STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 16th day of November, 2006.

In the Matter of the Tariff Filing of The Empire District Electric Company of Joplin, Missouri to Implement a General Rate Increase for Retail Electric Service Provided to Customers in the Missouri Service Area of the Company	))))))	**Case No. ER-2006-0315**

ORDER QUASHING SUBPOENAS

Issue Date: November 16, 2006 Effective Date: November 16, 2006

Background

On February 1, 2006, The Empire District Electric Company applied to the Commission for authority to file tariffs increasing rates for electric service provided to customers in the Missouri Service Area of the Company. On October 4, 2006, The Public Counsel verbally requested that the true-up hearing scheduled for October 5 and 6 be cancelled, as there was "nothing to do at it" and all parties had acquiesced to its cancellation. The hearing was cancelled. Subsequently, Counsel[1] noted in a joint pleading filed on October 12 that the true-up testimony had not been admitted into the record. In response thereto, an Order Admitting All True-Up Testimony into the Record was issued on that same day.

On October 20, Praxair sought rehearing of that Order. Although rehearing is not appropriate relief at such a point in this proceeding, as will be discussed more fully below, the Order was reconsidered. In light of the fact that nothing was filed in the

[1] Staff of the Missouri Public Service Commission, the Office of the Public Counsel, Praxair, Inc. and Explorer Pipeline, Inc.

record to demonstrate the consensus to cancel the true-up hearing and the subsequent "confusion" surrounding agreement of a party to the Stipulation and Agreement concerning corporate allocations, the most prudent course of action was to ensure that Parties' due process rights were safeguarded by reconvening the hearing for the submission of true-up testimony, affording Parties the opportunity to cross-examine the witnesses who had filed true-up testimony.

On October 31, such a hearing was attempted, but was objected to as having been set with less than ten day's notice. At that proceeding, it was determined that the hearing would re-convene at 9:30, Monday, November 20, 2006, which was confirmed by written order on November 7. At the same hearing, all Counsel would also have the opportunity make closing arguments concerning the true-up testimony in lieu of further briefs and to argue the issue of whether the two non-unanimous Stipulation and Agreements were supported in the record. On November 1, 2006, Praxair sought and was granted subpoenas to compel the attendance of two Empire witnesses, Mr. Gipson and Mr. Tarter, which were duly served on November 3. Empire filed an Objection and Motion to Quash Subpoenas or, in the Alternative, Motion to Continue Hearing.

Rehearing

Praxair has filed several Motions for Rehearing in this matter, some of which are combined with a request for reconsideration and some which are not. In this instance, the Motion requested only rehearing. Rehearing at this stage of the proceeding is not proper.

Not every Commission order is subject to rehearing. In *City of Park Hills v. Public Service Commission*, 26 SW 3d 401, 406 (Mo.App. W.D. 2000), the Court noted:

> [W]e believe the references in §386.510 to "applications for rehearing" and "decisions on rehearing" suggest that the legislature was thinking of the reviewability of these kinds of agency rulings traditionally subject to review, which are primarily *final* rulings. We believe Fee Fee is distinguishable because even though the orders reviewed were interim orders, they were rate orders of a substantive nature, similar to test orders "which traditionally have been subject to review." 522 S.W.2d at 73. We conclude the General Assembly never intended in §386.510 that *all* agency orders be reviewable [.]

The Court noted in another case pertaining to review of Commission Orders, *State ex rel. Riverside Pipeline Company v. Public Service Commission,* 26 SW3d 396, (Mo.App. W.D. 2000) that "[n]either *Fee Fee* nor the test order cases, however, support judicial review of interlocutory orders under §386.510." (at 399) The Court further noted,

> Both the Missouri Constitution and Mo. Rev. Stat. §536.150 (1986) impose the additional requirement that the decision be final before it is reviewable. "Finality" is found when "the agency arrives at a terminal, complete resolution of the case before it. An order lacks finality in this sense while it remains tentative, provisional or contingent, subject to recall, revision or reconsideration by the issuing agency. (at 400, citations omitted).

As the Order Admitting All True-Up Testimony into the Record was subject to reconsideration, and was, in fact, reconsidered, it clearly was an interlocutory order not subject to rehearing.

