BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of the Application of The Empire District Electric Company for authority to file tariffs reflecting increased charges for electric service within its Missouri service area	))))))	**Case No. ER-2001-299**

INTERVENOR PRAXAIR'S RESPONSE IN OPPOSITION TO STAFF MOTION

I. INTRODUCTION.

On May 14, 2001, Missouri Public Service Commission Staff (Staff), Office of the Public Counsel (Public Counsel) and Empire District Electric Company (Empire or Company) submitted a Stipulation and Agreement concerning certain fuel and purchased power issues. On May 18, 2001 Praxair Inc. (Praxair), pursuant to Commission rules, submitted its objection to the Stipulation and Agreement and requested that a hearing be held on all issues comprehended by the stipulation.

Staff subsequently moved that a hearing be scheduled "on the Stipulation," that motion being joined in by Empire and Public Counsel.

On May 24, 2001, in its Order Directing Filing (May 24 Order) the Commission rejected these motions, noting that *State ex rel. Fischer v. Public Service Commission, 645 S.W.2d 39 (Mo.App. 1982), cert. denied, 464 U.S. 819, 104 S.Ct. 81, 78 L.Ed.2d 91 (1983)* (*Fischer*) prohibited just such a limited

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hearing procedure and also prohibited "procedural gymnastics" that would achieve the result of forcing the nonunanimous stipulation upon Praxair.

On May 25, 2001, the Staff submitted yet another motion with the lengthy title of "Staff Motion for Leave for Nonunanimous Stipulation and Agreement Regarding Fuel and Purchase Power Expense to be Received for Filing as Joint Recommendation and For Leave For Staff Testimony to be Received for filing as Staff Testimony in Support of Joint Recommendation" (Staff Motion). Praxair here responds in opposition to the Staff Motion.

II. ARGUMENT.

The Staff Motion should be denied for the following reasons:

A. The So-Called "Joint Recommendation" Terminated Pursuant to Its Own Terms on May 24, 2001.

Paragraph 15 of the Stipulation provides as follows:

> If the Commission does not approve this Agreement, this Agreement shall ***immediately*** become null and void and none of the Signatories shall be bound by the terms hereof. (Emphasis added).

Moreover, the preceding sentence of Paragraph 15 of the May 14 Stipulation states that none of the signatory parties are bound by the terms of the Stipulation "except as expressly specified herein" which, of course, sweeps therein the above

exculpatory language. Pursuant to its own explicit terms, upon issuance of the Commission's Order Directing Filing of May 24, 2001, the Agreement "immediately" became "null and void" and the parties thereto ceased being bound, again as a result of their own agreement. There is thus no Joint Recommendation to be admitted into evidence in this or any other case.

B. Acceptance of the Stipulation as a "Joint Recommendation" Results in the "Procedural Gymnastics" That Were Condemned in *Fischer* and That Were Rejected by the Commission in Its May 24, 2001 Order Directing Filing.

In its Order Directing Filing of May 24, 2001, the Commission properly ruled that it cannot under *Fischer* "by procedural gymnastics, impose a nonunanimous stipulation and agreement upon objecting parties and thereby dispose of a contested case." Order, p. 4.

Praxair agrees with this interpretation. Obviously, Staff does not. Staff's response is to substitute "Joint Recommendation" for "Stipulation and Agreement" on the top of the May 14 document. The strictures and admonitions of Fisher are not affected by the title of the document.

Staff confuses the Commission's language that the proposed "stipulation and agreement is no more than the joint recommendation of the parties that signed it." May 24 Order, p. 4. There is a difference between a joint recommendation (lower case) and the "Joint Recommendation" that Staff proposes. In fact, what Staff proposes is that nothing has changed, and that

only the title of the document that was filed needs to be changed. Thereafter, argues Staff, we can proceed with the hearing on the "Stipulation" just so long as we refer to it as a "Joint Recommendation." This is not a faithful reading of either the Commission's May 24 Order nor the *Fischer* case.

Staff further disavows intending an outright violation of *Fischer*, stating that it is not Staff's intention that the Commission hold hearings "solely" on the nonunanimous Stipulation. But having said that, the Staff again argues that it wants to hold hearings on the retitled "Stipulation and Agreement/'Joint Recommendation'" and all fuel and purchase power issues. But this is not what the May 24 Order said. That order said that the hearing was to be on the issues that were comprehended by the nonunanimous settlement, not on those issues ***and*** the nonunanimous settlement. As noted by *Fischer*, the twin objectives proposed by Staff cannot coexist.

