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-2006-0315** Tariff File No. YE-2006-0597

APPLICATION FOR REHEARING

COMES NOW the Office of the Public Counsel and for its Application for Rehearing states as follows:

1. On December 21, 2006 the Commission issued its Report and Order in this case. That order is unjust, unreasonable, arbitrary and capricious, and unlawful for the following reasons. The Report and Order is unlawful, unjust, unreasonable and unconstitutional in that it completely fails to separately and adequately identify conclusions of law and findings of fact. The Report and Order is unlawful, unjust, and unreasonable in that it is not based upon competent and substantial evidence of record.

2. The termination of the Interim Energy Charge (IEC)

The Commission's unilateral termination of the IEC is not supported by competent and substantial evidence that it is contrary and detrimental to the public interest and the Report and Order lacks sufficient findings and competent and substantial evidentiary support in the record that the IEC no longer promotes and is no longer consistent with the public interest such that the IEC should be terminated. The Commission did not make clear and unequivocal factual findings of the basic facts or make legal conclusions consistent with the law necessary to authorize and support

termination. The essential consideration the Commission must make in determining whether its action or decision is contrary or consistent with the public interest is whether it provides sufficient benefit and protection for the ratepayer. The Report and Order lacks this evidence and does not make such a finding. In fact, the decision is based upon the impact on the company. The Commission failed to make an essential finding of fact and the evidence does not demonstrate that the IEC deprived or will deprive the company with the opportunity for a reasonable return on its investment or other wise is harmed under Bluefield and Hope.

The Commission sidestepped the question and failed to address and make findings of whether the terms of the IEC stipulation and agreement itself allows The Empire District Electric Company to seek early termination of the agreement and instead it focused on the Commission's authority to terminate the agreement if the Commission determines that it is no longer in the public interest. While the Commission's unilateral termination of a contract to which it is not a party may have been easier than applying the terms of the contract, this termination decision that is unsupported by any evidence and lacks factual findings to support it appears to be results-driven than evidence-based and therefore is unreasonable and arbitrary. It is dumbfounding that the Commission would order this termination in apparent obliviousness to the adverse repercussions on the settlement of rate cases without the expense, time, and delay of a full contested hearing and the rights of the parties to rely upon continuation of settlement agreements over the life of the agreement in absence of compelling reasons for termination and clear and convincing evidence that the detrimental effect on the public interest outweighs the voluntary agreement of the parties to resolve the dispute.

While Public Counsel does not dispute that the Commission can repudiate a contract (and even the IEC agreement recognized this), the Commission should disregard and repudiate the voluntary settlement agreement previously approved by the Commission only in truly extraordinary circumstances. This setting aside of a settlement agreement after Commission approval and during the term of the settlement should not be done without compelling reasons or nonchalantly. Overturning the IEC agreement has a chilling effect on the future of flexible and creative agreements that can advance the interest of the parties as well as the public interest. The Commission has in one fell swoop imposed a substantial disincentive, maybe an insurmountable obstacle and perhaps eliminated the ability of the parties in cases before the Commission to enter into creative and flexible agreements that address thorny issues.

There's an old saying: "Fool me once, shame on you. Fool me twice, shame on me." Now that it is clear that agreements such as the IEC will be found invalid if they operate to some minor detriment of the utility, Public Counsel will not be fooled again into entering into one. Nor will Public Counsel feel any hesitation in asking the Commission to do away with one that no longer operates in customers' favor.[1]

Constrained as it is by prohibitions against single issue and retroactive ratemaking, the Commission cannot lawfully impose on unwilling parties creative solutions like the EARP. And knowing that such programs will last only as long as they

[1] Other settlement agreements such as Empire's (and KCPL's) Regulatory Plan no longer seem to be operating as favorably for ratepayers as originally expected. Certainly nobody thought at the time the Regulatory Plan was entered into that customers would be giving KCPL an 11.25% return, a 3:1 opportunity for a windfall on off-system sales margins, and $21 million in amortizations before construction has even begun on Iatan 2. The harm to ratepayers from the continued application of KCPL's Regulatory Plan appears to be at least as great as the harm to Empire from the continuation of the IEC.

are working in a utility's favor, consumer representatives will no longer be willing to enter into them.

