

**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	)	<b><u>Case No. ER-2006-0315</u></b>
Service Provided to Customers in the	)	
Missouri Service Area of the Company	)	

**RESPONSE TO MOTION FOR CLARIFICATION**

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

1. On February 1, 2006, The Empire District Electric Company filed tariff sheets, testimony and associated materials to request a general rate increase. As part of that request, Empire asked to terminate its currently effective Interim Energy Charge (IEC) and to begin a new Energy Cost Recovery Rider (ECR). The IEC was first implemented in Case No. ER-2004-0570, pursuant to a Stipulation and Agreement<sup>1</sup>

2. On March 24, 2006, Empire filed a Motion for Clarification. In that motion, Empire seeks to have the Commission adopt an interpretation of the Stipulation and Agreement in Case No. ER-2004-0570 that is inconsistent with Public Counsel's interpretation, and is inconsistent with the interpretation of several other parties to this case that were also parties to ER-2004-0570.

3. Empire offers three primary arguments in support of its request for

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<sup>1</sup> In the matter of the Empire District Electric Company's Application for Certification of Public Convenience and Necessity and Approval of an Experimental Regulatory Plan Related to Generation Plant.

clarification. The Company argues that; (1) increased fuel and purchased power costs are driving the need for an increase; (2) the Commission has the authority to order the end of the IEC; and (3) it is incorrect to interpret the Stipulation as prohibiting Empire from requesting that the IEC be terminated and replaced with an ECR.

4. As further support for its request for clarification, Empire references portions of the Stipulation in Case No. EO-2005-0263 as evidence that the parties to ER-2004-0570 were aware of Empire's intent to exclusively rely "upon the [fuel and purchased power cost recovery] mechanism of SB 179 for its recovery of fuel and purchased power costs..." Empire implies that the lack of a provision in EO-2005-0263 for a fuel and purchased power provision is an acknowledgement that other parties were aware that it would seek a 179 recovery mechanism during the term of that agreement.

5. The Stipulation in ER-2004-0570 clearly prohibits Empire from requesting an ECR for the duration of the Commission approved IEC.<sup>2</sup>

Section 4 of the Stipulation states:

4. In consideration of the implementation of the IEC in this case and the agreement of the Parties to waive their respective rights to judicial review or to otherwise challenge a Commission order in this case authorizing and approving the subject IEC, for the duration of the IEC approved in this case Empire agrees to forego any right it may have to request the use of, or to use, any other procedure or remedy, available under current Missouri statute or subsequently enacted Missouri statute, in the form of a fuel adjustment clause, a natural gas cost recovery mechanism, or other energy related adjustment mechanism to which the Company would otherwise be entitled. Empire also agrees not to request an Accounting Authority Order or other regulatory mechanism to accumulate and or recover any amount of variable fuel and purchased power cost that exceeds the IEC ceiling.

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<sup>2</sup> Nonunanimous Stipulation and Agreement Regarding Fuel and Purchased Power Expense, Case No. ER-2004-0570, Filed February 22, 2005.

6. In its Report and Order, effective March 27, 2005, the Commission approved the Stipulation and Agreement including the provision for a three year IEC and specifically directed the parties to comply with the terms of the February 22, 2004, Stipulation and Agreement:

5. That the Nonunanimous Stipulation and Agreement Regarding Fuel and Purchased Power Expense, filed on February 22, 2005, and deemed to be unanimous by operation of Commission Rule, is hereby approved. The parties shall comply with the terms of the Stipulation and Agreement.

Since approving the IEC, the Commission has not issued an order terminating the three year IEC.

7. Empire's request to terminate the IEC and replace it with the ECR violates the terms of the Stipulation and Agreement and the Commission's explicit direction to comply with those terms. Praxair, Inc. and Public Counsel have honored the Stipulation and should not be penalized while Empire is rewarded for reneging on its commitment. If Empire is allowed to back out of an agreement that it no longer likes, despite such clear evidence of its obligations, Public Counsel will be less inclined to rely on negotiated agreements as an effective means to protect consumers' interests in the future.

