

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

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|---|---|-------------------------------------|
| In the Matter of the tariff filing of The |) | |
| Empire District Electric Company |) | |
| to implement a general rate increase for |) | <u>Case No. ER-2006-0315</u> |
| retail electric service provided to customers |) | |
| in its Missouri service area. |) | |

**MOTION FOR EXPEDITED TREATMENT OF
APPLICATION FOR REHEARING**

COMES NOW, Praxair, Inc. ("Praxair") and Explorer Pipeline, Inc. ("Explorer"), pursuant to 4 CSR 240-2.080(16), and in support of their Motion for Expedited Treatment of Application for Rehearing respectfully states as follows:

1. On October 12, 2006, the Chief Regulatory Law Judge, purportedly under delegation of authority, issued an Order Admitting All True-Up Testimony Into The Record ("Order"). On October 20, 2006, Praxair / Explorer filed their Application for Rehearing of the Regulatory Law Judge's Order. As reflected in that Application for Rehearing (attached hereto as Exhibit 1), the Order was defective, *inter alia*, in that it denied the parties' fundamental rights of due process and was not supported by competent and substantial evidence.

2. To date, the Commission has failed to act upon the pending Application for Rehearing. Nevertheless, on November 7, 2006, the Regulatory Law Judge, again under delegation of authority, issued an Order Confirming Hearing. This Order purports to convene a hearing for, among other things, admission of true-up testimony into the record.

3. Recognizing that the Regulatory Law Judge has already issued an Order accepting the true-up testimony into the record, and that the Commission has not taken

any action to rectify this Order, the purpose underlying the hearing is inherently suspect and procedurally defective.¹ Specifically since the testimony has already been accepted into evidence, the need for any evidentiary hearing related to this evidence is pointless.

4. If the Commission desires to correct the error inherent in the October 12, 2006 Order Admitting All True-Up Testimony Into The Record and validate the purpose of the scheduled hearing, the sole vehicle for correcting that error is via the statutorily mandated rehearing. In fact, presumably in light of the error in the October 12, 2006 Order and in response to Praxair / Explorer's Application for Rehearing, Empire filed a pleading in which it recommended that "the Commission *should grant the requested rehearing* and schedule a hearing to address any and all issues arising from the true-up testimony."²

5. Pursuant to 4 CSR 240-2.080(16), Expedited Treatment of the Application for Rehearing is appropriate. Absent such rehearing, the hearing regarding true-up issues is inherently suspect and procedurally defective. Commission action granting the pending Application for Rehearing will be of public benefit in that it will help to clarify the record.

6. Praxair / Explorer requests that the Commission act on this Motion for Expedited Treatment as its next scheduled agenda session.

7. This Motion for Expedited Treatment is timely filed in that the Order Confirming Hearing was issued on November 7, 2006 and received by counsel on November 9, 2006. As such, this Motion, filed coincident with receipt of the Order

¹ Praxair / Explorer notes that the scheduled hearing is also designed to allow for the hearing of Praxair / Explorer's objection to the non-unanimous stipulations regarding corporate allocations and regulatory plan amortizations. The scheduled hearing regarding the objected to nonunanimous stipulations is appropriate and no action regarding that portion of the hearing is requested herein.

² Empire's Response to Praxair / Explorer Pleadings, filed October 23, 2006, at page 2. (emphasis added).

Confirming Hearing, is filed as soon as practical and is therefore consistent with 4 CSR 240-2.080(16)(C).

WHEREFORE, Praxair / Explorer respectfully request that the Commission issue its Order: (1) granting this Motion for Expedited Treatment and (2) granting rehearing of the issues addressed in the October 12, 2006 Order Admitting All True-Up Testimony Into The Record.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David L. Woodsmall", is positioned above a horizontal line. To the right of the signature, there is a vertical red line extending downwards.

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ATTORNEYS FOR PRAXAIR, INC. and
EXPLORER PIPELINE, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.

A handwritten signature in black ink, appearing to read "David L. Woodsmall", is positioned above a horizontal line. A vertical red line is located to the right of the signature.

David L. Woodsmall

Dated: November 9, 2006

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APPLICATION FOR REHEARING

COMES NOW, Praxair, Inc. (“Praxair”) and Explorer Pipeline, Inc. (“Explorer”), and in support of their Motion for Rehearing respectfully states as follows:

1. On October 12, 2006, the Chief Regulatory Law Judge, purportedly under delegation of authority, issued an Order Admitting All True-Up Testimony Into The Record (“Order”). This action was taken because the previously scheduled true-up hearing was cancelled and not rescheduled.

