BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of the Application of The Empire District Electric Company for authority to file tariffs reflecting increased charges for electric service within its Missouri service area	))))))	**ER-2004-0570**

RESPONSE OF PRAXAIR, INC.
AND EXPLORER PIPELINE COMPANY
TO ORDER DIRECTING FILING

COME NOW PRAXAIR, INC. ("Praxair") and EXPLORER PIPELINE COMPANY ("Explorer") and tender their response to the August 4, 2004 Order Directing Filing Regarding Ex Parte Contact and Hearing Procedure as follows:

I. INTRODUCTION.

The necessity for this response arises because of events that occurred at a scheduled proceeding on July 26, 2004.[1/] At that time, it appeared, *first*, that the order scheduling the proceeding, issued June 17 (June 17 Order) had given rise to confusion as to the scope and purpose of the proceeding. While subsequently the scope of the proceeding appeared to be clarified, both Public Counsel and these intervenors objected to

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[1/] It is ironic that, as this pleading is being finalized, we received yet another ex parte communication from Empire, by e-mail, that was directed to several staff members and three sitting commissioners. Analysis of that communication is ongoing as well as an appropriate response thereto, but it is indeed interesting that, even as the controversy regarding earlier ex parte communications involving Empire continues, Empire injects yet new ex parte communications into the mix.

evidentiary presentations by Empire witnesses (as opposed to factual and legal argument about Empire's pending motion as noted in the June 17 Order) as well as objections regarding narrative testimony, general lack of notice of the proceeding, all as detailed in the transcript of the proceeding. These objections were overruled but, *second*, during the discussions that ensued, it was disclosed that certain communications had occurred that may have either been prohibited ex parte communications or that should have indicated confusion regarding the scope and purpose of the proceeding.

Following the issuance of the Order to which we here respond, the Commission issued an Order Denying Empire's Motion to Lift Suspension. That outcome may have a substantial effect on the relief these parties may need to seek. However, other issues have arisen in the evolving course of this dispute that should be clarified as well. Hence this response will address both the relief these parties believe is needed at this point as well as these other issues.

II. RESPONSE AND COMMENTS ON THE COMMUNICATIONS AND THE HEARING PROCEDURE.

A. The Professional Rule Does Not Preclude An Attorney Taking the Stand to Testify Regarding An Ex Parte Communication.

As noted by the August 4 Order, counsel sought to inquire regarding the nature, timing and content of these commu-

nications. While the August 4 Order is correct in stating that counsel did not suggest that impropriety had occurred, we lacked information regarding what had occurred and it appeared only two persons were involved, but only one of whom, Judge Thompson, was identified. In an effort to ascertain the facts, Mr. Swearengen, counsel for Empire was called to the witness stand. Counsel made amply clear the strictly limited nature of the inquiry that was proposed,[2/] and objections to Mr. Swearengen's testimony were overruled.

Mr. Swearengen refused to take the stand despite being ordered to do so by the presiding Regulatory Law Judge. His statement was that he would refuse to do so unless a court order was obtained. Acting as his counsel, Mr. Boudreau cited to Missouri Supreme Court Rule 4-3.7. In his July 28 letter, Mr. Swearengen also cited the same rule as precluding his testimony. Perhaps it would be helpful to look at the actual text of the rule.

> Rule 4-3.7. Lawyer as Witness
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> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
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> (1) the testimony relates to an uncontested issue;
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> (2) the testimony relates to the nature and value of legal services rendered in the case; or

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[2/] Tr. p. 239.

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

The cited rule plainly does not prohibit Mr. Swearengen taking the stand to give testimony regarding the (at that time) alleged ex parte communication to Judge Thompson.[3/] Quite obvi-

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[3/] In counsel's offer of proof, he stated the following:

MR. CONRAD: Well, I believe that based on what Mr. Coffman has told me and what you yourself indicated on the record at the commencement of the proceeding yesterday that a

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communication between you and someone on behalf of the company -- I'm suspicioning that that may be Mr. Swearengen. That may not be. That's part of the question. It occurred in advance of Friday afternoon. Else you had to have that information provided to you some way somehow. And I have not seen a notification that such a communication occurred. I do not know the substance of that communication. I do not know which -- who -- who activated the -- the telephone to place that. But it would seem that that would come out through this.

