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, INC.
FOR REHEARING, RECONSIDERATION OR MODIFICATION

COME NOW Praxair, Inc. and Explorer Pipeline, Inc. (Applicants) and through their attorney seek reconsideration or rehearing of the Commission's Suspension Order dated February 7, 2006 in the following particulars:

A. Timeliness of This Application.

1. The subject Suspension Order was issued on February 7, 2006 and stated to be effective that same date. Missouri law requires that any such order[1/] 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. Else parties are denied the opportunity to

[1/] It cannot seriously be questioned that a suspension order that establishes a conteested case has substantive effect.

seek rehearing of a substantive order before they even see it. This Application, filed within 10 days of the February 7, 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.

B. Failure to Recognize Status of Applicants

1. Paragraph D.1.c. of the Stipulation and Agreement filed in Case No. EO-2005-0263, the same being Empire's "Regulatory Plan," as approved by the Commission on August 2, 2005, provides:

> Each of the Signatory Parties shall be considered as having sought intervenor status in any rate case or rate filings without the necessity of filing an application to intervene and Empire consents in advance to such interventions.

2. Applicants were signatory parties to that Stipulation and Agreement and this filing by Empire is "any rate case or rate filing" within the scope of that Stipulation and Agreement.

3. Similar language was recognized by the Commission and corresponding signatory parties were established as intervenors in ER-2006-0314 without the necessity of formal applications for intervention.

4. However, in this case, identical language has not produced the bargained-for result. Applicants are entitled to the benefit of their bargain as signatory parties to the Stipula-

tion and Agreement in Case No. EO-2005-0263 and should be so recognized by the Commission. The Suspension Order should be corrected accordingly. Applicants more discretely sought to call this error to the attention of the Commission by filing an Entry of Appearance reciting the above facts. However, that filing has not resulted in the correction of the Suspension Order, so more formal means must now, apparently, be employed.

C. Advance Rulings on "Continuances for Negotiation" is Arbitrary, Capricious, Unreasonable, Violates Commission Rules and Violates Governing Missouri Law and Public Policy.

1. In Paragraph 11 of its February 7, 2006 Suspension Order, the Commission rules in advance on what are termed "continuances for negotiation" and further appears to require unanimity in stipulations. This is not only arbitrary and capricious but violates the Commission's rules, governing law and public policy favoring negotiation and settlement of controverted issues. It appears to result from inexperience regarding the settlement process and the often controversial, complex and contentious negotiations surrounding settlement of all or part of a rate case and bespeaks a lack of understanding and experience regarding that process.

2. The clause in Paragraph 11 is arbitrary and capricious because the Commission has not been presented with any motions for continuance in this proceeding, whether for "negotiation" or otherwise and has no factual or legal circumstances upon

which to base such an order of advance denial. Denying such a motion in advance, without knowledge of either the facts or circumstances that might underlie such a motion, is the very essence of arbitrariness and capriciousness. While Applicants appreciate the sometimes frustrating process of case handling and resolution, public policy encourages settlement. The number of cases that settle on the "courthouse steps" is legion. Rather than constructing arbitrary and edict-driven obstacles to an already contentious settlement process, the Commission should be seeking counsel from the representatives of the respective parties regarding encouragement of the process.

3. A requirement that continuance applications will not be granted unless a unanimous stipulation is submitted violates the Commission's own rule. 4 C.S.R. 240-2.115 clearly recognizes nonunanimous stipulations in Commission practice and the Commission has frequently been presented with nonunanimous stipulations.[2/] That rule provides a mechanism for a party that, while unwilling for many reasons to ***sign*** a settlement, still has no desire to ***contest or oppose*** that settlement. There may well be good and sufficient reasons that the party cannot disclose without breaching ethical constraints why in a particular set of facts they cannot sign a settlement. In other instances their inability to do so may be obvious to all involved. Nevertheless, for different reasons, such a party may not wish to

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[2/] We have searched in vain for a notice of proposed rulemaking that would seek to alter this well-established rule.

contest the settlement. The Commission's uninformed February 7 Suspension Order would force these parties either to go to hearing or sign.

4. A settlement is a contract between the signatory parties. The Commission has an opportunity to consider that contract and approve or reject it pursuant to the rule. If a party does not sign, but does not request a hearing, the Commission is empowered by its rule to treat that settlement as unanimous for purposes of its processes. But the Commission cannot force an unwilling party into a contract that party does not wish to accept but does not wish to oppose or contest. An arbitrary advance ruling that requires unanimity forces hearings upon parties who might not be sufficiently opposed to request them under the rule. Moreover, under the guise of trying to "save" Commission time, it actually would force the Commission into a potentially lengthy hearing which certainly the signing parties do not wish and which the non-signatories have not requested. To force that result is absurd and unreasonable and again bespeaks inexperience as to the nature of the settlement process.

5. Indeed, such a rule might well distort the otherwise favored settlement process by imposing upon it a requirement of unanimity when none is required by Commission rule. It violates the governing Missouri law on the subject which, including the Commission's own rule, is embodied in *Fischer v.*

P.S.C.[3] The rule noted above was promulgated following the *Fischer* decision and has proved amply adequate to deal with hundreds of Commission cases filed in the more than two decades following. It has well served the public and the functioning of the Commission. This settlement process, though often frustrating, is neither broken nor misunderstood by the Commission bar.

