

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of The Empire Dis-)	
trict Electric Company of Joplin,)	
Missouri for authority to file)	
tariffs increasing rates for elec-)	ER-2006-0315
tric service provided to customers)	
in the Missouri service area of the)	
Company)	

RESPONSE TO STAFF'S REPLY TO THE RESPONSES OF
PUBLIC COUNSEL AND PRAXAIR/EXPLORER PIPELINE
TO THE ORDER OF NOVEMBER 20, 2007

COME NOW Praxair, Inc. ("Praxair") and Explorer Pipeline ("Explorer") and through their attorney of record and for their Response to Staff's Reply to the Responses of Public Counsel and Praxair/Explorer Pipeline to the Order of November 20, 2007 ("Staff's Reply"), respectfully state:

1. In his reply, Staff Counsel suggests that all the Commission has to do is issue a *nunc pro tunc* order and correct the "clerical error" of not giving a reasonable time to file a motion for rehearing.¹ Noticeably, Staff Counsel does not specify which clerk made the alleged error. Staff Counsel asserts this theory despite the fact that he recognizes at pages 2-3 that a *nunc pro tunc* order is not to be used "to alter or

¹ On December 3, 2007 the Public Counsel also filed a Response joined with a Motion to Strike certain of the General Counsel's pleadings because of the apparent confusion of the General Counsel regarding conflicted representation. These intervenors support Public Counsel's Motion to Strike. This pleading will address the substantive concerns while we are reviewing other means to address the ethical issues presented by

amend the rendered judgment" and that such an order does not lie to "correct judicial omission or oversight; to show what the court might or should have done as distinguished from what it actually did; or to conform to what the court intended but did not do."

Noticeably, Staff counsel fails to provide his basis for his claim that this is a "clerical error," in which a *nunc pro tunc* action may be appropriate, as opposed to a "judicial omission" in which situation *nunc pro tunc* is clearly not applicable. Indeed, if this were merely a "clerical error" then why did the Commission expend considerable resources while vigorously defending its original order? If this were merely a "clerical error" then why didn't the Commission merely issue a *nunc pro tunc* order eleven months ago when notified of the error raised by Public Counsel's mandamus action? The answer is simple - this is not a clerical error. Rather, this is a judicial omission - an omission by which the Commission, on the prodding of Staff and Empire, issued a hurried decision which increased utility rates and denied the parties their statutory rights. Now, in an effort to again accommodate that same regulated utility, Staff counsel attempts to improperly claim that this is a clerical error.

2. A review of Staff's Reply leads one to the unmistakable conclusion that Staff's Counsel is in denial. According to Staff's Counsel at page 4, the effect of the Writ of Mandamus on the Compliance Tariffs is "None." According to Staff Counsel, (...continued)
the General Counsel's conduct.

the Writ is not a road block - it is not even a speed bump. The opinion and mandate of the highest court in the state has no effect whatsoever.

The underlying basis for Staff counsel's current state of denial" is founded in his failure to understand the basic difference between "vacating" an order and "opening" an order. As Missouri courts have noted:

There is a marked and clearly recognized distinction between the vacation of a judgment and the opening of a judgment. A judgment which is vacated is destroyed in its entirety upon the entry of the order that the judgment be vacated, while a judgment which is merely opened does not lose its status as a judgment, but is merely suspended so far as concerns the present right to maintain further proceedings based upon it. In the latter case, if the party who obtained the opening of the judgment is afterwards defeated in his attempt to obtain relief, the result is to restore the judgment to full force and effect, while if he prevails in his attempt, the judgment is then vacated and a new judgment entered.²

Clearly, Staff counsel is operating under the mistaken view that the Supreme Court merely ordered the Commission to open its previous decision and allow Public Counsel additional time to seek rehearing. Thus, under this strained interpretation, Staff's *nunc pro tunc* approach is somehow permitted. Staff's approach, however, is clearly contrary to the Supreme Court's mandate that the Commission "vacate" its previous decision. When an order is vacated it is destroyed, finito, kaput. It no longer exists. There is no order to *nunc pro tunc*. There no longer

² *Krummel v. Hintz*, 222 S.W.2d 574, 578 (Mo.App. E.D. 1949) (citing to 49 C.J.S., Judgments, § 306, p. 558; 31 Am.Jur., Judgments, secs. 713, 793) (emphasis added).