And if that is, as I mentioned to the Commissioner, it would indicate that some impropriety had occurred in the context of that exchange, then we would have that of record. And I think that record as I would go back to amplify impacts on how this proceeding started, which has been conducted heretofore over my objection, my continuing objection, which I lodged yesterday and we'll lodge again if we need to today. So that's -- that is the sole purpose that I would ask Mr. Swearengen to take the stand.

I have a great deal of respect and

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admiration for Mr. Swearengen. He is, as far as I know, maybe a year or two, my senior in the bar. And I have no personal animosity toward him nor do I wish to embarrass him or cause him in any way to reveal any client confidence. But I do think I am entitled to

(continued...)

ously the rule pertains to a situation in which the attorney (or the client) could reasonably expect that the attorney would be called as a witness to the substantive events or facts of the underlying litigation. Indeed, were it otherwise, circumstances of professional or judicial misconduct might never be disclosed, the public interest correspondingly damaged, and public confidence in the integrity of the legal profession and in our public institutions compromised. The cited Rule does plainly speak to a situation such as where an attorney observes the facts of a traffic accident or other factual occurrence giving rise to a lawsuit or potential professional engagement for the attorney. In such a circumstance that attorney should not accept an engagement to represent one of the parties in that accident or occurrence unless there were multiple other witnesses that observed the same accidence (in which case the attorney would not be a "necessary witness"), or in a case in which the liability had been stipulated and the issue for trial was the construction of the terms of insurance coverage or the like (where it would be unlikely that the attorney would be called as a witness because their observations would not be material to the facts of the suit). It is not a rule of disqualification of attorney testimony, but rather an admonition against accepting representation

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[3/] (...continued)

explore that question because that question goes to the heart of this proceeding.

where the attorney is likely to be a necessary witness in the case.

As we stated at the time, we had and continue to have the highest respect and admiration for Mr. Swearengen, both as a long-time, professional, and distinguished colleague and counselor at the Bar, and as a long-time and good friend in uncounted instances of litigation before the Commission and courts of record. At the time we called him to the stand, only one party (Judge Thompson) to the subject communication was known.[4/] Mr.

[4/] Commissioner Clayton, although initially intervening in the process of disclosure of the communication by Judge Thompson (Tr. p. 19), appeared later to recognize that opposing parties were entitled to inquire into the nature of this communication and its content. Tr. p. 355. This view appears consistent with the comment to the Missouri Supreme Court Rule that requires a balancing between the various interests as follows:

> Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. ***It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness.***

Comment to Missouri Supreme Court Rule 4-3.7 (emphasis added).

Where the purpose of the inquiry is clearly announced and has already been made evident on the record of the proceeding, it

(continued...)

Swearengen might well have disclaimed knowledge of the communication and that would have ended the matter insofar as his involvement. Alternatively, he could have simply offered to state or explain the circumstances as he knew them. Mr. Swearengen's personal and professional integrity is not questioned here and requiring that such a statement be made under oath would have been superfluous.[5/] That option was not, however, offered at the time.

Given that the subject communication involved Judge Thompson and at least one other, and that further inquiry of Judge Thompson was precluded, our need to make a record and our own obligation to advocate and defend the interests of our clients made Mr. Swearengen's call necessary.

To his credit, Mr. Swearengen subsequently disclosed the transaction in his July 28 letter. Based on this letter we now know that a communication occurred, when it occurred and its general content.

[4/](...continued)
would seem that disclosure on that record and in the public view should be the result rather than the continued concealment of what ultimately might well be shown to have been an entirely innocuous communication.

[5/] "A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on the evidence given by others." Comment to Missouri Supreme Court Rule 4-3.7.

B. The Commission's Rule Regarding Ex Parte Communications Extends to the Merits of the Underlying Dispute.

The Commission's Rule is simple and straightforward.

> (2) In all proceedings before the commission, no attorney shall communicate, or cause another to communicate, ***as to the merits of the cause*** with any commissioner or examiner before whom proceedings are pending except:
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> (A) In the course of official proceedings in the cause; and
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> (B) In writing directed to the secretary of the commission with copies served upon all other counsel of record and participants without intervention.[6/]

C. Mr. Swearengen's July 28 Letter Is Not A "Prohibited Ex Parte Communication," Nor Is It An Ex Parte Communication At All.

