BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Proposed Charges Related To the Fuel Adjustment Clause of The Empire District Electric Company	)))	Case No. EO-2009-0349

RESPONSE OF THE EMPIRE DISTRICT ELECTRIC COMPANY
IN OPPOSITION TO
MOTION TO REJECT TARIFFS

The Empire District Electric Company (hereinafter "Empire" or "the Company"), by and through the undersigned counsel and pursuant to the Missouri Public Service Commission's ("Commission") May 18, 2009, *Order Directing Filing* in this case, hereby files this response in opposition to the "Motion to Reject Tariffs" filed on May 15, 2009, by Praxair, Inc., and Explorer Pipeline Company (jointly, the "Industrial Intervenors"). Empire believes the motion filed by the Industrial Intervenors and the relief requested therein fundamentally distorts the process for the recovery of fuel and purchased power costs through a fuel adjustment clause that is found in both the Commission's own rules as well as in the fuel adjustment clause approved for Empire in Case No. ER-2008-0093. In addition, if granted, the Industrial Intervenors' motion will nullify one of the primary legislative purposes embodied in Section 386.266, RSMo: the timely recovery of the Company's fuel and purchased power costs.

In support of its response, Empire states as follows:

1. On April 1, 2008, the Company filed proposed rate schedules designed to increase rates by $1.92 million, which would allow Empire to recover fuel and purchased power costs incurred during the initial Accumulation Period – running from September 2008 through February 2009 – that exceeded the amount of such costs that were included in base rates set by the Commission in Case No. ER-2008-0093. Empire's filing fully complied with the terms of its approved fuel adjustment clause – which provides for semi-annual adjustments of rates to recover increases and decreases in fuel and purchased power costs actually incurred by the Company – as

well as with applicable Commission rules; specifically 4 CSR 240-3.161(7) and 4 CSR 240-20.090(4).

2. On May 1, 2009, as required by 4 CSR 240-20.090(4), the Commission Staff filed its "Staff Recommendation to Approve Tariff Sheet." In that filing, Staff stated that Empire's proposed tariff sheets should be approved because: (i) the calculations filed by the Company in support of the proposed tariff sheets comply with the standards set forth in Empire's approved fuel adjustment clause, and (ii) the Company was current on all Surveillance Monitoring Reports required by the Commission's rules.

3. On May 15, 2009, the Industrial Intervenors filed their motion to reject Empire's proposed tariff sheets. The stated basis for that motion was allegedly imprudent operating practices at the Iatan I generating facility, which is operated by Kansas City Power & Light Company ("KCPL"). Empire is a part owner of that facility and receives power from it to meet the Company's base load energy requirement. And, as noted in the testimony of Empire's witness Scott Keith, part of the increase in fuel and purchased power costs that the Company incurred during the Accumulation Period was attributable to "a reduction in coal plant availability" that was caused by a longer than anticipated maintenance outage at the Iatan I facility. Based solely on the aforementioned combination of facts and assumptions allegedly arising from those facts, the Industrial Intervenors propose that the Commission reject Empire's proposed tariffs and order the Company to file revised tariff sheets that exclude costs related to the extended Iatan I outage.

4. There are numerous reasons why the Commission should deny the Industrial Intervenors' motion. First and foremost, the relief requested by the motion and the basis for that request – because KCPL allegedly managed the Iatan I maintenance outage imprudently, certain of Empire's incurred fuel and purchased power costs attributable to that outage were also imprudent – would "turn on its ear" the carefully and thoughtfully crafted process for recovering prudently incurred energy costs that is embodied both in the Company's approved fuel adjustment clause tariff and the Commission's own rules. That process calls for three, well-

defined steps to be followed in order to ensure: (i) that the Company is able to timely recover its fuel and purchased power costs through its approved fuel adjustment clause, and (ii) that customers ultimately pay for only those costs that are prudently incurred.

5. The first step in that process – the periodic adjustment of rates through an approved fuel adjustment clause – is clearly described in 4 CSR 240-20.090(4). Under that rule, each utility with a fuel adjustment clause must adjust rates at least once annually to reflect the difference between the energy costs it actually incurs and the costs that have been included in base rates. Staff has thirty (30) days from the date of filing to evaluate the proposed rate adjustment and to make a recommendation to the Commission. If Staff concludes that the utility's proposed rate adjustment is in accordance with the Commission's rule, Section 386.266, and the approved fuel adjustment clause, the rule states:

> [T]he commission shall either issue an interim rate schedule adjustment order approving the tariff schedules and the FAC rate adjustments within sixty (60) days or, if no such order is issued, the tariff sheets and the FAC rate adjustments shall take effect sixty (60) days after the tariff schedules were filed.

The rule also states that the Commission can reject the tariffs, but only if Staff's recommendation finds "the FAC rate adjustment is not in accordance with the provisions of this rule, section 386.266, or the FAC mechanism established in the most recent rate proceeding . . .." The Commission also should note that in this phase of the process there is no provision in the rule for suspension of the proposed tariff sheets or for hearings related to those tariff sheets.

