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	)))))))	**ER-2006-0315**

APPLICATION BY PRAXAIR, INC. and EXPLORER PIPELINE FOR REHEARING OF JULY 10, 2006 "NOTICE OF PROCEDURAL CHANGE"

COME NOW Praxair, Inc. and Explorer Pipeline (Applicants) and through their attorney seek rehearing of the Regulatory Law Judge's July 10, 2006 "Notice of Procedural Change" in amplification and further pursuit of their timely-filed Application for Rehearing of the Commission Order Concerning Test Year and True-Up and Adopting Procedural Schedule ("Commission Order") dated April 11, 2006 and in particular Paragraph J (p. 6) and the related parenthetical in Paragraph ORDERED 3 (page 8) thereof and in support thereof state:

A. The Current "Notice."

On April 21, 2006, Praxair, Inc. and Explorer Pipeline (Applicants) filed their Application for Limited Rehearing, Reconsideration or Modification (Application for Rehearing) of the Commission's April 11, 2006 Order Concerning Test Year and True-Up and Adopting Procedural Schedule (Commission Order). Among other items addressed in the Commission Order for which Applicants sought rehearing was the Commission's decision to

limit post-hearing briefs to ten (10) pages. As more fully addressed in the Application for Rehearing, the Commission's decision to limit post-hearing briefs to ten (10) pages was arbitrary, capricious, unreasonable, and violates governing Missouri law and public policy.

On July 10, 2006, the Regulatory Law Judge assigned to this matter issued a document entitled "Notice of Procedural Change." In that Notice, the Regulatory Law Judge attempted to change the previously ordered ten page post-hearing brief limitation to thirty pages. In essence, through this Notice, the Regulatory Law Judge purports to address the substance of a portion of Applicants' still pending April 21, 2006 Application for Rehearing.

Applicants recognize that the Commission may delegate, pursuant to Section 386.240 RSMo, any "act, matter of thing" which the Commission is authorized to do under the pertinent statutory provisions. The delegation authority contained in Section 386.240 provides, however, that "no order, rule or regulation of any person employed by the Commission shall be binding on any public utility or any person unless expressly authorized or approved by the commission." (emphasis added).

Applicants understand that, at various points in time, the Commission has formally delegated certain authority to the presiding Regulatory Law Judge in a matter. Applicants are unable to locate a formal list of all delegated authority, but assert, based upon knowledge, belief and experience, that the

authority to address the substance of an Application for Rehearing is not among the powers delegated to the Regulatory Law Judge.

Recognizing that the authority to rule on Applications for Rehearing has not been "expressly authorized or approved by the commission", the matters purported to be addressed in the Regulatory Law Judge's July 10 Notice are not binding on any person including the Regulatory Law Judge. In fact, given the lack of express authorization to address Applications for Rehearing, the Notice of Procedural Change is, for all intents and purposes, irrelevant and the Commission Order stands with Applicants' Application for Rehearing unaddressed. As such, the ten (10) page limitation contained in the Commission's Procedural Order is still in effect and thus, that portion of the Application for Rehearing that seeks reconsideration of the page limitation still remains unaddressed. Absent some express authority by the Commission delegating authority to the Regulatory Law Judge to rule on Applications for Rehearing, the pending Application for Rehearing must be addressed by the Commission.

B. Timeliness of This Application.

The subject Order was issued on July 10, 2006 and not effective date appears to have been stated. Missouri law requires that any such order[1/] be issued with a reasonable time

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[1/] It cannot seriously be argued that an order that seeks to limit rights that are granted by state statute does not have substantive effect.

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. Else parties are denied the opportunity to seek rehearing of an order before they even see it. This Application, filed within 10 days of the July 10, 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.

C. The Commission's Advance Limitation on the Length of Post-Hearing Briefs, Whether to the Length of 10 or 30 Pages is Arbitrary, Capricious, Unreasonable, Violates Governing Missouri Law and Public Policy.

In Paragraph J of its April 11, Commission Order (p. 6), the Commission rules in advance on page lengths for post-hearing briefs. Later, at page 8, the Commission includes a corresponding limitation in Paragraph ORDERED 3. Paragraph J states:

> Since the prehearing briefs will cover most of the record, post-hearing briefs need not be lengthy and will be limited to ten (10) pages. Post-hearing briefs will update the prehearing briefs for new evidence adduced at the hearing.

The purported "Notice of Procedural Change," purporting to adjust this limit to 30 pages, whether or not authorized, is no less arbitrary. It is arbitrary to seek to limit the length of any post-hearing brief ***before*** the record is complete and,

indeed, months before the hearing has even been held and any intelligent guess can be made regarding its actual length, the issues that will be tried and the issues that may be resolved without trial. Moreover, there is no competent and substantial evidence to support such a decision. Such decisions are best left to the end of the hearing. At that time the number and complexity of the issues that the Commission must resolve will be known. The extent of the record necessary to be analyzed as well as the exhibits to be addressed with also be known.