There seems to be a basic misunderstanding about what constitutes an ex parte communication, even before the question of impropriety arises. A rough translation from the latin of the phrase *ex parte* means "without the parties," or "in the absence of the others," or "on one side only." Clearly Mr. Swearengen's July 28 letter does not fall within the ambit of that definition.[7/] Following the practice of general pleading before the

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[6/] 4 CSR 240-4.020 Conduct During Proceedings (emphasis added).

[7/] On July 29, 2004 the decisional officer placed a copy of Mr. Swearengen's July 28 letter into the record of this proceeding indicating that the decisional officer had received an ex parte communication. We do not mean to be unsympathetic to the decisional officer who may, in the circumstance, desired to err, if at all, on the side of caution.

Commission, Mr. Swearengen addressed his July 28 letter to the Secretary of the Commission, properly identified it to the case at issue, and copied the representatives of all parties to the proceeding. Based on the distribution list at the end of the letter, copies were also sent to the individual Commissioners, a practice that is not frequent but not unprecedented and that certainly does not make the letter into an ex parte communication. It was not an ex parte communication because the parties were provided copies similar to any other pleading filed with the Commission. Were this to be considered as an ex parte communication, then all pleadings filed with the Commission would seemingly need to be so designated. Since it was not in our view an ex parte communication either under logic or the Commission's Rule, Mr. Swearengen's July 28 letter could not be a prohibited ex parte communication.

D. Mr. Swearengen's June 22, 2004 Communication to Judge Thompson Was An Ex Parte Communication.

Following the same analysis, the June 22, 2004 telephone conversation between Mr. Swearengen and Judge Thompson that was disclosed by Mr. Swearengen's July 28 letter is an ex parte communication. No dissemination of the communication was provided to the other parties, no notice was given in advance, nor was any notice subsequently given to any of the parties. The ques-

tion then becomes whether this ex parte communication was improper.

Under the Commission's rules, and as noted on July 27 on the record, procedural inquiries to presiding officers are proper.[8/] Indeed, given an attorney's obligation both to represent their client and to attend to the efficient administration of justice, such communications may be necessary.

Much of the content of this June 22 communication as disclosed by Mr. Swearengen's July 28 letter seems to us to be entirely within these procedural bounds. But, in the context of a pending interim request, an inquiry from company counsel to the presiding judge seeking an ***earlier date*** for the "presentation," may come close to being advocacy because it emphasizes the applicant's claimed need for the relief on an expedited basis, one of the elements of the existing test for granting interim relief and certainly going to the merits of the matter. Consider, for example, the "meta-message" that would be sent by a request for a ***later*** date for the presentation. That suggests a lack of urgency for the request. Correspondingly, suggesting the need for an earlier date implies urgency which goes to the merits of the application.

There appears to have been at least a second aspect of the communication that also may have been beyond procedural. The

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[8/] Tr. pp 313, 358.

indication apparently given by Mr. Swearengen that witnesses would be presented and testimony offered ***in the context of the notice that had been issued*** suggests that the company had in mind something beyond presenting the "factual and legal argument" that was directed in the June 17 Order. Indeed, identification of the particular proposed expert witnesses (both retained and non-retained) is a matter that (outside of Commission practice) has significant substantive overtones and is in fact the subject of a specific Missouri Supreme Court Rule 56.01(b)(4) and (5).

It will never be known whether Mr. Swearengen had all this in mind when he telephoned Judge Thompson on June 22, but we doubt it and are inclined to give Mr. Swearengen the benefit of that doubt. Knowing Mr. Swearengen as we have for many years through many individual pieces of litigation, we are satisfied that he neither had intent nor desire to present Judge Thompson with an ethical conundrum. Mr. Swearengen is a zealous, effective and well-respected advocate for his clients. ***We have often been on opposing sides of a matter or issue, yet we have never known him to consciously violate any professional obligation and in fact have observed him going the "extra mile" to avoid such an implication.*** We have only his July 28 letter to evaluate. Accordingly, ***we are satisfied that any such communication that may have strayed beyond the permitted zone of the procedural -- if it did -- was unintended and inadvertent.***

Insofar as the discussion goes to that point, we are quite comfortable letting it rest there. We request no action on that aspect of the matter.

E. The June 22 Communication Nevertheless Should Have Alerted the Commission To An Ambiguity In Its June 17 Order.

Mr. Swearengen's letter of July 28 disclosed a discussion in which he indicated to Judge Thompson that Empire intended to call witnesses at the scheduled proceeding on July 26. This could have reasonably given Judge Thompson an indication that some confusion might have arisen as to the nature of that proceeding.