6. The second step of the process is the true-up review, which is described in 4 CSR 240-20.090(5). True-up reviews must also occur at least once annually, with the purpose of such reviews being to determine if the utility over or under-collected its actually incurred fuel and purchased power costs through a previously approved periodic rate adjustment. In this phase Staff is also required to file its recommendation within thirty (30) days of a utility's true-up filing; however, unlike the process for approving periodic adjustments, in this phase the rule allows Staff to recommend suspending the filing for further investigation, which may include hearings.

7. The final step in the process is the prudence review, which is governed by 4 CSR 240-20.090(7). The purpose of the prudence reviews, which must occur at least once every eighteen (18) months, is obvious: to determine if the fuel and purchased power costs that have been passed through a fuel adjustment clause and recovered from customers were prudently incurred. Because this step in the process is much more detailed and potentially contentious than the other two steps, the Commission's rule affords Staff one hundred eighty (180) days to complete its prudence audit. Moreover, the rule also allows Staff, the Office of Public Counsel, and any other party to the prudence review proceeding to conduct discovery, to supplement in information a utility is required to provide, and to seek penalties for failure to timely comply with those discovery requests. The rule also allows any party to the case to request an evidentiary hearing. If, following the conclusion of the prudence review, including any hearings, the Commission finds that some or all of the energy costs flowed through the fuel adjustment clause were imprudently incurred, the utility will be ordered to refund those costs to customers with interest.

8. The preceding discussion shows that the three-step process for approving, truing-up, and auditing for prudence all amounts collected by Empire under its approved fuel adjustment clause ensures that all of the requirements of Section 386.266 are observed and all of its objectives are achieved. Utilities, like Empire, are allowed to timely recover their actually incurred fuel and purchased power costs; at the same time, customers are guaranteed that they will be required to pay, energy-based rate increases, only those excess energy costs that are prudently incurred.

9. The Industrial Intervenors' motion, and the relief it asks the Commission to grant, attempts to short-circuit the carefully and thoughtfully-crafted three-step process for approving and reviewing energy-related rate adjustments. Specifically, the Industrial Intervenors ask the Commission to make preliminary determinations regarding the prudence of fuel and purchased power costs incurred by Empire at the initial step of the process instead of deferring

such questions to the third step where they are supposed to be considered. If the Commission grants the motion, Empire will be denied the right to timely recover its incurred energy costs through its approved fuel adjustment clause, which will completely nullify one of the key objectives of the Missouri General Assembly when it enacted Section 386.266. In fact, if the Commission grants the Industrial Intervenors' motion, it Empire may be forever denied the ability to recover its increased energy costs related to the Iatan I maintenance outage even though it was never proven that those costs were, in fact, imprudent.

10. In addition, granting the Industrial Intervenors' motion will deny Empire the benefit of the procedural safeguards that have been built into the Commission's rule governing the prudence review process. There is no *evidence* to support the allegations of imprudence that are contained in the Industrial Intervenors' motion. Indeed, while the movants have requested that the Company's proposed tariff sheets be rejected in favor of revised sheets that eliminate the effects of allegedly imprudent costs related to Iatan I, the Industrial Intervenors never state the amount of the costs that should thus be eliminated. The only support for the motion that exists – in fact, the only support that can exist at this step of the process, which does not provide for hearings related to Empire's proposed tariff sheets – are the self-serving statements in the motion itself. And the Commission should not forget that these self-serving statements are made by parties who, in Empire's last general rate case, strongly opposed the fuel adjustment clause currently in effect. Therefore, it is quite possible that the Industrial Intervenors' motion is nothing more than an attempt to gain via motion in this proceeding what could not be achieved in that rate case: a significant reduction in the amount of costs that Empire is allowed to recover through its fuel adjustment clause. Moreover, the relief requested by the Industrial Intervenors' motion asks the Commission to ignore the well-established principle of regulatory law that costs actually incurred by a utility are presumed to be reasonable and prudent until proven to be otherwise by competent and substantial evidence. Since no such evidence exists, the presumption in favor of Empire must remain unrebutted.

11. Finally, it is not necessary for the Commission to adopt the position espoused by the Industrial Intervenors in their motion in order to ensure that the mandate in Section 386.266 – that only prudently incurred fuel and purchased power costs be passed on to customers through Empire's fuel adjustment clause – is achieved. As noted previously herein, the three-step process that the Commission has adopted for adjusting, truing-up, and auditing energy-related rates guarantees that only prudently incurred costs will be borne by the Company's customers. As prescribed in the Commission's rule and in Empire's approved fuel adjustment clause tariff, if, as a result of a mandatory prudence review, the Commission concludes that certain costs recovered from customers were not prudently incurred, those amounts will be returned to customers with interest. The short-circuited process proposed by the Industrial Intervenors in their motion will not improve on that result.

WHEREFORE, for the reasons stated in this response, the Commission should deny the Industrial Intervenors' motion; should allow Empire's proposed tariff sheets to go into effect, as recommended by Staff; and should grant the Company such other relief as the interests of justice require.

Respectfully submitted,

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ATTORNEYS FOR THE EMPIRE DISTRICT ELECTRIC COMPANY

Certificate of Service

I hereby certify that on the 20th day of May, 2009, the foregoing has been sent by United States mail, hand-delivered, or transmitted by facsimile or electronic mail to counsel of record for each of the parties to Case No. ER-2008-0093.

/s/ L. Russell Mitten