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

SUGGESTIONS IN OPPOSITION TO
INDUSTRIAL INTERVENORS' MOTION TO REJECT AND STRIKE

COMES NOW The Empire District Electric Company ("Empire" or the "Company"), by and through counsel, and files these Suggestions in Opposition in response to the Motion to Reject Specified Tariff Sheets and Strike Testimony filed herein on April 11, 2008, by Praxair, Inc., Explorer Pipeline, Inc, and General Mills, Inc. (collectively, the "Industrial Intervenors"). Empire requests an order of the Missouri Public Service Commission (the "Commission") denying the Industrial Intervenors' Motion and, in this regard, respectfully states as follows to the Commission:

Factual and Procedural Background

On February 22, 2005, Empire, the Office of the Public Counsel ("Public Counsel"), and certain other parties to Commission Case No. ER-2004-0570 executed a stipulation with regard to the implementation of an Interim Energy Charge ("IEC"). An IEC was subsequently implemented by Empire through tariffs filed with and approved by the Commission.

On February 1, 2006, Empire filed revised tariff sheets with the Commission designed to implement a general rate increase for retail electric service (denominated Commission Case No. ER-2006-0315). On December 21, 2006, the Commission issued the Report and Order addressing all contested issues in Commission Case No. ER-2006-0315, to be effective December 31, 2006. The Commission concluded, in part, as follows:

> To the extent that the 2005 Stipulation limits recovery of Empire's prudently incurred fuel and purchased power expenses, then it attempts to limit one of the "factors which determine rates" and is overcome by the Commission's exercise of the police power granted to it. . . . The Commission concludes that Empire may recover the prudently incurred fuel and purchased power costs at the level determined above in base rates.

Further, in its Report and Order Upon Reconsideration issued in ER-2006-0315, effective April 5, 2008, the Commission found as follows:

> The Commission finds that the terms of the 2005 Stipulation specifically recognize that the Commission may terminate the IEC prior to the expiration of the agreed upon maximum term. The Commission also finds that the IEC established by the 2005 Stipulation has prevented Empire from recovering prudently incurred fuel and purchased power costs of approximately $24 million, and, therefore, has deprived Empire of the opportunity to earn a fair and reasonable return on the value of the assets it has devoted to the public service. The Commission further finds that these results will likely recur if the IEC remains in place.

On December 28, 2006, Empire filed compliance tariffs pursuant to the Report and Order issued in Case No. ER-2006-0315 (Tariff File No. YE-2007-0488). The Commission found these compliance tariffs to be an accurate reflection of the revenue increase authorized by the Report and Order. Accordingly, on December 29, 2006, the Commission issued its Order Granting Expedited Treatment and Approving Tariffs, to be effective January 1, 2007 ("First Tariff Order"). The First Tariff Order approved the compliance tariffs for service rendered by Empire on and after January 1, 2007.

On January 1, 2007, Empire began providing service and charging customers pursuant to the compliance tariffs authorized by the Report and Order and approved by the First Tariff Order. At no time was the effectiveness of the compliance tariffs stayed by the Commission or by any court. Further, as of today, no court has examined the lawfulness or reasonableness of the substance of the First Tariff Order and/or the underlying tariffed rates.

The First Tariff Order was the subject of a writ proceeding initiated by Public Counsel (SC88390), and, pursuant to the Court's opinion and mandate in that proceeding, the Commission issued its Order Vacating December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs, and Order Approving Tariffs on December 4, 2007, effective December 14, 2007 ("Second Tariff Order"). The Second Tariff Order is the subject of a second writ proceeding initiated by Public Counsel (SC89176). Oral argument in that proceeding is scheduled for May 13, 2008, and the Missouri Supreme Court has not, as of yet, issued any order in that proceeding which indicates whether or not the Court believes the Commission failed to comply with its mandate in SC88390 and/or whether or not the Court believes the Second Tariff Order is deficient or defective in some manner.

On October 1, 2007, Empire initiated the instant rate case (Case No. ER-2008-0093). As part of this case, Empire is requesting the implementation of a fuel adjustment clause ("FAC").

The Allegations of the Industrial Intervenors

The Industrial Intervenors allege that certain tariff sheets should be rejected and certain testimony stricken because of the impact of the Missouri Supreme Court's opinion and mandate issued in SC88390. Pointing to a provision of the IEC stipulation regarding Empire's ability to request a FAC with the IEC in place,[1] the Industrial Intervenors argue that Empire may not seek a FAC in this proceeding because (1) the IEC was in place when Empire initiated this rate case and/or (2) the IEC is currently in place. The allegations of the Industrial Intervenors thus require an examination of various filing and effective dates. Dates of arguable significance are as follows:

- January 1, 2007 – effective date of First Tariff Order in ER-2006-0315;

[1] As the issue is not determinative in the case at hand, Empire will not re-argue its position that Empire was authorized to *request* a FAC or other similar mechanism when the IEC was in place.