Careful examination of that June 17 Order reveals only the following pertinent sentence:

> ***The parties shall be prepared to present legal and factual arguments in support of their positions*** on Empire's Motion to List [sic] the Suspension of the IEC Rider.[9/]

Neither the word "evidence" nor "evidentiary" appear anywhere in the June 17 Order. Neither do the words "testimony," "witnesses," or "cross-examine" appear. The word "hearing" appears nowhere in the June 17 Order. Notice that a "factual and legal argument" will be held is, in our view, not notice that an evidentiary hearing will be held, that witnesses will be proffered, that sworn testimony will be taken on the record of

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[9/] Order Setting On-The-Record Presentation, June 17, 2004, p. 5 (emphasis added).

the proceeding, nor that cross-examination of the "testimony" will be expected and if not taken, waived.

The words "factual" and "legal" are adjectival modifiers of the word "argument." An "argument" is neither a hearing, testimony, nor an opportunity to cross-examine witnesses. We are confident that any of the attorney-Commissioners would have been surprised to appear at one of the Courts of Appeal or the Supreme Court for a noticed "argument" and been confronted with witnesses prepared to provide narrative statements, PowerPoint presentations, all under oath and then have the opportunity to piece together a intelligent cross-examination. Obviously, it would have been important for the other parties to know of company's intentions, given the wording of the June 17 Order.

If not on June 22, the ambiguity in the June 17 Order and the resulting misunderstanding should have become apparent when Mr. Coffman called Judge Thompson the preceding Friday to verify the location of the proceeding, was advised that testimony from witnesses would be taken, and expressed surprise at being so advised. At that point the breakdown in communication that was evidenced by the "train wreck" on July 26-27, 2004 should have been reasonably anticipated and the other parties advised.[10/]

[10/] Implicitly confirming the ambiguity in the June 17 Order, following the lunch break on the first day of the proceeding, the presiding officer advised the parties that the purpose of the proceeding had been clarified. Tr. pp. 121-22. On the second day, Commissioner Clayton confirmed that "[t]here was (continued...)

In any event objections were lodged to the apparent process and, during that discussion disclosure that certain parties had earlier notice of the process and of the confusion resulting from the wording of the June 17 Order became apparent.

The question now turns to why this is important and why it was necessary to make a record or to protect the record in the proceeding because of these disclosures.

F. Legislative Hearings and an Adjudicatory Hearing on a Contested Case Are Not The Same.

Based on the rulings from the bench overruling Public Counsel's and these parties' objections, and the unusual reactions of Commissioner Davis quoted in the record at Tr. pp. 118-19, it also appears that there is a misunderstanding of the difference between a legislative hearing where witnesses are not sworn and where there is no "record" made for the purposes of potential judicial review, and the hearing that is required in a contested case under Missouri law and Article V, Section 18 of the Missouri Constitution which states:

> Section 18. All final decisions, findings, rules and orders on any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; ***and such review shall include the determination whether the same are***

[10/](...continued)
definitely some confusion" about the procedure that was to be used based on the June 17 Order. Tr. p. 315.

> ***authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record.*** Unless otherwise provided by law, administrative decisions, findings, rules and orders subject to review under this section or which are otherwise subject to direct judicial review, shall be reviewed in such manner and by such court as the supreme court by rule shall direct and the court so designated shall, in addition to its other jurisdiction, have jurisdiction to hear and determine any such review proceeding.[11/]

This rate proceeding is a contested case in which a hearing is required by Missouri law.[12/] In addition to review under the foregoing Constitutional standard, the parties are entitled to a procedure that is fair and protects their due process rights.

> Due process requires that administrative hearings be fair and consistent with rudimentary elements of fair play. Tonkin v. Jackson County Merit System Commission, 599 S.W. 2d 25, 32-33[7] (Mo. App. 1980) and Jones v. State Department of Public Health and Welfare, 354 S.W. 2d 37, 39-40[2] (Mo. App. 1962). One component of this due process requirement is that parties be afforded a full and fair hearing at a meaningful time and in a meaningful manner. Merry Heart Nursing and Convalescent Home, Inc. v. Dougherty,

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[11/] Mo. Const., Art. V, Section 18 (emphasis added).