The problem is compounded by the Commission's refusal to even consider the question of what consideration the parties other than Empire gave up when entering into the IEC agreement. In this way, Empire gets a double win: it gets all the concessions that the parties were willing to give to enter into the IEC settlement, and it gets out of its bargain now that it appears to have been a less than a bargain for Empire.

3. Unaddressed motions

At the time the Commission issued its Report and Order, there were a dozen motions pending, some of them almost a year old, most of which the Commission never publicly discussed. None of these were discussed in any detail in any Commission order until the resolution in Ordered Paragraph 4, which states in its entirety: "That all pending motions, not otherwise disposed of herein, are hereby denied." The Commission's Report and Order is unlawful in that it violated the due process rights of Public Counsel and other parties by not timely resolving procedural issues. It is also unjust and unreasonable in that it is manifestly unfair to refuse to discuss or even acknowledge so many motions, and then summarily dismiss them all without discussion on the very last page of the final order in the case.

Resolving this number of contested procedural and substantive issues with no discussion is unlawful in that it violates 386.280 RSMo 2000 which requires all Commission decisions to be in writing.

The Commission, although acting in this case as a quasi-judicial capacity, operates under different rules than a court does. Pursuant to Chapter 610 ("the Sunshine

Law"), the Commission's discussions and deliberations are required to be public. Written notice of the topics to be discussed at each meeting must be posted, and written minutes of each meeting must also be posted. Most of the motions so cursorily addressed in Ordered Paragraph 4 were not even discussed, much less resolved, at any public meeting.

4. Return on Equity

No expert testified that the national average should be used as the basis for a "zone of reasonableness." No expert testified that it should be calendar year 2006 or calendar year 2005. No expert testified that using an entire calendar year is more accurate than using third quarter 2006, or three years including 2006, or any other variation of recent national figures. The Commission's decision to rely on a combination of national figures is arbitrary and capricious and not based on competent and substantial evidence. Furthermore, the Commission's decision purports to be based on a finding that "the national average ROE was … 10.55% for calendar year 2006." There is no evidence in the case to support this finding.

Even aside from the unlawfulness and unreasonableness of the "zone of reasonableness" concept, the Commission's application of it is arbitrary and capricious and unreasonable and unlawful. The Commission did not discard the testimony of Empire witness VanderWeide even though Dr. VanderWeide's recommendation was above the "zone of reasonableness." Only by ignoring the overall recommendation of the Empire witness can the Commission shoehorn his testimony into the Commission's "zone of reasonableness." Furthermore, the Commission erred by using national information that will be a year old when the Report and Order becomes effective to establish its "zone of

reasonableness" without any discussion of why this figure is more appropriate than more recent figures. Finally, the Commission's adoption of a zone of reasonableness of 9.55% to 11.55% is arbitrary and capricious and unreasonable in that – on the very same day – it issued an order in Case No. ER-2006-0314 establishing a "zone of reasonableness" of 9.37% to 11.37%.

On December 29, 2006, Praxair, Inc. and Explorer Pipeline, Inc. filed an Application for Rehearing. Public Counsel concurs with the arguments raised in Paragraphs 9-14 of that application and incorporates them as though fully set out herein.

5. Risk Factor

The Commission did not address, much less resolve, the issue of what risk factor should be applied to off-balance-sheet obligations. Public Counsel proposed the use of a 10 percent risk factor; Staff and Empire proposed the use of Standard and Poor's calculation; presumably based on a 50 percent risk factor. The Commission failed to decide this issue, which is worth about five million dollars. In any case before the Commission in which a utility seeks to increase its rates, the burden is on the utility to prove that such an increase is just and reasonable. If the Commission fails to decide an issue in favor of the party with the burden of proof, that party should lose the issue.

It appears that the Commission will be supplementing or changing its Report and Order based on pleadings filed **after** Empire filed compliance tariffs, and after this Application for Rehearing is filed. It is an indication of how far astray the Commission has wandered from its path of protecting ratepayers that it would change its Report and Order to comply with a utility's filed tariffs.

WHEREFORE, Public Counsel respectfully requests that the Commission grant rehearing of its December 21, 2006, Report and Order.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

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By:_____

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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 29th day of December 2006:

/s/ Lewis R. Mills, Jr.