Staff's confusion appears to stem from its belief that the terms of the nonunanimous Stipulation are in its view salutary, are even better than the solution enacted by the legislature, and represent an acceptable resolution of these issues. But to simply retitle its nonunanimous settlement document, then seek admission thereof, is no more than the very "procedural gymnastics" that the Commission condemned as a means of evading *Fischer*. It places Praxair in the position, not of addressing the issues, but rather in the position of rebutting the desir-

ability of the nonunanimous solution that less than all of the parties have proposed.

C. Use of the Stipulation, by Whatever Title, Deprives the Commission of the Ability to Explore the Issues in This Case and Make Required Factual Findings Thereon.

Not only did *Fischer* find a due process violation in that earlier Commission's use of a nonunanimous stipulation, it also ruled that the limited hearing procedure employed resulted in a decision that did not have the factual support for the findings of fact that would be required. We may expect that, if Staff's Motion is granted (or perhaps even if it is not), the signatory parties will only minimally cross-examine the witnesses of the purportedly "opposing" parties and, instead, question those witnesses about the desirability of the terms of the nonunanimous stipulation. Sadly, as a result of this procedure, the Commission will likely not hear a full development of these issues nor of the concerns that caused the issue to arise in the first instance. The same limited hearing procedure condemned by *Fischer* will result.

The signatory parties seem intent on making this same error by urging introduction of testimony "to support the Stipulation and Agreement" from some of the signatories. This again would lead the Commission into error.

Consider what would have been the case if Praxair and Empire had submitted a nonunanimous stipulation "settling" as

between them, a rate design issue in a manner not acceptable to Staff. Presumably Staff would oppose such a stipulation and request a hearing. Following a similar order, Praxair and Empire would seek to admit their nonunanimous document by retitling it as a "Joint Recommendation," then support their rejected deal through cross-examination of each other's witnesses. The hearing is effectively restricted and the Commission is rendered unable to hear and appreciate the exploration of the issues on as full a basis as would have been had there been no "settlement." If this approach would be objectionable in the case of a private deal between Empire and Praxair, it is no more acceptable when foisted upon the Commission by its Staff or by different parties. It is either a settlement, joined in by all (or not opposed by any), or it is nothing.

The process urged by Staff should be recognized for what it is. It is nothing more than an attempt by several parties to impose the terms of a nonunanimous settlement that they found acceptable upon other parties to whom it was not acceptable. The Commission properly ruled on May 24 that the hearing must be on "all issues comprehended by the nonunanimous settlement in the context of the contested rate case." That result is not achieved, and the Commission's and the public's interest are frustrated by a procedure that avoids development of the issues, hides from the Commission the information and factual development that it needs to resolve the issues, and continues to

focus attention on the nonunanimous settlement, however it is named.

D. Staff's Cited Authority Does Not Sustain Its Position.

Staff cites a 1993 Empire rate case and a 1999 certificate case as supporting its view. They do not. Clearly the utility's application is modified by a change of its position, which it could do unilaterally. The 1993 rate case was a precursor to the present rule and was responsive to a court decision which found that, even in the case of a unanimous stipulation, the Constitutional requirement for record support for the Commission's decisions was still needed.

The Commission may be certain that neither Commission case supports the Staff's proposal here. If either did, rest assured that it would be clearly set out in Staff's Motion as authority. In fact, neither case supports Staff's proposal, even obliquely. Staff appears to be "in denial" about this nonunanimous stipulation.

E. Staff's Motion Would Perpetuate The Unfair Bias of the Procedure Rejected by *Fischer*.

The essence of the due process violation repudiated by Fisher was the subtle (or, perhaps, not so subtle) bias by having an inchoate settlement by **some** parties put forward as a resolution of a contested issue for **all**. In *Fischer*, the court ruled that the hearing that had been provided was not "meaningful in

that the Commission was precluded from approving anything by the stipulated rate design . . . ." Id. at 43. While Staff disclaims intent to "preclude" such consideration, the upshot of its motion is to clearly lay before the Commission a resolution that it believes is acceptable but which, in fact, represents no more than a settlement position that was rejected by Praxair. Staff's procedure would produce the same result as in the *Fischer* case because of its often unique position in a rate case.