2. The referenced Order claims to have been effective on the same date as it was issued. Missouri law requires that any such order³ be issued with a reasonable time within which to seek rehearing or reconsideration. Failure to provide such a reasonable period, which Missouri courts have construed as not less than 10 days, results in such a period being imposed by law, otherwise parties are denied the opportunity to seek rehearing of an order before they even see it. This Application, filed within 10 days of the October 12, 2006 date, is, accordingly, timely. Indeed, Judge Brown of the Cole County Circuit Court has previously chastened the Commission for attempting to make its orders impervious to review by declaring them effective simultaneously with their issuance.

³ It cannot seriously be argued that any order that seeks to limit rights that are granted by state statute does not have substantive effect.

3. Praxair / Explorer seek rehearing of the Regulatory Law Judge's decision on the basis that it is unlawful and denies the parties certain constitutional rights. Chapter 536 provides for certain procedures that must be followed in any contested case. These procedures are in place to preserve the parties' fundamental rights of due process. Moreover, Article V, Section 18 of the Missouri Constitution requires agency's decisions to be supported by competent and substantial evidence.

4. Missouri Courts have found that, while the Commission has flexibility in its proceedings, the Commission does not have "unlimited discretion to conduct its hearings in any possible manner."⁴ In fact the Court has noted that Section 386.420 RSMo "sets forth minimal procedural requirements for Commission hearings."⁵ Among other things, Section 386.420 guarantees that all parties "have the right to be heard and to introduce evidence."⁶ Furthermore, Section 536.070 guarantees parties a right to cross-examine opposing witnesses. Other statutory provisions provide the parties a right to closing statements or written briefs as well as a right to require the Commissioners to read the transcript.⁷

10. The Missouri Supreme Court has often discussed the procedural requirements and safeguards that must be observed by the Public Service Commission. Each time, that Court has found that "expediency" is not a proper consideration of this Commission.

Thus, while these statutes are remedial in nature, and should be liberally construed in order to effectuate the purpose for which they were enacted, "neither convenience, expediency or necessity are proper matters for

⁴ State ex rel. Fischer v. Public Service Commission, 645 S.W.2d 39, 42 (Mo.App. 1982).

⁵ Id.

⁶ Id.

⁷ Section 536.080.2 RSMo.

consideration in the determination of" whether or not an act of the commission is authorized by the statute⁸

In still another case the Supreme Court found:

In State ex rel. Missouri Water Co. v. Public Service Commission, supra, the court, in considering the problem the PSC has in arriving at a rate base, said, 308 S.W.2d at 720, ". . . 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, sec. 22, Constitution of Missouri, V.A.M.S. For the reasons stated, we are forced to the conclusion that the order of the Commission is neither authorized by law nor supported by competent and substantial evidence upon the whole record."⁹

11. In the immediate case, the Commission's Order purports to accept evidence into the record without following the "minimal procedural requirements for Commission hearings." Specifically, Section 536.070 provides:

Each party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not the subject of the direct examination, to impeach any witness regardless of which party first called him to testify, and to rebut the evidence against him.

12. By accepting the various pieces of true-up testimony into evidence without a hearing, the Regulatory Law Judge denied the parties an opportunity to introduce exhibits, to cross-examine opposing witnesses, to impeach such witnesses and to rebut the evidence against them.

13. Moreover, the filed testimony was accepted into the evidentiary record without the need for the sponsoring party to lay even the slightest foundation as to its relevance, the witness' credentials and knowledge of the subject matter or any witness' statement regarding the truth, veracity and preparation of the prefiled testimony.

⁸ *State ex rel. Utility Consumers Council, Inc. v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. Banc 1979) (citing to *State ex rel. Kansas City v. Public Service Commission*, 301 Mo. 179, 257 S.W. 462 (Mo. Banc 1923)).

⁹ *State ex rel. Martigney Creek Sewer Co. v. Public Service Commission*, 537 S.W.2d 388, 394 (Mo. 1976).

14. Finally, the October 12, 2006 Order is procedurally unworkable in that, while it purports to accept certain testimony into evidence, it does not nor could it assign Exhibit numbers to those individual pieces of testimony.

15. As can be seen, the October 12, 2006 Order is by all regards procedurally defective.

WHEREFORE, Praxair / Explorer respectfully request that the Commission issue its Order granting rehearing of the issues addressed in the October 12, 2006 Order Admitting All True-Up Testimony Into The Record.

Respectfully submitted,

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David L. Woodsmall

Dated: October 20, 2006