8. Allowing Empire to deviate from the approved IEC by imposing an ECR or by altering base rates would likely cost consumers millions of dollars and strip away protections for which customers already made concessions. The terms of the Stipulation in ER-2004-0570 set specific dollar limits on the amount of fuel and purchase power recovery for three years. The parties, including Empire, agreed to an annual recovery of fixed and variable MO fuel and purchased power costs in base rates of \$102,994,356, of which \$85,064,873 represents variable costs. The parties agreed that the IEC would

collect an additional amount of \$8,249,000 in variable fuel and purchased power costs<sup>3</sup> which would be subject to true-up and refund under certain conditions.<sup>4</sup>

9. The Commission's Order approving the Stipulation also clearly delineates these agreed to levels of revenue requirement:

59. On February 22, 2005, Empire, the Public Counsel, Praxair, Inc., and Explorer Pipeline Company jointly filed a Nonunanimous Stipulation and Agreement Regarding Fuel and Purchased Power Expense. No party filed a timely objection or request for hearing with respect to this Nonunanimous Stipulation and Agreement. The Stipulation and Agreement provides that a certain specified amount of Revenue Requirement shall be collected in Empire's permanent rates with respect to its Missouri jurisdictional fixed and variable fuel and purchased power costs and that an additional specified amount of Revenue Requirement for such costs shall be collected on an interim basis, subject to true-up and refund, through a surcharge referred to as an Interim Energy Charge ("IEC"). The IEC shall be in effect for three years. The amount of Revenue Requirement to be included in Empire's permanent rates is \$102,994,356; the additional amount to be collected through the IEC is \$8,249,000. The actual cents-per-kilowatt-hour IEC to be collected from each customer class is set out in Appendix B to the Stipulation and Agreement. The amount collected by the IEC is intended to include only the on-system Missouri retail variable costs collected in FERC accounts 501, 547 and 555. Net revenues from capacity release and gas sales shall be a credit against expenses in the true up. The fixed costs in FERC accounts 501, 547 and 555 shall be collected in permanent rates. The Stipulation and Agreement sets out other details and provisions governing the operation of the IEC, the true up, and any refunds.

10. In large part, Public Counsel joined in the Stipulation because the terms of the Stipulation cap until 2008, at specific dollar levels, the exposure to upward price volatility that consumers face associated with fuel and purchased power costs. In addition, the true-up provisions of the Stipulation allow for downward but not upward

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<sup>3</sup> Section 1(a)

<sup>4</sup> Refunds are triggered by 2 year IEC recovery in excess of \$10 Million under Section 1(d), or final audit Section 1(e) of the Stipulation and Agreement.

rate adjustments based on true-up<sup>5</sup> and prohibit an AAO or other regulatory mechanism to accumulate and recover amounts in excess of the IEC ceiling.<sup>6</sup> In joining as a signatory party, Public Counsel believed that these three elements of the Stipulation and Agreement would provide consumers with price protection and price certainty. If the Commission allows Empire the ECR it seeks, consumers would be exposed to increases associated with fuel and purchased power of at least 19 million dollars annually.<sup>7</sup> The 19 million dollar per year estimate is conservative in that it is the Company's estimated adjustment to fuel and purchased power expense. The cost to consumers of an uncapped ECR, however, under certain market conditions, could be much greater given elimination of the \$8,249,000 cap on IEC recovery. Public Counsel urges the Commission to enforce the protections that it afforded consumers in approving the Stipulation and Agreement.

11. Empire benefited from concessions gained from consumers through the Stipulation and Agreement. In addition to the IEC going into effect and generating additional revenues sooner than it might have otherwise, Empire avoided litigation by securing Public Counsel's waiver of its right to judicial review or to otherwise challenge a Commission order approving the IEC. Apparently, until the natural gas commodity market moved against its interests, Empire was satisfied with these concessions.

12. At the time the Stipulation was inked, it was no secret that natural gas prices might be subject to substantial volatility. The Stipulation in ER-2004-0570 was submitted on February 22, 2005, following four years of volatile natural gas prices. (See Attachment 1) Empire could have conditioned acceptance of the Stipulation and

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<sup>5</sup> Sections 1(d) and 1 (e)

<sup>6</sup> Section 4

<sup>7</sup> Empire witness Keith, page 6, line 13-14.