exists the order of December 29th sayeth the Supreme Court of Missouri.³

3. Furthermore, it is not possible for the Commission to issue an order *nunc pro tunc* and have the same effect that the original order would have had. Had the original Order Granting Expedited Treatment and Approving Tariffs been lawfully issued with an effective date of ten (10) days after its issuance on December 29, 2006, or effective January 8, 2007, then the tariffs it approved could not have become effective until January 8, 2007, the effective date of the order, and not on January 1, 2007 as unlawfully ordered. Thus, even under Staff Counsel's dream scenario, there still would have been unlawful tariffs for the seven (7) days from January 1st to January 8th.

4. Additionally, in conceiving its Pollyanna-like view of the writ, Staff Counsel, while quoting the language of the Supreme Court, misses the point that the entire order was vacated. The Court stated:

This Court makes peremptory its alternative writ of mandamus, requiring the PSC to **vacate its order granting expedited treatment and approving the tariffs issued on December 29, 2006**, and allow public counsel reasonable time to prepare and file an application for rehearing on the tariffs. [Emphasis Added]

³ Had Staff counsel, then Commission counsel, believed that the Supreme Court actually intended for the Commission to "open" its previous decision, then the proper avenue would have been to seek clarification from the Supreme Court. Noticeably, Staff counsel failed to avail himself of that option. Only now, when faced with an understanding of the meaning of a vacated order, does counsel appear to suggest that the Supreme Court meant something different.

Staff Counsel fixates on the last portion of the Court's language of allowing Public Counsel time to file an application for rehearing and simply ignores the language of the Court that it is vacating the "order granting expedited treatment and approving the tariffs." In other words, Staff Counsel blindly refuses to see that the Commission's order approving the tariffs was vacated and, therefore, destroyed as though it never existed. Hence, since the rates were never approved by a lawful order but rather by an unlawful order that has now been vacated and no longer exists, the new tariffs under which Empire has been charging since January 1, 2007 are not lawful and have never been lawfully approved. Since they have never been lawfully approved, the rates in existence at the time of the unlawful order continue in effect until such time as the Commission issues a lawful order approving new rates. And, oh yes, for such new order to be lawful, it must give the parties a reasonable time to prepare and file an application for rehearing.

5. In its efforts to make a silk purse out of a sow's ear, Staff Counsel on page 6 attacks Praxair/Explorer Pipeline for relying on the jurisprudence of vacated judgments because the "order" was not a "judgment." Apparently, Staff Counsel completely forgot or chose not to remember that on pages 3-4, he relied on the jurisprudence of the *nunc pro tunc*, which itself is based on "judgments" not "orders" as his cited cases disclose.

6. Both Sections 393.130 and 393.140, prohibit an electric utility from charging a greater or less or different rate than the rates and charges applicable and in effect at the time of making such charge. Since the rates under which Empire has been charging since January 1, 2007, have not been approved by a lawful order of the Commission, Empire has been charging unlawfully since January 1, 2007. The cases cited by Staff Counsel regarding the inability of the customers to obtain a refund of the monies unlawfully collected are not *appropo*. In none of the cases cited did a court vacate the Commission's Order thereby destroying it. This case is *sui generis*. The order approving the rates was not reversed, it was vacated. It no longer exists. Since it does not exist, the rates it charged were never approved. Since the rates were never approved, Empire has been charging its customers unlawfully and it may not keep such revenues unlawfully received. While the Commission cannot authorize refunds, it should also not attempt to cleverly recreate the past and manipulate its orders, as suggested by Staff counsel, solely for the purpose of attempting to preclude parties from seeking refunds. The parties are authorized by law to seek refunds in the courts for unlawful overcharges from January 1, 2007 until new rates are finally approved in a lawful manner.

WHEREFORE, Praxair/Explorer Pipeline respectfully request that this Commission issue its Order in compliance with the true result and meaning of the Supreme Court opinion issued October

30, 2007, *i.e.*, issue an order that destroys its December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs and which restores all parties to their "previously existing status".

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.

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EXPLORER PIPELINE

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.

/s/ Stuart W. Conrad
Stuart W. Conrad

Dated: December 4, 2007