2006-0315, the Commission has destroyed the Stipulation and Agreement in Case No. ER-2004-0570 and released Empire from its obligations there under. Ms. Meisenheimer's testimony is based upon a different interpretation of the result of the various orders in ER-2006-0315: that the Commission did not validly approve any tariffs to replace the compliance tariffs approved at the end of Case

No. ER-2004-0570 until after Empire filed this case, and that the obligations from the Stipulation and Agreement in ER-2004-0570 (as embodied in the tariffs) still applied at the time this case was filed. If Ms. Meisenheimer's interpretation is correct, then her testimony about Empire's obligations under the Stipulation and Agreement in ER-2004-0570 is entirely germane to the issue of how the Commission should address fuel costs and a fuel adjustment clause in this case.

3. In the near future, the Missouri Supreme Court is likely to shed some light on the issue. At the very least, it is likely to rule one way or the other on the pending petition for a writ of mandamus in Case No. SC89176. If Public Counsel prevails in the Supreme Court mandamus case, the Commission will likely need to address the issue of the applicability of the Stipulation and Agreement in Case No. ER-2004-0570 to the filing in this case – the very issue that Ms. Meisenheimer addresses in her testimony that Empire seeks to strike. Even if Public Counsel does not prevail in the Supreme Court, the issue of the applicability of the Stipulation and Agreement in Case No. ER-2004-0570 may not be entirely clear, and the Commission may very well need to address it in this case.

4. Striking Ms. Meisenheimer's testimony will serve no useful purpose. Empire has already filed responsive testimony, and the schedule of witnesses is certainly not rushed. If the Commission does not strike Ms. Meisenheimer's testimony, and court rulings confirm Empire's position, little will have been lost except perhaps a little time posing a few cross-examination questions. If the Commission does strike Ms. Meisenheimer's testimony, and court rulings do not confirm Empire's position, or if they do not clarify the situation, the Commission may need to reopen the record to take evidence on the applicability of the Stipulation and Agreement in Case No. ER-2004-0570 and the Report and Order in Case No. ER-2006-0315. There is much to be lost and little to be gained by striking the testimony at this point.

5. Empire asserts two bases for striking Ms. Meisenheimer's testimony: 1) that she is wrong about certain facts; and 2) that her testimony constitutes an impermissible collateral attack on the Commission's Report and Order in Case No. ER-2006-0315. As discussed above, it is certainly not clear that she is wrong on the facts. Even if she is, being wrong does not support striking testimony. The Commission should not decide who is right and who is wrong on the facts until it creates an evidentiary record. Striking testimony because one party asserts another party is wrong on the facts would certainly streamline the case, but it would deprive one party of the due process of law.

6. As to Empire's collateral attack theory, it cites no cases¹ to support the notion that taking a position in a subsequent case consistent with pending applications for rehearing in a prior case is a collateral attack on an order that is not yet final. Indeed, the statute that Empire cites (Section 386.550 RSMo 2000) specifically refers to “orders and decisions of the commission which have become final....” The Commission's Report and Order in ER-2006-0315, which Empire alleges is the subject of Ms. Meisenheimer's impermissible collateral attack, is not yet final. Because the Commission still can – and should – reconsider its decision in that case, the not-yet-final Report and Order is not immune from parties taking contrary positions in this case.

WHEREFORE, Public Counsel respectfully request that the Commission deny Empire's motion to strike portions of the Direct Testimony (Revenue Requirement) of Public Counsel witness Barbara Meisenheimer.

¹ The cases cited by Empire deal with orders of the Commission which had become final and were later challenged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the following this 9th day of May 2008.

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