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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**

RESPONSE TO STAFF REPLY AND MOTION TO STRIKE

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

Motion to Strike

1. The Commission should strike from the record and refuse to consider pleadings filed on behalf of the Staff by an attorney who has previously represented the Commission itself on the issues currently being considered. The Commission's General Counsel represented the Commission during most of the duration of the Western District Court case and the Supreme Court case. Shortly after the Supreme Court handed down its opinion, the Commission added this matter to its November 1, 2007 Agenda meeting for good cause, and discussed it in closed session.[1] The Commission should not meet with its General Counsel in closed session where he receives feedback and guidance no other party is privy to, and then allow him to advocate a position on behalf of a party to the case. It is a violation of the spirit, if not the letter, of the Sunshine Law to close the public out of a meeting and then allow a party to use the information gleaned in that secret meeting in arguments against other parties. Whatever response the Commission chooses to take with regard to this action, it should at the least not sanction it by

[1] The Commission discussed "Litigation" in closed session at several subsequent Agenda meetings, but neither the agendas nor the minutes of those meetings reveal whether this case was discussed.

relying on the pleadings ostensibly filed on behalf of the Staff. There have been two of these: the first filed on November 27 and the second on November 30.

2. It has always been the practice of the Commission that once a lawyer from its General Counsel's office has represented the Commission itself in an appellate matter, that lawyer will not represent the Staff on the same matter after it has returned to the Commission. While Public Counsel does not know just when that practice changed, it has not been a change for the better. Public Counsel had hoped that the first pleading filed by the General Counsel was simply an oversight, but the filing of the second pleading makes clear that this is a deliberate change of the Commission's long-standing practice.

Response to Staff Reply

3. If the Commission nonetheless chooses to accept and consider arguments ostensibly made on behalf of the Staff by the attorney who has previously acted on behalf of the Commission itself, Public Counsel offers the following response. In general terms, Staff has two arguments: that the present situation is so unusual that the laws which usually constrain the Commission do not apply; and that the Supreme Court did not really mean "vacate" when it said "vacate."

4. Staff argues, at page 3, that it understands that the Supreme Court afforded to Public Counsel the relief that Public Counsel requested. That is consistent with Public Counsel's understanding as well. In that light, it is informative to review Public Counsel's request for relief. The Petition for Writ of Mandamus, filed with the Supreme Court on March 19, 2007 requested the following relief:

> WHEREFORE, Public Counsel requests that the Court issue its preliminary writ of mandamus to the Public Service Commission of Missouri and
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> (1) direct that the Commission vacate and rescind its December 29 Order Granting Expedited Treatment and Approving Tariffs and,
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> (2) upon the issuance of a new order **– if the Commission so chooses to issue an order –** direct that the Commission provide an

> effective date for such Report and Order or other final order that is at least ten calendar days after the issuance of the Report and Order or other final order or that has an effective date that is after the date of issuance by an amount of tie that is reasonably sufficient to allow for the preparation of an adequate application for rehearing: and,
>
> (3) direct that Respondent respond to this petition and to the Court's preliminary writ of mandamus within the time set by the Court for response: and, for such other relief the Court deems just and proper.
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> (Petition for Writ of Review, page 12; emphasis added).

The Supreme Court was fully aware of the relief requested and granted that relief. Nothing in the request or the Supreme Court's opinion or mandate requires the Commission to issue a new order. The Supreme Court simply made clear to the Commission that the reasoning behind vacating the December 29, 2006 order would apply to a new order: if the Commission so chooses to issue a new order, it must allow sufficient time for rehearing.

