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**

APPLICATION FOR REHEARING

COMES NOW the Office of the Public Counsel and for its Application for Rehearing states that the Commission's July 30, 2008 Report and Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is on record, is arbitrary and capricious, and is an abuse of discretion for the following reasons:

1. The Commission erred in finding that Empire was free to request a fuel adjustment clause in this case despite Empire's agreement in the Stipulation and Agreement in Case No. ER-2004-0570 that it would not seek a fuel adjustment clause while the Interim Energy Charge mechanism established in that case was still in effect.

In Empire's last rate case, Case No. ER-2006-0315, in an order entitled "Order Clarifying Continued Applicability of the Interim Energy Charge," issued May 2, 2006, the Commission stated that: "The Commission clarifies that The Empire District Electric Company, pursuant to the Stipulation and Agreement [in Case No. ER-2004-0570], may not make any request for an energy cost recovery rider while the existing interim energy charge is effect."

On October 1, 2007, when Empire filed this case, the only lawfully-approved tariffs for Empire were those filed in compliance with the Report and Order in Case No. ER-2004-0570 and approved by the Commission. As a result, the existing interim energy charge embodied in those tariffs was in effect when this case was filed, and Empire was prohibited from requesting a fuel adjustment clause in this case.

2. The Commission erred in finding that "Of the states that allow fuel adjustment clauses, the vast majority of those states allow 100 percent pass-through of fuel costs." The record simply does not support such a finding. The Commission cites to Overcast Rebuttal, Exhibit 10, Schedule HEO-1. But this schedule, prepared by Empire witness Overcast, does not support this finding. Schedule HEO-1 was not intended to – and does not – illustrate all of the states that allow fuel adjustment clauses. Nor does it show that, of those states that it mentions, a majority allow 100 percent pass-through. At most, it shows that a narrow majority of the states in which a select group of utilities operates allows some utilities to use some sort of a fuel adjustment clause, and it shows that some of those states (Missouri, Idaho, and New Mexico) allow some utilities to use a fuel adjustment clause but do not allow other utilities to use a fuel adjustment clause. The Commission also cites to Exhibit 32. Exhibit 32 was prepared by Industrial Intervenors witness Brubaker at the request of Empire's counsel. The exchange in which Empire requested the information was as follows:

> Q. [By Empire] Okay. You also indicated that **you were aware of** several commissions that had imposed a requirement that companies collect less than 100 percent of their fuel and purchased power costs through their fuel adjustment clause?
> A. [By witness Brubaker] That there was a sharing, yes.
> Q. Would you be willing to provide **a list of those utilities that you're aware of**?
> A. Sure.
> (Transcript, page 787, emphasis added)

The fact that Mr. Brubaker was aware of six utilities in four different states that use a sharing mechanism certainly does not show that the vast majority of states allow 100 percent pass-through. Neither Exhibit 32, nor Schedule HEO-1, nor any other evidence in the record supports the Commission finding.

3. The Commission bases its rejection of the pass-through percentages proposed by Staff and Public Counsel **entirely** on a purported finding that fuel costs are expected to rapidly rise. The Commission twice refers to the "expected" rise in fuel costs on page 46. But the Commission does not cite to the record for any evidence on which it relies to conclude that fuel costs are expected to rapidly rise during the period in which rates set in this case are to be in effect.

4. The Commission erred in concluding that a 60% pass-through would discourage investment. The Commission cites Staff testimony that Empire shareholders had to absorb $85.5 million in fuel and purchased power costs over a four year period from 2002 to 2006. There is no evidence in the record that Empire was unable to attract investors during that period, and Empire remained investment grade throughout. The Commission makes no findings of fact to support its conclusion that a 60% pass-through would discourage investment.

5. The Commission erred in failing to make adequate findings of fact to support its conclusion that Empire should be allowed a 10.8% return on equity. This failure is particularly acute with regard to "basic facts" that would allow a reader (or a reviewing court) to understand how the Commission arrived at that exact number from the entire record in the case. There is no way that a reader can glean from the Report and Order how the Commission arrived at that particular number.