Necessity of Appearance of the Subpoenaed Witnesses

As to the true-up testimony, the parties are limited to the submission of pre-filed testimony and the cross examination of those witnesses who have so filed. The Order Concerning Test Year and True-Up and Adopting Procedural Scheduled provided as follows:

> True-Up Audit and Hearing:
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> On March 7, 2006, Staff of the Missouri Public Service Commission, the Office of the Public Counsel, Praxair, Explorer and DNR recommended a true-up of "fuel expense and other significant revenue requirement elements for the three-month period ending June 30, 2006." The aforementioned parties provided the Commission with the following list of items they believed should be subject to the true-up: [list of issues deleted]. No parties have objected to the recommended true-up audit and hearing. The Commission will adopt the true-up recommendation.
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> (A) The Commission will require the prefiling of testimony as defined in 4 CSR 240-2.130. … The practice of prefiling testimony is designed to give parties notice of the claims, contentions and evidence in issue and to avoid unnecessary objections and delays caused by allegations of unfair surprise at the hearing.

According to that Order, true-up direct testimony was required to have been filed by 4:00 p.m., September 27, 2006. Neither Mr. Gipson nor Mr. Tarter filed true-up testimony. Although they did file testimony in this matter, both men previously took the stand, had their testimony (or a portion thereof) admitted as evidence in the record and were subject to cross examination by each party on any relevant, material topics. Praxair, like other parties, is precluded from calling as witnesses any person who did not file true-up testimony on Praxair's behalf and can only cross-examine witnesses called by other parties.

As to the ability to call Mr. Gipson or Mr. Tarter as witnesses on the non-unanimous stipulations, the Commission's rules, at 4 CSR 240-2.115(2)(D), provide:

> A nonunanimous stipulation and agreement to which a timely objection has been filed shall be considered to be merely a position of the signatory parties to the stipulated position, except that no party shall be bound by it. All issues shall remain for determination after hearing.

The Courts have been reasonably clear that when a non-unanimous stipulation and agreement is filed, the Commission may not truncate the hearing process to

determine whether to approve or not approve the stipulation and agreement, but must hold a full hearing so that it may issue findings of fact and conclusions of law in support of the position asserted in the "stipulation and agreement" or any other position the Commission determines. The Commission has not sought to truncate this proceeding, but has had a full evidentiary hearing on all matters in dispute, including the issues concerning corporate allocations and regulatory plan amortizations. See *State ex rel. Fischer v. PSC*, 645 SW2d 39 (MoApp1982). The courts have also found that the Commission may not summarily approve a nonunanimous stipulation and agreement it believes is a good idea. Rather, it must support its decision, whether approving the stipulation and agreement or otherwise, by proper findings of fact and conclusions of law. See *State ex rel. Monsanto v. PSC*, 716 SW2d 791 (MoBanc 1986).

The filing of the non-unanimous Stipulation and Agreement does not require further testimony on the issues addressed. All that remains is whether the existing record is sufficient to support the position taken in the non-unanimous stipulation and agreement, or to establish that some other position is better. No witnesses will be called on these "stipulated" issues. Either the evidence presently exists in the record or it does not; there is no opportunity or need to call additional witnesses or recall previous witnesses. Counsel may argue about the sufficiency of the record to support the alteration of the signatories' position, just as they would have been able to concede the point in their briefs and argue it there, if sufficient time remained for further briefing. Such a change in position does not create a need for additional evidence, nor does it serve to set aside the requirement that testimony be pre-filed.

As no purpose will be served by requiring Mr. Tarter or Mr. Gipson to attend the proceedings on November 20, 2006, the subpoenas requiring their attendance will be quashed.

IT IS ORDERED THAT:

1. The subpoenas issued on November 1, 2006 compelling the attendance of Bill Gipson and Todd Tarter at the continuation of the hearing in this matter set for November 20, 2006 are hereby quashed.

2. The hearing to be held in this matter shall be in three parts:

a. Calling of witnesses who pre-filed true-up testimony, cross-examination of those witnesses and oral argument concerning the true-up testimony in lieu of briefs.

b. Oral argument concerning the sufficiency of the record to support the non-unanimous stipulation and agreement on corporate allocations.

c. Oral argument concerning the sufficiency of the record to support the non-unanimous stipulation and agreement on regulatory plan amortizations.

3. To the extent this Order conflicts with the Order Setting Hearing issued on October 24, 2006, or the Order Confirming Hearing issued on November 7, 2006, then those Orders should be considered to have been reconsidered and this Order supersedes them.

4. This order shall become effective on November 16, 2006.

BY THE COMMISSION

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray and Appling, CC., concur.
Gaw and Clayton, CC., dissents to follow.

Dale, Chief Regulatory Law Judge