[12/] Sections 536.010(3), .090 RSMo 2000. *See, e.g., State ex rel. Gulf Transport Co. v. Public Service Comm.*, 658 S.W.2d 448, 446 (Mo. App. 1983); *State ex rel. Fischer v. Public Service Comm.*, 645 S.W.2d 39, 42 (Mo. App. 1982).

> 131 N.J. Super. 412, 330 A. 2d 370, 373-374[7] (Ct. App. Div. 1974).[13/]

As a contested case proceeding, it is subject to a number of constitutionally required due process protections pertinent to all the parties. While this process may appear to cause delay when viewed from the paradigm of a legislative process, the process in a contested case is, assuredly, not legislative but quasi-judicial.[14/] The members of the Commission are also held to the "same high standard as judicial offi-

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[13/] *State ex rel. Fischer v. Public Service Com.*, 645 S.W.2d 39, 43 (Mo. Ct. App., 1982).

[14/] *Union Electric Co. v. Kirkpatrick*, 678 S.W.2d 402, 409 (Mo., 1984); *State ex rel. Missouri Power & Light Co. v. Riley*, 546 S.W.2d 792, 797 (Mo. App. 1977); *Brooks v. General Motors Assembly Division*, 527 S.W.2d 50, 52-53 (Mo. App. 1975)(the constitutional provision for judicial review is self-enforcing and requires no legislation to make it effective). The courts have also stated that:

> When the Commission determines facts from disparate evidence and applies the law to come to decision in a particular controversy, it acts as an adjudicator, and so exercises quasi-judicial power. *State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69, 75[10, 11] (Mo. banc 1982); *National Labor Relations Board v. Wyman-Gordon Company*, 394 U.S. 759, 770, 22 L. Ed. 2d 709, 89 S. Ct. 1426 (1969); R. Shewmaker, *Procedure Before, and Review of Decisions of, Missouri Administrative Agencies*, 37 V.A.M.S., p. 145 (1953). n3

State ex rel. Gulf Transport Co. v. Public Service Com., 658 S.W.2d 448, 465-466 (Mo. Ct. App., 1983)

cers."[15/] Shortcuts are not permitted at the sacrifice of substantial rights.[16/]

In this context, counsel who are in opposition to the proposed procedure are ***duty bound*** to take steps to protect the record (and, if necessary, ***make a record to substantiate the erroneous and prejudicial procedure***), even though to do so may disturb the perceptions of and meet with resistance from the very decision-makers whose decision is being teed-up for a potential

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[15/] *Union Electric Co. v. Public Service Com.*, 591 S.W.2d 134, 137 (Mo. Ct. App., 1979):

> It is true, of course, that the Public Service Commission is an administrative body created by statute and has only such powers as are expressly conferred by statute and reasonably incidental thereto. *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177, 181[5] (Mo.App. 1960). However, the courts in this state have held officials occupying quasi-judicial positions to the ***same high standard as apply to judicial officers*** . . . .

(emphasis added).

[16/] But however difficult may be the ascertainment of relevant and material factors in the establishment of just and reasonable rates, neither impulse nor expediency can be substituted for the requirement that such rates be "authorized by law" and "supported by competent and substantial evidence upon the whole record." Article V. § 22, Constitution of Missouri, V.A.M.S.

State ex rel. Missouri Water Co. v. Public Service Com., 308 S.W.2d 704, 720 (Mo. 1957)

judicial review.[17] It is not the purpose of counsels' objections to "disrupt" the proceedings or to offend particular Commissioners.[18] However, just like Mr. Swearengen, the under-

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[17] That the objections were apparently frustrating to the decisional officer is apparent from these exchanges:

> MR. COFFMAN: I was just going to note that we were, I guess, unaware that I guess this was going to be an evidentiary hearing, and we, not to doubt any of the particular information in here specifically, but we've not received the work papers that back this up. And I guess on that basis, I guess would object to the admission at this time until we've had sufficient opportunity to investigate
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> the underlying calculations.
> JUDGE THOMPSON: Objection is overruled. Any other objections?
> MR. FREY: Staff would just note that we also would be -- would want all of the work papers backing up this presentation.
> JUDGE THOMPSON: ***Have you asked for them?***
> MR. FREY: ***We've just now seen the presentation, your Honor.***
> JUDGE THOMPSON: Okay. Well, I note that you want the work papers. ***I suggest you tell Mr. Swearengen behind you. Any other objections?***

Tr. pp. 116-17 (emphasis added).