6. The Commission erred in establishing a "tracker" for vegetation management costs to retroactively true-up past revenues and expenses. This is clearly unlawful retroactive ratemaking. The seminal UCCM[1] decision defines retroactive ratemaking as redetermining rates already established and paid:

> However, to direct the commission to determine what a reasonable rate would have been and to require a credit or refund of any amount collected in excess of this amount would be retroactive ratemaking. The commission has the authority to determine the rate to be charged, § 393.270. In so determining it may consider past excess recovery insofar as this is relevant to its determination of what rate is necessary to provide a just and reasonable return in the future, and so avoid further excess recovery, see State ex rel. General Telephone Co. of the Midwest v. Public Service Comm'n, 537 S.W.2d 655 (Mo. App. 1976). It may not, however, redetermine rates already established and paid without depriving the utility (or the consumer if the rates were originally too low) of his property without due process. See Arizona Grocery Co. v. Atchison, Topeka and Santa Fe R. Co., 284 U.S. 370, 389-90, 76 L. Ed. 348, 52 S. Ct. 183 (1932); Board of Public Utility Commissioners v. New York Telephone Co., 271 U.S. 23, 31, 70 L. Ed. 808, 46 S. Ct. 363 (1926); Lightfoot v. City of Springfield, 361 Mo. 659, 236 S.W.2d 348, 353 (1951).

WHEREFORE, Public Counsel respectfully requests that the Commission grant rehearing of its July 30, 2008, Report and Order.

Respectfully submitted,

OFFICE OF THE Public Counsel

/s/ Lewis R. Mills, Jr.

By:_____

Lewis R. Mills, Jr. (#35275)
Public Counsel
P O Box 2230
Jefferson City, MO 65102
(573) 751-1304
(573) 751-5562 FAX
lewis.mills@ded.mo.gov

[1] State ex rel. Utility Consumers Council, Inc. v. Public Service Com., 585 S.W.2d 41, 58 (Mo. 1979)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the following this 8th day of August 2008:

Office of General Counsel
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
GenCounsel@psc.mo.gov

Steven Reed
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
steven.reed@psc.mo.gov

Dean L Cooper
The Empire District Electric Company
312 East Capitol
P.O. Box 456
Jefferson City, MO 65102
dcooper@brydonlaw.com

Diana C Carter
The Empire District Electric Company
312 E. Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
DCarter@brydonlaw.com

James C Swearengen
The Empire District Electric Company
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
LRackers@brydonlaw.com

Russell L Mitten
The Empire District Electric Company
312 E. Capitol Ave
P.O. Box 456
Jefferson City, MO 65102
rmitten@brydonlaw.com

David Woodsmall
Explorer Pipeline
428 E. Capitol Ave., Suite 300
Jefferson City, MO 65102
dwoodsmall@fcplaw.com

Stuart Conrad
Explorer Pipeline
3100 Broadway, Suite 1209
Kansas City, MO 64111
stucon@fcplaw.com

David Woodsmall
General Mills, Inc.
428 E. Capitol Ave., Suite 300
Jefferson City, MO 65102
dwoodsmall@fcplaw.com

Stuart Conrad
General Mills, Inc.
3100 Broadway, Suite 1209
Kansas City, MO 64111
stucon@fcplaw.com

David Woodsmall
Praxair, Inc.
428 E. Capitol Ave., Suite 300
Jefferson City, MO 65102
dwoodsmall@fcplaw.com

Stuart Conrad
Praxair, Inc.
3100 Broadway, Suite 1209
Kansas City, MO 64111
stucon@fcplaw.com

Shelley A Woods
Missouri Department of Natural Resources
P.O. Box 899
Jefferson City, MO 65102-0899
shelley.woods@ago.mo.gov

/s/ Lewis R. Mills, Jr.