The quoted paragraph makes the assumption that the prehearing briefs will "cover much of the record" but fails to recognize that in many instances the length of the hearing is less controlled by the parties and what they file as by the questions that are posed by various commissioners, the need for additional questions and activity following those questions, the additional rounds of cross-examination that may be necessitated by those questions, and the need to consider exhibits that may be produced or requested during those exchanges. Moreover, the Commission's failure to rule on pending applications for rehearing of other orders is forcing the parties to this case to, in effect, prepare two cases for presentation, which will certainly lengthen the period of the hearing.

The Commission's apparent shift in reliance to a prehearing brief and a statement that the only purpose served by post-hearing briefs is to "update the prehearing briefs for new evidence adduced at the hearing" is troubling. Certainly an

appropriate pre-hearing brief or, more succinctly, a statement of position, is a useful addition to the procedure.[2/] Appropriately used, a pre-hearing brief can succinctly state the issues and briefly articulate the party's position on those issues. A prehearing brief might also identify specific evidentiary legal issues that may arise in the case and provide the submitting parties an opportunity to make initial arguments regarding those issues.

But a prehearing brief is not a substitute for an effective and well-drafted post-hearing brief for several reasons. *First*, no litigator worth the title of attorney should be expected to reveal -- in advance of hearing -- their trial strategy, including the witnesses that they expect to cross-examine, the content of that cross-examination and the forensic exhibits that they may choose to introduce to limit the witness' testimony or otherwise impeach their credibility. The hearing process is, among other things, an opportunity for the foundations of an opposing witnesses' opinions to be undercut or the witness impeached. Expecting parties to reveal through a pre-hearing brief their trial strategy compromises the most basic responsibilities, could require the disclosure of attorney work-

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[2/] Actually, this practice is neither new nor inventive. For a number of years the practice of a "hearing memorandum" was followed. However, that document grew so lengthy and its preparation became so cumbersome that it was abandoned in favor of "statements of position" which include all the material necessary to orient the Commissioners to the issues in the case and do not require concurrence by the other parties in the wording of a party's position.

product, and may be subject to challenge as an attempt by the Commission to regulate how law is practiced which is clearly beyond the Commission's jurisdiction.

Second, there is legitimate concern that the Commission's apparent desire to limit post-hearing briefs to absurdly low page limits months in advance of the hearing runs afoul of the Commission's basic responsibility to base its decision on competent and substantial evidence on the whole record.[3/] *A priori*, a prehearing brief cannot be based on the ***record*** of the proceeding, since that record does not exist until the time of the hearing. Indeed, prepared testimony -- the only thing on which a prehearing brief could be based -- is ***not part of the record*** -- and cannot be "competent" evidence within the meaning of the Missouri Constitution -- until it has been subjected to cross-examination.[4/] "Competent evidence is defined

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[3/] An administrative decision in a contested case must be supported by competent and substantial evidence on the whole record. Mo. Const., Art. V, Section 18.

[4/] Fixing of rates imposes a

> "duty which carries with it fundamental procedural requirements. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such."

Morgan v. United States, 298 U.S. 468, 479-80, 56 S.Ct. 906, 80 L.Ed. 1288 (1936).

by Missouri courts as relevant and ***admissible*** evidence that can establish the fact at issue."[5/]

Third, Section 536.080 imposes the requirement upon the Commission and requires that the individual commissioners certify compliance with its alternative provisions. The Section provides:

> 1. In contested cases each party shall be entitled to present oral arguments or written briefs ***at or after*** the hearing which shall be heard or read by each official of the agency who renders or joins in rendering the final decision.
>
> 2. In contested cases, each official of an agency who renders or joins in rendering a final decision shall, prior to such final decision, either ***hear all the evidence, read the full record including all the evidence, or personally consider the portions of the record cited or referred to in the arguments or briefs. . . .***[6/]

[5/] *City of Kan. City v. New York - Kan. Bldg. Assocs.*, L.P., 96 S.W.3d 846, 861 (Mo. Ct. App. 2002); *Loven v. Greene County*, 63 S.W.3d 278, 292 (Mo. Ct. App. 2001); *Consolidated Sch. Dist. No. 2 v. King*, 786 S.W.2d 217, 219 (Mo.App. W.D. 1990) (emphasis added).

Evidence is not competent if there is no opportunity for cross-examination.

> "These reasons were not competent as evidence prior to the cross-examination of the witness, nor were they made either necessary or competent by that cross-examination.

State v. McDonough, 232 Mo. 219, 234 (Mo. 1911)

[6/] Section 536.080 RSMo 2000 (emphasis added).

A prehearing brief cannot be prepared "at or after" the hearing and therefore cannot be used as a substitute for briefing that follows the hearing. In *T. J. Moss Tie*, the court, stated:

> Under the provisions of section 536.080, each agency official who joined" in rendering a final decision" was required prior thereto either to have heard all the evidence, to have read the full record including all the evidence, or personally to have considered the portions of the record cited or referred to in arguments or briefs. Inasmuch as only one commissioner heard the evidence ***and no transcript was available until eleven days after the decision and thus another commissioner could not have read the full record or considered citations to such transcript prior to the decision, and inasmuch as the record does not disclose any written or oral stipulation of the parties waiving compliance with the provisions of section 536.080, it is apparent that the requirements of that section were ignored.***[7/]

Section 536.080.2 provides three explicit alternatives for decisionmakers: (1) ***hear all*** the evidence; (2) read the full record including all the evidence; or (3) personally hear or read and consider the portions of the ***record cited in the arguments or briefs***.[8/]

Setting aside the issue of a dishonest certification, a commissioner cannot read a prehearing brief and fulfill this statutory requirement. The "record" does not yet exist and

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[7/] *T. J. Moss Tie Co. v. State Tax Com.*, 345 S.W.2d 191, 193 (Mo. 1961).