[18] Consider the following exchange:

> JUDGE THOMPSON: Thank you. We're going to adjourn for lunch.
> COMMISSIONER DAVIS: Your Honor, can I ask a question?
> JUDGE THOMPSON: In general, what does an on-the-record presentation mean? When we say we're going to have an on-the-record presentation here, don't you expect people to come and put things in the record? Wouldn't you be
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> expecting? I mean, I don't know whose responsibility it is to provide information to who here, but I mean what did you expect that they are just going to show up and twiddle their thumbs?
> MR. CONRAD: Do you want a response to that? I'll give you one.
> COMMISSIONER DAVIS: ***Stu, I am breathless in anticipation.***
> MR. CONRAD: The response, sir, is that if we're going to have a hearing, due process requires notice of

(continued...)

signed is also an advocate and is charged -- like Mr. Swearengen -- with the zealous representation of his client's interests. No less than the utility's attorneys, we are obligated to object to a procedure and process that we believe both wrong and prejudicial to those interests. As recently confirmed, objections, if not timely made, are waived, sometimes with dramatic effect.

> Section 536.090 requires the Commission to make findings of fact and conclusions of law in a contested case. "Whether such findings and conclusions are sufficient is an issue of law for the independent judgment of this court." Deaconess Manor Ass'n v. Pub. Serv. Comm'n, 994 S.W.2d 602, 612 (Mo. App. 1999).[19]

Although the phrase "on-the-record presentation" was used in the title of the June 17 Order and once on page 5, there

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[18] (...continued)

11 a hearing. If we're going to have an on-the-record
12 presentation, that frequently has been reserved, and in my
13 experience, has been exclusively reserved for presentations
14 of stipulations where parties are in agreement and the
15 Commission wants explanation of aspects of their agreement.
16 It is not used to be a shortcut to a contested proceeding,
17 which this is.
18 Now, I don't --
19 COMMISSIONER DAVIS: You'll have to forget the
20 ignorance of some of us who have only been here for two
21 months and aren't familiar with the intricacies of what
22 orders specifically mean. I mean, when this was brought up
23 before the agenda meeting, then this was the way it was -- it
24 was proffered and that's the way -- the reason why we went
25 down this road. But for future reference, from now on, we

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1 will schedule a full-blown hearing.

Tr., pp. 118-19 (emphasis added). *And see, Duncan v. Pinkston,* 340 S.W.2d 753, 755-57 (Mo. 1960); *State v. Montgomery*, 363 Mo. 459, 251 S.W.2d 654, 656-58 (1952).

[19] *State ex rel. GS Techs. Operating Co. v. PSC of Mo.*, 116 S.W.3d 680, 691 (Mo. Ct. App., 2003)

is nothing to "present" to the Commission. As was stated at the time, the phrase "on-the-record presentation" is typically used to provide notice to the parties following the submission of a unanimous stipulation that the Commission has questions regarding some of the terms or provisions of that stipulation. The "on-the-record presentation" is then used to provide the Commission with an opportunity to inquire into the provisions, effect and possible impact of a settlement between the parties that the parties have agreed to accept and would like the Commission to approve. That proceeding is conducted under a conditional waiver by the parties of many of their due process rights concerning the completion of the record, the evidentiary content of the record and their rights to appeal a decision accepting the stipulation as presented. These waivers and reservations of rights are explicit in the usual stipulation. In this case, however, there has been no stipulation, may never be one, and the matter is a fully contested proceeding. Given that status, there is simply no place for an "abbreviated" procedure wherein the decisionmakers are exposed to objectionable evidence that may flavor or affect their ultimate decision.[20/]

[20/] One of the objections made, but overruled, concerned the narrative nature of the testimony taken. Tr. pp. 17-18. Parties must be permitted an opportunity to make objections to questions asked, even on direct. A proper objection even on direct is that the question calls for a narrative answer. The reason is that it prevents the opposing party from making a timely objection before the witness testifies to objectionable (continued...)

G. Given That The Record Contains Evidence That Is Inappropriate and The Proper Remedy Would Usually Be to Strike Such Evidence From the Record, And Given the Commission's Decision to Deny Relief as Requested by Empire, Such Remedy May Be Moot If No Rehearing Or Reconsideration is Sought of the Commission's Order Denying Empire's Motion to Lift Suspension.

