BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Consideration of Adoption of the PURPA Section 111(d)(13) Fossil Fuel Generation Efficiency Standard as Required by Section 1251 of the Energy Policy Act of 2005	Case No. EO-2006-0495

THE RESPONSE OF THE EMPIRE DISTRICT ELECTRIC COMPANY TO STAFF'S MOTION TO OPEN RULEMAKING DOCKET

The Empire District Electric Company ("Empire" or "Company"), through its undersigned counsel, hereby submits the following response in opposition to the *Motion to Open Rulemaking Docket* ("Motion") filed by the Staff ("Staff") of the Missouri Public Service Commission ("Commission") on October 31, 2006. In that filing, Staff proposed that the Commission open a single rulemaking docket to address any and all rulemaking considerations related to Case Nos. EO-2006-0493, EO-2006-0494, EO-2006-0495, EO-2005-0496, and EO-2006-0497. Staff's Motion also requested that the Commission order parties and/or Staff to file, on or before April 30, 2007, either: 1) proposed rules that address two standards that were included in the "Energy Policy Act of 2005" ("EPAct 2005") – time-based metering/communications and interconnection – that are currently under consideration in Case Nos. EO-2006-0496 and EO-2006-0497, respectively; or 2) pleadings explaining why rulemaking is not required to bring the State of Missouri into compliance with those standards.

Empire opposes Staff's motion because the Company believes no rulemaking is necessary to bring the State of Missouri's standard for fossil fuel efficiency into compliance with the federal standard, which was enacted as part

of EPAct 2005 and was codified as 16 U.S.C §2621(d)(13). Missouri's standard, which is set out in 4 CSR 240 20.040(1), is sufficiently comparable to the federal standard that the Commission can determine, as a matter of law, that no further action is required to bring Missouri into compliance with EPAct 2005.

In addition, Empire believes that Staff's proposal to open a single rulemaking docket to consider the fuel sources standard that is the subject of this case as well as the federal standards under consideration in Case Nos. EO-2006-0493, EO-2006-0495, EO-2006-0496, and EO-2006-0497 would prove unwieldy for both the Commission and any parties who may choose to participate in such a docket.

Background of the Federal Fuel Sources Standard

1. EPAct 2005 includes provisions that require each state utility regulatory authority to consider several standards related to electric energy and to determine if any or all of the standards should be adopted for electric utilities over which the regulatory authority has jurisdiction. The statutory language that imposes this requirement is as follows:

> (a) Consideration and determination. Each State regulatory authority (with respect to each electric utility for which it has ratemaking authority) and each nonregulated utility shall consider each standard established by subsection (d) and make a determination concerning whether or not it is appropriate to implement such standard to carry out the purposes of this title. . . Nothing in this subsection prohibits any State regulatory authority or nonregulated electric utility from making any determination that it is not appropriate to implement any such standard, pursuant to its authority under otherwise applicable State law.

16 U.S.C. § 2621(a).

2. What the Commission must do to fulfill these obligations is set out in 16 U.S.C. §2621(c):

> (1) The State regulatory authority (with respect to each electric utility for which it has ratemaking authority) or nonregulated electric utility may, to the extent consistent with otherwise applicable State law:
>
> > (A) implement any such standard determined under subsection (a) to be appropriate to carry out the purposes of this title, or
> >
> > (B) decline to implement any such standard.
>
> (2) If a State regulatory authority (with respect to each electric utility for which it has ratemaking authority) or nonregulated electric utility declines to implement any standard established by subsection (d) . . . such authority or nonregulated electric utility shall state in writing the reasons therefore.

3. Taken together, the two statutes quoted above show that, although each state is required to *consider* the federal standards, Congress did not require each state to *adopt* those standards. For regulated electric utilities, the decision to adopt or decline to adopt the federal standards is left to the discretion of the utility regulatory authority in each state.

4. Among the standards adopted in EPAct 2005 was one pertaining to "fossil fuel efficiency," which the statute describes as follows:

> Fossil fuel generation efficiency. Each electric utility shall develop and implement a 10-year plan to increase the efficiency of its fossil fuel generation.

16 U.S.C. § 2621(d)(13). In response to a motion filed by Staff, the Commission opened the current case to consider the federal fuel sources standard and decide if it should be adopted in Missouri.