The problems that are associated with this type of a procedure, and the biases that may result and lead the decision maker to an inappropriate decision are detailed in Krieger, *Problems for Captive Ratepayers in Nonunanimous Settlements of Public Utility Rate Cases*, 12 Yale J. on Reg. 257 (Summer, 1995). In this interesting and thoughtful article, Professor Krieger states:

> Participation of the commission staff in the nonunanimous agreement may accentuate the power imbalance. The staff, as a arm of the commission, wields significant power. Indeed, if the staff allies itself with the utility, a bandwagon effect may be created, swaying other parties to join the agreement, albeit reluctantly. As one court that recognizes the concept of nonunanimous settlements has noted:
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> > [nonunanimous agreements create] the possibility of an unintentional shift of the burden of proof from the utility to the opponents of the stipulation. There is a danger that when presented with a ready-made solution, the Commission might unconsciously require that the opponents refute the agreement,

> rather than require the utility to prove affirmatively that the proposed rates are just and reasonable. This danger is increased when the Commission staff is a signatory party and is in a position of advocating the stipulation.
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> *City of Abilene v. Public Util. Comm'n*, 854 S.W.2d 932, 938-39 (Tex. Ct. App. 1993).

Id., 307-08.

Professor Krieger even goes so far as to suggest that the use of such devices adversely impacts the perceived legitimacy of the regulatory system itself.

> Regulators and regulated companies develop a relationship of close mutual dependence. The companies rely upon regulators for their revenues and profit. Most regulators by nature are risk averse. Wishing to avoid blatant failures, regulators rely upon the regulated companies to provide reliable and high quality service. "An agency will be reluctant to push too hard with regulatory directives that may cause, or plausibly be claimed to cause, service failures. Regulators are similarly reluctant to enforce measures that may seriously impair the financial health of the regulated industry."[1/]
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> [T]he nonunanimous settlement process may exacerbate legitimacy problems . . . . In fact, these kinds of settlement discussions may expose commission staff to persistent pressure to go along with a settlement or face the consequences of the adverse effects that lengthy hearings may have on the financial health of the company . . . .

[1/]Quoting from Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655, 674.

> Because the utilities do not have to obtain the consent of all parties and because the commission staff has significant influence over the commission, the nonunanimous settlement procedure encourages utilities to reach an agreement with the staff.

Id. at 315-16.

For these reasons, Staff's Motion here is all the more disturbing.

In this particular proceeding, Praxair is a unique, 95% interruptible large industrial customer, and occupies a single rate class. We believe Praxair is the largest single load on the empire system, yet it is almost completely interruptible at Empire's call. As a result, Praxair's billings are heavily affected by kWh costs. Regardless, it is in Empire's interest to brush aside concerns about impact on Praxair's costs, claiming that its "financial future" is at stake. Similarly, it is not in Public Counsel's interest to be at all concerned with impacts of a particular settlement proposal upon Praxair's operational costs. While Staff may somehow try to argue that it is, somehow, "neutral" or "unbiased," it is obviously not so, particularly when it continues to press upon the Commission the adoption of a three-party settlement in which Praxair did not join. Admission of an irrelevant stipulation will simply inject prejudice into the proceeding to the obvious disadvantage of Praxair.

F. The Purported "Joint Recommendation" is Not Evidence and is Legally Irrelevant to Any Issue in the Case.

Staff seeks to admit its "Stipulation and Agreement/Joint Recommendation." Simply to inquire as to what issue this pleading is relevant reveals the purpose behind such offer.

The nonunanimous stipulation is not evidence of any issue in the case. It is evidence that the parties met and attempted -- unsuccessfully -- to settle an issue, but that is not a material issue in the case. As an inchoate, unsuccessful and incomplete settlement negotiation, the nonunanimous stipulation -- by whatever title -- is legally irrelevant just as the evidence of settlement positions, rejected offers and the like are legally irrelevant in all proceedings. This is nothing more than a settlement proposal that was rejected by Praxair. In what possible circumstance may it be then admitted as evidence against and over the objection of Praxair? Its admission before the Commission would be highly prejudicial and identical to a party or a subgroup of parties by themselves determining to reveal their settlement position to the Commission.

The nonunanimous stipulation is also irrelevant hearsay. It is an out of court statement offered to prove the truth of what it states, namely that the terms and conditions of a proffered settlement that was rejected by Praxair nevertheless should be approved by the Commission.

Setting aside issues of privilege, relevancy and materiality for a moment, Praxair cannot cross-examine the document, nor cause it to testify. Its calculations are unsworn, unverified and unauthored, as is the draftsman(men) of the document. It does not issue from any particular source, thus its basic evidentiary foundation cannot even be established. It was prepared long following the test year in this case.

Even more serious evidentiary concerns are raised when irrelevance and materiality are considered. The purpose of admitting the nonunanimous stipulation is obviously not to establish any issue in the case for the determination by the Commission. Instead it is clearly and openly purposed at placing before the Commission the terms and conditions of a nonunanimous settlement that Praxair rejected so as to convince the Commission ***independent of actual evidence***, that this proposed approach should be approved. The difference between this process and a "hearing on the stipulation" is legally indistinguishable. The attempt should be rejected.