Agreement on numerous options for addressing the potential volatility of natural gas prices in a forth right manner at the time the agreement was negotiated. This would have allowed Public Counsel and other parties the option of accepting or rejecting the total agreement in light of the concessions Empire might later seek from customers and the potential detriment customers might face.

13. Ultimately, Public Counsel agreed to a Stipulation because it contained no “catastrophic” clause to cover unexpected or anomalous changes in the natural gas commodity market, no upward rate adjustment based on true-up and no provision to rebase, at a later time, the level of fuel and purchased power recovered in base rates or through the IEC. It would be patently unfair to consumers to now allow Empire to unilaterally override the terms of the Stipulation and Agreement by allowing any such additional recovery mechanisms.

14. Public Counsel agrees that the Commission has the authority to terminate the IEC but there is no reason to do so. The Stipulation and Agreement approved by the Commission states:

The IEC tariff or rate schedule will expire no later than 12:01 a.m. on the date that is three years after the original effective date of the revised tariff sheets authorized by the Commission in this case, Case No. ER-2004-0570, unless earlier terminated by order of the Commission.

This provision of the Stipulation and Agreement which Empire refers to in its Motion simply recognizes that the Commission can not be bound by a previous decision. It does not constitute a loophole by which Empire should be allowed to evade its commitments.

15. Revisiting the IEC issue, at this time, on the Commission’s own motion will likely result in litigation.

Empire's testimony and filings requesting elimination of the IEC have tainted the process by which the Commission, on its own motion, might choose to review Empire's fuel and purchased power expense recovery, at this time. Arguably, Public Counsel would be derelict in not considering the degree to which Empire's inappropriate filings might have precipitated such a review and could ultimately lead to an increase in rates in excess of 19 million dollars. Empire has placed the Commission in a precarious situation and should not be rewarded for it.

16. The provisions of the Stipulation in Case No. EO-2005-0263 are fully consistent with continuation of the three year IEC agreed to in Case No. ER-2004-0570. The Stipulation and Agreement in Case No. EO-2005-0263 addresses in relevant part, the terms and conditions under which Empire will seek recovery of costs associated with Iatan 2 or other base load generation plant. The Agreement recognizes that Empire may file a rate case prior to the expiration of the Agreement but must file a rate case related to the Iatan 2 investment no sooner than 2009. Under the terms of the Stipulation in EO-2005-0263, if Empire chooses to initiate a rate case during the 5 year term of the agreement, then Empire must comply with four conditions addressing (a) the treatment of special contracts, (b) affordability, demand response, and efficiency programs, (c) intervention without application by signatory parties to the Stipulation and (d) mandatory data to be provided to certain parties.<sup>8</sup> None of the four conditions address fuel or purchased power or in any way affect Empire's prior commitment to refrain from requesting an ECR.

17. Section D(6) of the Stipulation and Agreement in EO-2005-0263 does

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<sup>8</sup> Stipulation and Agreement, E)-2005-0263, pages 10-11, Section D(1)(a)-(d)

address fuel and purchase power with respect to rate cases but it is not inconsistent with the three year IEC. Section D(6) reflects Empire's intent to seek an ECR mechanism and the parties agreement to not address the issue in the Stipulation. It does not reflect an agreement by the parties in ER-2004-0570 to release Empire from its obligation under the previous Stipulation. Agreeing to not address an issue can not be viewed as a Public Counsel concession to dismantle the previous Stipulation and Agreement in ER-2004-0570. Further, Section D(6) can not be interpreted as a Commission order terminating the IEC approved in ER-2004-0570. This is clearly the case since Empire continued to charge the IEC after the Stipulation and Agreement in EO-2005-0263 became effective.

18. Unless the Commission terminates the IEC, it will run until 2008, after which Public Counsel acknowledges that Empire is free for the remaining portion of the 5 year term of the EO-2005-0263 agreement to request an ECR provided that Empire does not sign away that right in the interim.

WHEREFORE, Public Counsel respectfully requests that the Commission deny Empire's Motion of Clarification.

Respectfully submitted,  
OFFICE OF THE PUBLIC COUNSEL

**/s/ Lewis R. Mills, Jr.**

By:\_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been emailed to all parties this 24<sup>th</sup> day of April 2006.

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