Fossil Fuel Efficiency Standards in Missouri

5. The Commission has had in effect for many years rules that require each Missouri electric utility to analyze a variety of supply-side fuel and generation resources. Each utility's obligation is stated in 4 CSR-240-22.040(1):

> (1) The analysis of supply-side resources shall begin with the identification of a variety of potential supply-side resource options which the utility can reasonably expect to develop and implement solely through its own resources or for which it will be a major participant. These options include new plants using existing generation technologies; new plants using new generation technologies; life extension and refurbishment at existing generating plants; enhancement of the emission controls at existing or new generating plants; purchased power from utility sources, cogenerators or independent power producers; efficiency improvements which reduce the utility's own use of energy; and upgrading of the transmission and distribution systems to reduce power and energy losses. . . .

The language quoted above already requires Missouri electric utilities to analyze and evaluate the efficiency of their generating plants as part of the Integrated Resource Planning ("IRP") process. Among the options that the rule requires these companies to consider are "life extension and refurbishment at existing generating plants" and "efficiency improvements which reduce the utility's own use of energy."

6. Although the IRP process does not require utilities to implement a plan to increase the efficiency of fossil fuel plants, it would be unreasonable to include such a requirement in light of the fundamental purpose of the supply-side resource planning process. That purpose is stated in 4 CSR 240-22.010 as follows:

> (1) The commission's policy goal in promulgating this chapter is to set minimum standards to govern the scope and objectives of the

> resource planning process that is required of electric utilities subject to its jurisdiction in order to ensure that the public interest is adequately served. ...
>
> (2) *The fundamental objective of the resource planning process at electric utilities shall be to provide the public with energy services that are safe, reliable and efficient, at just and reasonable rates, in a manner that serves the public interest.* ... (emphasis added)

7. It is possible that improving the efficiency of a fossil fuel generating facility may not be consistent with the objective of providing service that is "safe, reliable, and efficient, at just and reasonable rates." For example, if a fossil fuel generating facility were at or near the end of its economic life, it would not be reasonable to mandate that capital be expended to refurbish the facility in order to improve its efficiency. Yet that kind of inflexibility, which is inconsistent with the stated objectives of the Commission's IRP planning process, is what would occur if Chapter 22 of the Commission's rules were amended to require the development and implementation of a mandatory ten-year plan to improve fossil fuel efficiency.

8. The scheme that currently is in place – which requires Missouri electric utilities to consider refurbishment of existing facilities to achieve objectives that include improved efficiency but does not require them to take any particular action – is much superior to the mandatory scheme suggested by the federal standard. Changing Chapter 22 to require mandatory efficiency improvements would also require the Commission to change the fundamental objective of the IRP rules. Such a change, however, is not in the best interests of Missouri's electric utilities or their customers.

Further Action Regarding Fuel Sources That Is Required to Bring Missouri Into Compliance with the Federal Standard

9. Staff's Motion suggests that further action by the Commission – in the form of a large, unwieldy rulemaking docket convened to consider fuel sources and other federal energy standards included in EPAct 2005 – is necessary to bring Missouri into compliance with federal law. Empire disagrees. Because the Commission has already addressed the issue of fossil fuel efficiency in its rules, the Company believes that re-plowing the same ground with another rulemaking proceeding on the same subject is neither required nor desirable.

10. Under the "prior state action" provisions of EPAct 2005, the Commission need not take any further or additional action regarding the fossil fuel efficiency standard if, prior to the enactment of the statute in August 2005:

> (1) the State has implemented for such [electric] utility the standard concerned (or a comparable standard);
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> (2) the State regulatory authority for such State . . . has conducted a proceeding to consider implementation of the standard concerned (or a comparable standard); or
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> (3) the State legislature has voted on the implementation of such standard (or a comparable standard) for such utility.[1]

11. The Commission's rule requiring utilities to consider improving the fuel efficiency of existing generating facilities as part of a range of supply-side IRP options qualifies as "prior state action" under EPAct 2005. The Commission, therefore, is free to determine that, because a comparable fuel sources standard already exists in Missouri, no further action regarding the federal standard is

[1] 16 U.S.C. § 2622(d).

necessary. Furthermore, Empire believes that such a determination, which is a question of law and not fact, can be made in the current case based solely on the pleadings. This would obviate the large and cumbersome rulemaking docket that Staff proposes in its Motion.

WHEREFORE, for the reasons stated above, Empire urges the Commission to reject Staff's suggestion that a rulemaking docket be opened to address any and all rulemaking considerations related to the fuel sources standard that is the subject of the current case as well as the other federal energy standards that are the subjects of Case Nos. EO-2006-0493, EO-2006-0494, EO-2006-0496, and EO-2006-0497.

Respectfully submitted,

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Certificate of Service

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