5. The Staff concedes, at pages 3-4, that the rule of law is that an order *nunc pro tunc* cannot be used to "show what the court might or should have done as distinguished from what it actually did." But the Staff argues that the "normal" law doesn't apply here, because the situation involves "extraordinary relief specifically ordered by the state's highest court." If there is any irresponsible argument advanced in this matter, it is Staff's suggestion that the Missouri Supreme Court does not know the difference between vacating an order and correcting an order *nunc pro tunc*. This is utterly specious; if the Supreme Court had intended the Commission to "correct" its order *nunc pro tunc*, thereby stretching the concept of *nunc pro tunc* to cover territory it was never meant to cover, the Supreme Court would have clearly stated that that is what it had in mind. But Public Counsel never asked the Supreme Court to ennoble the humble typo-correcting *nunc pro tunc* in such a fashion, and it is inconceivable that the Supreme Court would have unthinkingly overturned such a basic common law concept. The Supreme Court **vacated** the order, and it is just silly to suggest that the Supreme Court did not know what that term means.

6. At page 5, Staff states that the Supreme Court's writ "simply does not provide for any change to that aspect[2] of the Commission's original order." Staff does not understand or refuses to concede that the Supreme Court did not preserve that aspect or any aspect of the Commission's original order. The Supreme Court vacated that order. It destroyed that order. It made it as though that order was never issued. Nothing about that order can remain unchanged; that order (once the Commission complies with the Supreme Court's mandate) no longer exists in any legal sense.

7. Staff argues that "the Court has not ordered any refunds." (page 5). This is certainly true, and furthermore Public Counsel has conceded that the Commission cannot order refunds. But just because the Court did not order refunds and Public Counsel is not asking the Commission to order refunds does not lead to the conclusion, as Staff appears to believe, that the Commission must retroactively approve tariff sheets. In fact, other than Public Counsel's request that the Commission order certain calculations to be performed, the questions of whether or how or where refunds may or may not be sought have nothing to do with the issues presented to the Commission. The possibility that Public Counsel may seek refunds in court does not give the Commission any authority that the statutes do not provide. Staff again falls back on its "the present situation is far from normal"[3] argument to assert that the Commission has a power – to retroactively approve tariff sheets – that it was never given by the legislature.

8. The Staff argues at page 7 that the Supreme Court could not possibly have meant to cause "turmoil."[4] The Supreme Court has not caused this situation. On December 28, 2006,

[2] In this context, "that aspect" apparently refers to the effective date of the tariffs.
[3] Pages 5-6.
[4] Staff used the term "turmoil." "Turmoil" is defined as "utter confusion" or "extreme agitation." Public Counsel does not concede that the situation is one of turmoil. As Public Counsel explained in its November 27 pleading, Empire does have lawfully-approved tariffs in place; it is only the approval of a subsequent set of tariffs that has been vacated. Somewhat unusual, but hardly the Gaza Strip.

Empire asked the Commission to approve tariffs filed that day to be effective after just one business day. On December 29, 2006, less than an hour before the Commission met to consider the tariffs, the Staff recommended they be approved as Empire requested. The Commission, for "Good Cause," took up and approved the tariffs as requested by Empire and recommended by Staff with less than twenty-four hours notice. It was this unseemly and unlawful rush to get a rate increase shoved through that caused any "turmoil" and the Supreme Court took the narrowest possible action in response. The Supreme Court did only one thing: it vacated an action by the Commission that was so patently unreasonable as to be unlawful. All the Commission need do is to comply with the Supreme Court's mandate. While the Supreme Court certainly did not preclude the Commission from taking any other lawful action, neither did it authorize the sorts of extra-judicial actions that the Staff urges in its November 30 pleading.

9. At pages 8-10 of its November 30 pleading, Staff argues that money collected by a utility from its customers can never be refunded. Staff presents this argument despite the fact that no party has requested refunds, and Public Counsel has conceded[5] that the Commission cannot order refunds in this situation. Because no party has requested that the Commission order refunds, Public Counsel will not respond to Staff's arguments in any detail. But Public Counsel must point out one glaring flaw in Staff's analysis: in **all** of the cases it cites in which refunds were not allowed, the rates were charged under rate schedules that had been lawfully approved by the Commission.

10. In Straube, the court referred to money collected "at the legally established rate."[6]

11. In Joplin, the court did not directly address refunds because none had been

[5] Public Counsel November 27 pleading, page 5, paragraph 15.