[8/] It should immediately be observed that the statute provides ***only*** these three alternatives. It does ***not*** on its face permit a commissioner to hear "some" of the evidence, read the "balance" of the record, and then rely upon the parties briefs to bridge that which the commissioner did not "hear." The statute does ***not*** say ". . . or any combination of the foregoing."

cannot be cited in a prehearing brief. Although a reviewing court may be willing to presume compliance with the statutory requirement,[9] that presumption is rebuttable and could be easily rebutted by a showing that compliance was impossible.[10]

These three alternatives provided by the General Assembly recognize the power post-hearing briefing brings to the decisional process. This is the opportunity that the attorneys

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[9] *State ex rel. Jackson County v. Public Service Com.*, 532 S.W.2d 20, 30 (Mo., 1975):

> . . . . it is presumed that administrative decisions are made in compliance with applicable statutes. *Dittmeier v. Missouri Real Estate Commission*, 316 S.W.2d 1 (Mo. *en banc* 1958), *cert. denied* 358 U.S. 941, 3 L. Ed. 2d 348, 79 S. Ct. 347.

[10] Consider the court's words from *State ex rel. Jackson County v. Public Service Com.*, 532 S.W.2d 20 (Mo. 1975):

> However, the facts as to Commissioner Sprague create a possible denial of due process and the actual truth of the matter should be brought forward. To accomplish the same, and hopefully to avoid further delay in this matter, the trial court is directed to modify its "order of remand" to allow Commissioner Sprague ten days to certify to it that he had complied with § 536.080 at the time of denial of the motions for rehearing. Absent such certification, the remand for reconsideration should follow.

To this point, the Missouri courts have also ruled:

> Our Administrative Procedure Act provides that upon judicial review of a decision or order of an administrative officer or body: "The court may in any case hear and consider evidence of alleged irregularities in procedure or of unfairness by the agency, not shown in the record." § 536.140, P4.

Dittmeier v. Missouri Real Estate Com., 316 S.W.2d 1, 5 (Mo. 1958).

can "connect the dots" in their respective cases after the evidence and exhibits are "in the can" and after the witnesses have been subjected to the crucible of cross-examination. Not only does the Commission risk violation of the statute by a procedure that arbitrarily cripples post-hearing briefs, it deprives itself of the benefit of the analysis of the parties who should best know their respective cases to marshall their arguments, testimony, evidence and exhibits to the proof of their respective cases. Competent practitioners should reject an attempt to "dumb down" the process and to make their skills in trial advocacy and persuasive writing superfluous or irrelevant.

If it is to be the position of the Commission that the hearing does not matter and that what happens at the hearing does not matter, then the Commission should openly state so rather than implicitly try to limit the significance of the hearing, and the cross-examination of witnesses, by suggesting that briefs in advance of the hearing will "cover most of the record."

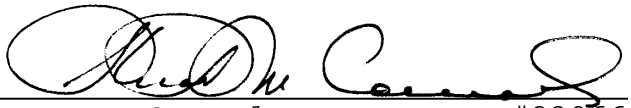
The Commissions' arbitrary and capricious advance determination of the length and content of post-hearing briefs raises other questions that go to the heart of the essential fairness of the hearing. What if the cross-examination by the parties and the Commissioners' questions and their responses require much more than 10 pages to address? How can that be addressed if the Commission has predetermined the length of that pleading? What if prefiled testimony is the subject of an objection and the objection is sustained? Or is such testimony's

simple filing sufficient to include it in the record? Is the Commission seeking recognition of a new definition of what constitutes "the record?" And what in such a case should be made of a particular party's reliance on the rejected testimony in their prehearing brief. How can such a rejection be "updated?" These and possibly many other questions many of which may rise to the level of due process issues can be avoided by simply withdrawing Paragraph J and the related parenthetical provision in Paragraph ORDERED 3.

WHEREFORE, rehearing of the July 10, 2006 "Notice" and of the April 11, 2006 Commission Order that still pends should be granted and the Order corrected to delete Paragraph J and the related provision in Paragraph ORDERED 3. In addition the purported "Notice" should be set aside and disregarded.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.



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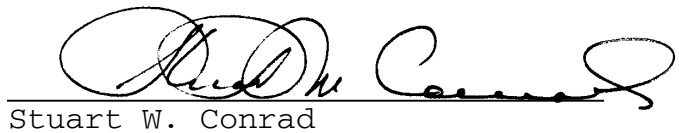
ATTORNEY FOR PRAXAIR, INC. and
EXPLORER PIPELINE

July 19, 2006

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.



Stuart W. Conrad

Dated: July 19, 2006