G. The Nonunanimous Stipulation Should be Rejected as a Rejected Settlement Proposal Subject to Privilege.

The general rule is that an offer of compromise of an existing controversy is inadmissible as to either validity or amount of a claim.[2/] The exclusionary rule is broad. In

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[2/] *Kay v. Friedman*, 785 S.W.2d 90, 93-94 (Mo.App. W.D. 1990).

McPherson Redevelopment Corp. v. Watkins, 743 S.W.2d 509 (Mo.App. E.D. 1987) it was held to be reversible error to allow reference to letters disclosing prior offers and negotiations of compromise and settlement, even though the ostensible purpose was to refresh a witnesses' recollection. In *Cantrell v. Superior Loan Corp.*, 603 S.W.2d 627, 642 (Mo.App. E.D. 1980) it was held error to allow admission of a letter in which a settlement was proposed, over the contention that the exclusionary rule should be limited to "peaceful" offers. The exclusionary rule is particularly pertinent to the exclusion of other parties' offer of compromise. *Vinyard v. Herman*, 578 S.W.2d 938, 941-43 (Mo.App. S.D. 1979).

The underpinning of this exclusionary rule or rule that "settlement negotiations are privileged" comes from the public policy interest in encouraging settlement of disputes. There are two approaches. First, and as noted above, an offer of compromise is neither material to the issues in the case nor relevant to any issues that are present, thus is inadmissible. Second, it is perceived that the fact of settlement negotiations and their terms may, in fact, be so excessively relevant as to prejudice the interests of the opposing party and deprive them of a fair hearing before an impartial tribunal or fact finder. This second point is similar to the rule that evidence of insurance coverage and its extent is highly prejudicial.

While the typical example occurs in two-party litigation, the same principle holds in multi-party litigation.

Disclosure serves no public policy purpose whatever, and disserves proper public purposes. It does not encourage future candid and open settlement discussions to allow a limited coalition of selected parties to negotiate a deal that is acceptable to them, then present the other parties with a "take it or leave it" offer and submit their nonunanimous stipulation if the parties chose not to accept the proffered deal.

Praxair believes that the Commission has recognized this in its May 24, 2001 Order Directing Filing. Permitting the introduction into evidence of privileged settlement material and positions would disserve the public purpose.

H. The Agreement Is Unlawful Under the UCCM Decision.

In *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41, 56 (Mo. En Banc 1979)* ("*UCCM*"), the Missouri Supreme Court rejected a fuel adjustment clause as single issue ratemaking. Not only did the Court rule that there was no authority for the Commission to consider such a clause, it ruled that a rate case that did not consider "all relevant factors" was insufficient to result in a lawful and reasonable decision.

Although the proponents have sought to distinguish their stipulation from the prohibited fuel adjustment clause, it would, if approved on its terms increase rates without regard to any other determinations in the case. For example, the facts

when shown might well indicated that Empire would otherwise be entitled to a decrease, particularly if the new proposed plant should fail to come on line as scheduled or fail to meet the requirements of on-line testing.

The proponents may be expected to assert that the approach employed by the stipulation was used following the *UCCM* decision. If true, the decision was never judicially tested and survived only for a short time, and was not used again. Further, the mechanism employed in those cases did not cover all fuel costs but only certain selected fuel costs.

Further discussion would only take us into the terms of the nonunanimous stipulation. Accordingly, Praxair believes it is sufficient to state that the Staff proposal would lead the Commission toward legal error.

I. Rejection of Staff's Motion Does Not Deny Supporting Parties the Ability to Change Their Position, Nor to Advocate a Similar Position in Their Post-Hearing Briefs.

We expect that supporting parties will plead that they are free to change their position and advocate their new position. Praxair has no difficulty with that argument, but it proves too much. By denying Staff's Motion, the Commission will not deny these parties any ability to change their positions, nor to change them back again. They are free to pursue that position in their evidence and in their briefs. What we believe they should not be free to do is to continue to advocate their failed

nonunanimous stipulation in the upcoming hearing through the procedural gymnastics of relabeling it as a "Joint Recommendation" and thereby effectively present the Commission with the same choice that was rejected in *Fischer*.

III. CONCLUSION.

For the foregoing reasons, Staff's Motion should be denied.

Respectfully submitted,

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ATTORNEYS FOR PRAXAIR, INC.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document by hand delivery or mail upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated: May 29, 2001

Stuart W. Conrad, Esq.
An attorney for Praxair Inc.