[6] Straube v. Bowling Green Gas Co., 360 Mo. 132, 143 (Mo. 1950)

requested,[7] but in *dicta* in a footnote cited the Straube case for the proposition that "money legally collected from ratepayers **under established rate schedules** becomes utility's property of which it cannot be deprived without violating due process."[8]

12. In Lightfoot,[9] the court held:

> No ultimate consumer had ever made a request or a demand that any of the money collected by the utility from its customers at Springfield in accordance with **rate schedules in force and effect as approved by the Public Service Commission**, or as fixed by the City Council of Springfield or by City's Board of Public Utilities, should be ordered set apart, segregated or impounded to await the event of the decision upon the review of the Federal Power Commission's order.

13. Staff's reliance on UCCM is similarly misplaced. Staff cites, at page 9, a portion of the UCCM opinion. Putting Staff's cite into context makes clear that the case does not stand for the proposition that rates collected pursuant to a tariff unlawfully approved cannot ever be refunded. The entire section of which Staff cites a portion reads as follows:

> Public counsel requested in oral argument that we remand to the commission for a determination by it of the excess amounts collected by the utilities under the FAC over that which they would have collected under a just and reasonable rate, which would include rate increases properly authorized, and to order a refund of any such excess.
>
> 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**. HN6 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…. 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

[7] Indeed the question of refunds appears not to have been raised by Joplin, but interjected into the case by the Deputy Chief Regulatory Law Judge writing the Report and Order on Remand, now the Commission's General Counsel who is arguing against refunds even though none have been requested in this case either.

[8] State ex rel. City of Joplin v. PSC of Mo., 186 S.W.3d 290, 295 (Mo. Ct. App. 2005); emphasis added.

[9] Lightfoot v. City of Springfield, 361 Mo. 659, 669, 236 S.W.2d 348, 353-354 (1951); emphasis added.

process.

…

> This does not mean that the utilities have received a windfall profit of the amounts illegally collected. If no fuel adjustment clause or roll-in had been in effect, the utilities would have had a right to file for an increased rate, in order to allow them to recover their increased fuel costs and to maintain a just and reasonable rate. While the amounts they would have collected may not exactly match those collected under the fuel adjustment clause, to order a refund of the latter amounts would clearly be confiscatory, and to order an offset of this refund by what a "reasonable rate" would have been would be (retroactive) rate making at the order of this court, something we cannot do. The surcharge, however, is not subject to this difficulty.[10]

In context, it is clear that the court was ruling on a request by Public Counsel for a redetermination of the rate that should have been authorized absent a fuel adjustment clause. If and when refunds are sought in this matter, they will be based on the amounts collected in excess of the rate schedules lawfully approved in Case No. ER-2004-0570. In this case there is not now and never will be a need for the Commission or any court to go back and determine how rates might have been calculated under different circumstances as Public Counsel requested (and lost) in UCCM.

14. Finally, Staff cites Monsanto.[11] This case simply stands for the proposition that when a group of customers pays money into a stay fund pursuant to Section 386.520 RSMo 2000, that money can be refunded. It is necessarily silent on the question of what circumstances need to exist in order for refunds to be allowed if money was not paid into a stay fund. In short, none of the cases cited by the Staff establish that money collected in excess of lawfully approved rate schedules (albeit in accordance with unlawfully approved rate schedules) is not subject to refund by order of court with appropriate jurisdiction.

WHEREFORE, Public Counsel respectfully requests that the Commission: (1) strike

[10] State ex rel. Utility Consumers Council of Missouri, Inc., v. Public Service Commission of Missouri, 585 S.W.2d 41, 47 (Mo. banc 1979); emphasis added; internal citations omitted.

[11] State ex rel. Monsanto Co. v. Public Service Commission, 716 S.W.2d 791, (Mo. banc 1986).

the pleadings filed on behalf of the Staff by the attorney who has represented the Commission itself in this matter; or in the alternative (2) refuse to disregard the Supreme Court's mandate by correcting its December 29, 2006 order *nunc pro tunc*, and refuse to act in excess of its powers by retroactively approving the tariffs filed on December 28, 2006 as urged in the those pleadings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to all parties this 3rd day of December 2007.

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