BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

RESPONSE TO PROPOSED ORDER CONCERNING COMPLIANCE WITH SUPREME COURT MANDATE

COMES NOW, Praxair, Inc. ("Praxair") and Explorer Pipeline, Inc. ("Explorer"), and in support of their Response To Proposed Order Concerning Compliance With Supreme Court Mandate respectfully state as follows:

1. On October 30, 2007, the Missouri Supreme Court issued its opinion in Case No. SC88390. That opinion "makes peremptory its alternative writ of mandamus, requiring the PSC to ***vacate*** its order granting expedited treatment and approving tariffs issued on December 29, 2006."[1] Despite their party status in the Supreme Court proceeding, neither the Public Service Commission nor The Empire District Electric Company ("Empire") filed for reconsideration of the Supreme Court opinion. Therefore, on November 15, 2007, the Supreme Court issued its mandate returning jurisdiction to the Commission and making its preliminary writ "peremptory in conformity with the opinion of the Court herein delivered."

2. Given the Supreme Court's careful use of the word "vacate" in its opinion, the next step to be taken by this Commission necessarily turns on the meaning of the word "vacate." Critical to this point is the distinction between "vacation" of an order and "opening" of an order.

[1] Opinion, Case No. SC88390 at page 5. (emphasis added).

> 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]

3. In addition to the requirement that the order be destroyed, another critical aspect of a "vacated" order is that the parties are returned to their status at that point where the vacated order was entered. As *Corpus Juris Secundum* indicates:

> Where a judgment is vacated or set aside by a valid order or judgment, **it is entirely destroyed and the rights of the parties are left as though no such judgment had ever been entered**. No further steps can be legally taken to enforce the vacated judgment. The original judgment is not susceptible to appeal and cannot become a final judgment from which an appeal can be taken. The action, however, is left still pending and undetermined, and further proceeding may be had and taken therein.[3]

The notion that the parties' status be returned to the *status quo ante* has been repeatedly adopted by Missouri Courts. "The general rule is that when an order or judgment is vacated ***the previously existing status is restored*** and the situation is the same as though the order or judgment had never been made. The matters in controversy are left open for future determination."[4]

4. The Supreme Court chose to use the word "vacate" in reference to the Commission's Order Granting Expedited Treatment and Approving Tariffs. Neither the Commission nor Empire sought reconsideration of the Supreme Court's opinion. Neither

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[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).
[3] 49 C.J.S. Judgments §357. (emphasis added).
[4] *Buchanan v. Cabiness*, 245 S.W.2d 868, 873 (Mo. 1951) (emphasis added). See also, *Ball v. Shannon*, 975 S.W.2d 947 (Mo.App.S.D. 1998) ("The general rule is that when an order or judgment is vacated the previously existing status is restored and the situation is the same as though the order or judgment had never been made.") (citing to *State ex rel. Seiser's Estate v. Lasky*, 565 S.W.2d 792 (Mo.App.E.D. 1978)).

the Commission nor Empire sought to clarify that the Supreme Court really meant to have the Commission "open" its judgment. Therefore, the Supreme Court's opinion is final and the Commission has been ordered to "destroy" its December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs and return the parties to their "previously existing status."

5. The parties' "previously existing status" as of the issuance of the now "destroyed" Order Granting Expedited Treatment and Approving Tariffs consisted of electric service provided pursuant to tariffs approved on March 17, 2005 for service on and after March 27, 2005.[5] Therefore, necessarily attendant to the mandate to "destroy" the December 29, 2006 Order, the Commission's Order must also recognize the continued effectiveness of the rates, terms and conditions contained in the tariffs approved in Case No. ER-2004-0570 on March 17, 2005. This would obviously involve some ministerial changes to the tariffs held by the Commission and Empire for public review.[6]

6. Another aspect of the parties' "previously existing status" as of the issuance of the now destroyed December 29, 2006 Order was the fact that Empire had filed compliance tariffs on December 28, 2006. Those compliance tariffs carried the legally required 30-day effective date. Upon issuance of the "destroyed" order, only one day of that 30 day period had expired. Upon reassumption of jurisdiction, therefore, 29 days of this 30 day effective period remain. As of the date of filing of this pleading (November 27, 2007), additional days on the 30 day effective period have counted down.

[5] See, Order Approving Tariff in Compliance with Commission Order, Case No. ER-2004-0570. It is important to note that, while Empire filed new tariffs to increase its rates for electric service on February 1, 2006, those tariffs were expressly rejected by the Commission in its December 21, 2006. The effectiveness of the Commission's Report and Order which rejected those tariffs was not disturbed by the Supreme Court's recent opinion.