6. The recent settlement filed in Aquila's still-pending rate case, Case No. ER-2005-0436 examples the problem created. In that case the several signatories were able to bring forward a settlement (still pending before the Commission for its approval) which, while not signed by either Public Counsel or another party (AARP) was not opposed by either. In the recent on-the-record presentation, both these parties explained why they were not able to sign the settlement. It is uncertain whether a requirement of unanimity could have resulted in submission of a settlement in that case. We presume that the Commission would prefer that the parties settle, so it is difficult to understand why otherwise needless litigation should be forced upon the unwilling by the unwise.

7. In other cases, a party may be unable to enter into the contractual relationship of a settlement because of political reasons[4] or overall client policy. Nevertheless they

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[3] State ex rel. Fischer v. Public Service Commission, 645 S.W.2d 39, 43 (Mo.App. 1982), cert denied, 464 U.S. 819, 104 S.Ct. 81, 78 L.Ed.2d 91 (1983).

[4] This seems occasionally the case where other governmental bodies are the intervenors such as municipalities, county governments or the like.

do not wish to impede either settlement of the particular case or Commission consideration of the settlement as in the public interest by contesting the settlement or requesting a hearing. It is intriguing that the Commission itself does not require unanimity to issue a report and order and allows its members to either abstain or dissent, even without opinion or thorough explanation, sometimes for the same reasons as may be faced by individual parties in the settlement process. Yet the Commission through this order appears to deny the parties the same rights it claims for itself.

8. Finally, it should require only limited discussion to note that public policy favors settlement of disputes. This does not in the least diminish the Commission's statutory responsibility to evaluate presented settlements from the perspective of the public interest -- a much different public policy test. The public policy favoring settlement is why settlement discussions are closed and privileged or protected from disclosure -- a protection that is often obviously frustrating to Commissioners who would like to explore the intricacies of a settlement and the processes by which it was reached but are precluded from so doing by the "public policy" that favors settlements.

9. Successful settlements are often careful but precarious balances of perceived interests that often turn on the precise words chosen. That is often why parties are able to advise the Commission that they have a "settlement in principle" but need time to bring their nascent settlement to full expres-

sion in a document. Moreover, like the layers of an onion, developing that document often reveals additional layers of issues that had not originally been addressed by the parties but must be resolved before the settlement can proceed. That process takes time. While unfortunate, it is a reality that often the imminence of a hearing encourages parties to evaluate and reevaluate their "litigation" positions and their evaluation of "litigation risk."[5/] Ironically, in the same order that it makes a finding that 10 months is needed to investigate and resolve the case, the Commission appears insouciant regarding the realities of the settlement process -- a process that, despite intense efforts by individual parties to move it forward, often does not begin, if at all, until the imminence of the hearing.

10. While it is not the intent of the parties to keep the Commission "on hold" while that settlement process moves sometimes glacially forward, it is an unfortunate but unavoidable result of the process -- a process that is often as frustrating to the parties sitting on the inside as it is to the Commission sitting on the outside. But like King Canute's effort to command the tides, commanding that the process be otherwise is doomed to failure. That effort will result in unnecessary time expenditures, needless hearings and yet thinner hair for the Commission bar.

[5/] The legendary English lexicographer Samuel Johnson once penned that "Nothing concentrates one's mind like the imminence of hanging."

11. Though neither feasible nor possible, it would be helpful for the Commissioners to sit through the development of a settlement -- perhaps "endure" that process would be more descriptive. Were that possible, the Commission would then understand the complexity of the process, the challenges involved in bringing constructive solutions forward, the difficulty of crafting language that accurately captures the intricate settlement balance by expressing the areas of agreement and no more, and the unfortunate implications of an arbitrary advance ruling that would try to force "unanimity." It is understandable that Commissioners or others lacking in that experience see such an edict as a solution. It is not. It may even disrupt or destroy the process it seems intended to facilitate. This unwarranted and unwise edict should be rescinded. With respect, one who attempts such a modification simply "doesn't know the territory."[6/]

WHEREFORE, reconsideration of the February 7, 2006 Suspension Order should be granted and the Order corrected to recognize the intervenor status of the parties to the EO-2005-

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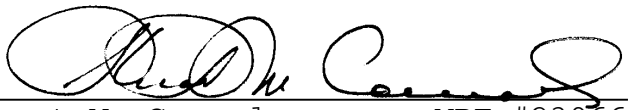
[6/] A description of Professor Harold Hill offered by a fellow travelling salesman in an early scene aboard a railroad car in Meredith Willson's American classic, *The Music Man*.

0263 settlement and to delete the last two sentences of Paragraph 11 of the Order.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.



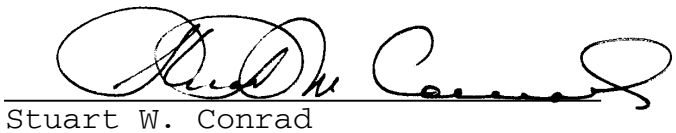
Stuart W. Conrad MBE #23966
3100 Broadway, Suite 1209
Kansas City, Missouri 64111
(816) 753-1122
Facsimile (816)756-0373
Internet: stucon@fcplaw.com

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

February 17, 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: February 17, 2006