Following the lunch break on July 26, Judge Thompson announced that the purpose of the proceeding was not to consider whether to grant Empire interim relief as proposed, but rather to consider whether to have a hearing to consider granting interim relief.[21/] Subsequently Public Counsel indicated that some concerns were allayed by an earlier clarification.[22/] Commissioner Clayton earlier appeared to seek such a clarification of the record regarding the purpose of the proceeding.[23/]

Our response then and response now was that the disputed evidence and procedure had contaminated the record of the proceeding such that, were the Commission to decide to have a further hearing on the Empire request, four of the Commissioners and Judge Thompson had sat through the objectionable presenta-

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[20/](...continued)
hearsay, material that may be privileged, lack foundation or other appropriate evidentiary objections that are waived if not timely made. *State ex rel. GS Techs. Operating Co. v. PSC of Mo.*, 116 S.W.3d 680 (Mo. Ct. App., 2003).

[21/] Tr. pp. 121-22.

[22/] Tr. p. 293.

[23/] Tr. p. 19, ll. 16-22.

tions the preceding day. Whether or not that could be repaired is problematic because the opportunity for cross-examination of those witnesses was constrained, we were not provided copies of the PowerPoint presentations in advance, workpapers were not supplied in advance and the opportunity that we would usually have to propound data requests regarding the "presentations" could not occur. Trying to turn the clock back would likely be unsuccessful.

The typical remedy would be to strike the testimony of the two presenters and the objectionable exhibits. Had the Commission not already denied the relief requested by Empire, that would seem to be a good starting point for such clean-up process as could be done at this point.

On August 11, 2004 the Commission issued an order, effective the same day, denying Empire's Motion to Lift Suspension. Even though the order was effective when issued, there is some suggestion in the law that a minimum period must be provided. As an interlocutory order, however, the status of immediately effective orders is, frankly, unclear.

We are directed to provide this response to the Commission by August 16 which is within 10 days of August 11.

We would respectfully conclude with a two-part recommendation that is predicated on the representation made by Judge Thompson at pages 121-122 of the record regarding the purpose of the proceeding. Assuming (1) that remains the purpose of the

proceeding and what the Commission did in its Order of August 11 was do deny Empire's Motion to Lift Suspension and there is no "carry-over" effect of the proceedings on July 26-27 regarding Empire's objectionable "presentation," and (2) there is no attempt by Empire to seek reconsideration or rehearing of the Commission's decision on its Motion to Lift Suspension, then it would seem that a request to strike these objectionable presentations from the record, while still appropriate, would be moot.

If, however, Empire should seek reconsideration of the August 11 Order, or applies for rehearing so as to preserve the point for appeal, then a motion to strike from the record of the proceeding all of the presentation of Mr. Beecher and all of the presentation of Mr. Gipson that were taken over objection on July 26 and the respective exhibits that were offered and admitted again over objection is still ripe and should be, for all the foregoing reasons, sustained.

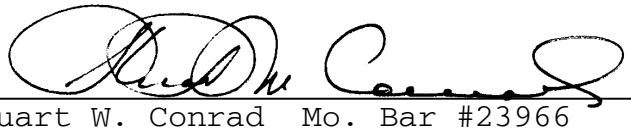
III. CONDITIONAL MOTION TO STRIKE.

WHEREFORE, Praxair and Explorer Pipeline conditionally move to strike from the record of this proceeding all the presentation of Messrs. Beecher and Gipson that was taken on July 26 and further move that the associated exhibits that were admitted over objection also be struck from the record of this proceeding. The condition of these motions to strike is such that, should the August 11, 2004 Order of the Commission Denying Empire's Motion

to Lift Suspension be retained as final and not be subject to rehearing, reconsideration or other modification, the foregoing motion should be considered as moot.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.



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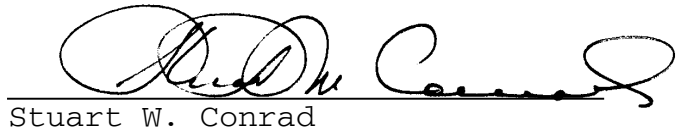
ATTORNEYS FOR PRAXAIR, INC. and
EXPLORER PIPELINE COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Application for Leave to Intervene either by hand delivery, by electronic means, or by U. S. mail, postage prepaid addressed to all parties by their attorneys of record as provided by the Secretary of the Commission.



Stuart W. Conrad

Dated: August 16, 2004