[6] See, Section 393.140(11).

Praxair / Explorer therefore suggest that the Commission must act on Empire's December 28, 2006 compliance tariffs on or before December 13, 2007. This action may take the form of either approving those tariffs or suspending those tariffs pursuant to the authority in Section 393.150.[7] Inaction by the Commission will necessarily result in the compliance tariffs becoming effective by operation of law.[8]

7. On November 19, 2007, Empire filed its Notice of Filing of Proposed Order. Apparent from Empire's Notice and its Proposed Order is Empire's erroneous interpretation that the Supreme Court merely "opened" the Commission's December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs. Based upon this erroneous interpretation, Empire seeks a Commission determination that its compliance tariffs "should ***continue*** in force and effect." (Emphasis added)

8. Empire's proposed order plainly does not comply with the Supreme Court's opinion and mandate. Where the Supreme Court order requires the Commission to "destroy" its previous order and reinstate the parties' "previously existing status," Empire suggests that the Commission merely open its previous decision, continue charging customers under the rates approved by the destroyed order, and provide for additional time to file for rehearing. In actuality, Empire simply contends that the Commission should reissue its order and provide the parties the required opportunity to seek rehearing.[9] Noticeably, Empire fails to provide any legal analysis to support its

[7] Praxair / Explorer suggest that suspending the December 28 compliance tariffs will provide the Commission the opportunity to take evidence in order to determine whether those tariffs actually comply with the Commission's Report and Order. To date, no evidence exists on the record to support a finding that those tariffs comply with the Commission's Report and Order.

[8] Of course, any Commission action, either approving the tariffs or suspending the tariffs, must account for the parties' "right" to seek rehearing of the Commission order. As the Supreme Court found, this right includes a "reasonable" time to seek rehearing. Therefore, Praxair / Explorer suggest that the Commission must take action some "reasonable" time in advance of the operation of law date.

[9] Included in Empire's proposed order is the following: "This [the Commission's finding that the compliance tariffs are just and reasonable and in compliance with the Report and Order] remains the

contention that the Commission can merely repeat its previous finding that the compliance tariffs are just and reasonable and provide for the necessary "reasonable" period for parties to seek rehearing. Indeed, Office of the Public Counsel may well have information as to why Empire's purported "compliance tariffs" do not comply with the Report and Order and should be rejected.

9. As this pleading and the legal analysis indicates, Empire's proposed order is not consistent with "vacating" the Commission's order, but rather is tantamount to reopening of that order. As noted in *Krummel v. Hintz*, this is contrary to the express meaning of the Supreme Court's decision. Empire's proposed order neither "destroys" the previous Commission order, nor does it reinstate the parties' "previously existing status." Contrary to Empire's assertion that the rates contained in its current compliance tariffs should "continue in force and in effect," the case law clearly indicates that, when the parties are returned to their "previously existing status," it is the rates in the March 17, ***2005*** tariffs that "shall continue in force and in effect."

10. It may appear unduly harsh to require Empire to charge the rates that resulted from its 2004 rate decision. This notion should be immediately discarded when one realizes that Empire is fully to blame for its current predicament. In its Motion for Expedited Treatment of its compliance tariffs, Empire explicitly requested that the Commission act on its tariffs in a fashion that would deny parties an opportunity to file for rehearing. Specifically, while referencing the December 28 compliance tariffs, Empire nevertheless suggests that the Commission was lawfully bound to approve those tariffs in a time period that would not allow a "reasonable" opportunity for parties to seek

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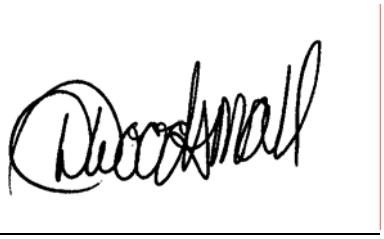
Commission's finding and conclusion based on the record in this case, and, as a consequence, said revised tariff sheets shall continue in force and in effect. However, the Commission will provide a ten day period between the issue and effective dates of this order."

rehearing. Clearly, the current situation, whereby Empire must return to charging the rates arising out of the 2004 rate case, is entirely a result of Empire's unwillingness to provide additional time to accommodate statutory requirements. In essence, Empire's desire to have the higher rates in place for an additional couple of days has resulted in a situation whereby it may be required to refund 11 months of overcharges.

WHEREFORE, Praxair / Explorer respectfully request that this Commission issue its Order in compliance with the Supreme Court opinion. Specifically, the Commission should issue an order that "destroys" the December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs and which restores the "previously existing status" of the parties.

Respectfully submitted,



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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.

David L. Woodsmall

Dated: November 27, 2007