- January 27, 2007 – thirty days following the filing of Empire's compliance tariffs (Tariff File No. YE-2007-0488) in ER-2006-0315;
- October 1, 2007 – Empire's current rate case, Case No. ER-2008-0093, initiated;
- October 30, 2007 – issuance of Opinion of Missouri Supreme Court in Case No. SC88390;
- November 15, 2007 – issuance of mandate in Case No. SC88390;
- December 14, 2007 – effective date of Second Tariff Order in ER-2006-0315; and
- April 5, 2008 – effective date of the Commission's Report and Order Upon Reconsideration in ER-2006-0315.

A review of these events and the applicable law, as discussed below, demonstrates that the Motion of the Industrial Intervenors should be denied.

Discussion and Argument

As noted, on January 1, 2007, Empire began providing service and charging customers pursuant to the compliance tariffs authorized by the Report and Order and approved by the First Tariff Order. At no time was the effectiveness of the compliance tariffs stayed by the Commission or by any court. Empire has been providing a service, and in exchange for that service, has been unconditionally collecting the tariffed rate in reliance upon the orders of the Commission. The tariffs which took effect on January 1, 2007, do not provide for the IEC.

In *State ex rel. City of Joplin v. Missouri Public Service Commission*, it was stated that principles of due process prevent a court from taking the property of a public utility where that property consists of money collected from ratepayers pursuant to lawful rates. 186 S.W.3d 290, 299 (Mo. App. W.D. 2005) (*citing Lightfoot v. City of Springfield*, 236 S.W.2d 348, 354 (Mo. 1951)). The *Joplin* court went on to state that a Commission order that sets rates is "'*prima facie*

lawful and reasonable'" until finally decided otherwise by the courts. *Id*. (*citing* RSMo. §386.270 ("All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.")).

Pursuant to the analysis set forth by the *Joplin* court, from the issuance of the Commission order approving a rate going forward, and until finally determined otherwise by the court, the filed rate is considered prima facie lawful, and any funds collected pursuant thereto are the property of the utility. *See Joplin*, 186 S.W.3d at 299. In *Joplin*, the court reviewed the case of *Lightfoot v. City of Springfield*, noting that a consumer had not requested that the money collected by that utility pursuant to the authorized rate increase be impounded pending a decision on appeal. The *Joplin* court stated that the funds came into the utility's possession unconditionally, and, because there was no stay fund, that the utility's property could not be taken without violating due process. *Id*. at 297, 299 (*citing Lightfoot*, 236 S.W.2d at 353-354).

These general due process concepts coincide with the logic of what has become known as the "filed rate doctrine." This doctrine forbids a regulated entity, such as Empire, from charging rates for its services other than those filed with the appropriate regulatory authority. *H.J. Inc. v. Northwestern Bell Telephone Company*, 954 F.2d 485, 488 (8th Cir. 1992).[2] In referencing other cases, the Eighth Circuit noted that the doctrine is designed, in part, to protect utilities charging filed rates for lawfully provided service. *Id*. at 490.

[2] The Eighth Circuit stated that the rationale underlying the filed rate doctrine applies whether the rate at issue was approved by a federal regulatory authority or a state agency. 954 F.2d at 494. Thus, the rationale of the filed rate doctrine is applicable to rates established by this Commission.

In accordance with the filed rate doctrine, as well as RSMo. §393.140(11),[3] Empire is forbidden from charging rates to its Missouri customers other than those filed with and/or approved by this Commission. In other words, beginning on January 1, 2007, Empire was legally obligated to charge the rates set forth in the tariffs then on file with the Commission and which had been approved by the Commission with the First Tariff Order. If one assumes the First Tariff Order became a nullity with the issuance of the Missouri Supreme Court's mandate in SC88390, the tariffs which took effect on January 1, 2007, as opposed to the previous tariffs which provided for the IEC, still were in effect following the issuance of the mandate. This is because if one removes the First Tariff Order from the equation, the compliance tariffs filed on December 28, 2006, would have taken effect, by operation of law, on January 27, 2007.

In the absence of a suspension order, no hearing is required in order for tariffs to take effect. An order from the Commission affirmatively approving the tariffs also is not required. The Commission may permit new rates to take effect based on a mere tariff filing by a utility – without a hearing and without the issuance of an order. *See* RSMo. §393.140(11); *see also Ex rel. Laclede Gas Company v. Public Service Commission*, 535 S.W.2d 561, 566 (Mo.App. 1976) (because of the statutory "file and suspend" provisions, the Commission has the discretionary power to allow new rates to go into effect immediately by "non-action"); *see also ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979) (a utility's rates may be increased without requirement of a hearing).

As such, even if one accepts the legal arguments of the Industrial Intervenors with regard to the meaning of "vacate", the previous tariffs which contained the IEC provision would have only been in effect prior to January 27, 2007, and would not have been in effect when this case

[3] RSMo. §393.140(11) reads, in part, as follows: "No corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time . . ."

was initiated or at any time thereafter. Empire had the right to rely, and is protected in its reliance, on the filed rates in providing utility service to its customers in Missouri.

WHEREFORE, The Empire District Electric Company respectfully requests the Order of the Commission denying the Industrial Intervenors' Motion to Reject Specified Tariff Sheets and Strike Testimony. Empire requests such other and further relief as the Commission deems just and proper under the circumstances.

Respectfully submitted,

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Certificate of Service

I hereby certify that the foregoing has been sent by United States mail, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record on the 21st day of April, 2008.

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