

**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	)	<b><u>Case No. ER-2006-0315</u></b>
retail electric service provided to customers	)	
in its Missouri service area.	)	

**MOTION FOR REHEARING**

COMES NOW, Praxair, Inc. ("Praxair") and Explorer Pipeline, Inc. ("Explorer"), and in support of their Motion for Rehearing respectfully states as follows:

1. On June 15, 2006, the Missouri Public Service Commission ("Commission") issued its Order Rejecting Tariffs and Striking Testimony ("Order"). In substance the Commission's Order struck certain tariffs and testimony that referenced Empire's request to implement an Energy Cost Recovery ("ECR") Rider. Nevertheless, contrary to Praxair / Explorer's Motion to Reject Specified Tariff Sheets and Strike Testimony, the Commission did not reject Empire's tariff sheet which purports to eliminate the IEC agreed to and approved by the Commission in Case No. ER-2004-0570. Furthermore, the Order continues to leave in place Empire's testimony which proposes to collect all fuel through base rates.

2. The Commission's Order eliminates the bargained-for agreement entered into by Empire's management in its last general rate proceeding, is unlawful, is not based on competent and substantial evidence, and is arbitrary and capricious. As such, Praxair / Explorer files this Motion For Rehearing requesting that the Commission reverse its Order. As provided in Section 386.510, this Motion for Rehearing is required prior to Praxair / Explorer seeking a writ of review in circuit court.

**I. ORDER IS UNLAWFUL UNDER SECTION 386.266.8**

3. As reflected in Praxair / Explorer's Reply to Empire's Response to Motion to Reject Specified Tariff Sheets and Strike Testimony, filed on June 14, 2006, any Commission action condoning Empire's request to terminate its currently effective Interim Energy Charge is expressly forbidden by Section 386.266.8. That section provides an explicit bar against any Commission action to terminate any incentive or performance based plan prior to the entire term of the plan. Specifically, Section 386.266.8 provides in pertinent part that, "[i]n the event the commission lawfully approves an incentive or performance based plan, such plan shall be binding on the commission for the entire term of the plan."

4. As provided in Section 386.270, all orders of the commission are presumed to be prima facie lawful and reasonable. Moreover, as a party to the underlying proceeding in which the IEC was agreed upon and approved by the Commission, Empire is estopped from arguing the lawfulness of the Commission's order approving the Stipulation and implementing the IEC.

5. Clearly, the currently effective IEC represents an incentive based plan as contemplated by Section 386.266.8. Given the existence of a cap and a floor, the IEC provides "incentives" for Empire to manage fuel and purchased power costs. In fact, in the event that Empire can drive such costs below the floor, it is permitted to keep all dollars under that floor.

6. The term of the current IEC runs through March 26, 2008. As reflected in the Stipulation and Agreement in Case No. ER-2004-0570 which implemented the IEC, "[t]he IEC shall be in effect for three (3) years" from March 27, 2005 until March 26,

2008.<sup>1</sup> This fact is supported by a number of subsequent documents. *First*, the Commission's Report and Order in Case No. ER-2004-0570 states that, "[t]he IEC shall be in effect for three years."<sup>2</sup> *Second*, Empire's tariffs filed with the Commission to implement the Commission's Report and Order provide that "[t]his interim rider shall be in effect from March 27, 2005 through March 26, 2008."<sup>3</sup> *Third*, Staff's recommendation recommending approval of the tariff sheets provides that "[t]he Missouri Public Service Commission Energy Department Staff (Staff) has reviewed the filed tariff sheets, and is of the opinion that they were filed in a timely manner and are in compliance with the Commission's Order."<sup>4</sup> It is unmistakable that the entire term of the incentive plan as contemplated by Section 386.266.8 lasts until March 26, 2008.

7. Recognizing that the current IEC is effective until March 26, 2008, and that the Commission is strictly prohibited, under the provisions of Section 386.266.8, from interfering with that IEC "for the entire length of the plan", any issue regarding the treatment of fuel and purchased power in the current proceeding is moot. As such, any Commission decision which condones and approves Empire proposal to terminate the IEC and seek recovery of all fuel in base rates is strictly prohibited and is unlawful. As such, Praxair / Explorer seeks rehearing of its request to reject tariffs and strike testimony as contained in its Motion dated May 26, 2006.

## **II. ORDER IS UNLAWFUL IN THAT IT IS CLEARLY CONTRARY TO EMPIRE'S TARIFF**

9. Missouri case law provides that, once approved, a tariff has the force and effect of a statute directly prescribed by the legislature. Allstates Transworld Vanlines,

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<sup>1</sup> Nonunanimous Stipulation And Agreement Regarding Fuel And Purchased Power Expense, Case No. ER-2004-0570, at page 2.

<sup>2</sup> Report and Order, Case No. ER-2004-0570 at page 32.

<sup>3</sup> P.S.C. Mo. No. 5, Section 4, 4<sup>th</sup> Revised Sheet No. 17 filed March 17, 2005.

<sup>4</sup> Staff Recommendation, Case No. ER-2004-0570, filed March 18, 2005, Appendix A.

Inc. v. Southwestern Bell Telephone Co., 937 S.W.2d 314, 317 (Mo.App. E.D. 1996). As such, a tariff should be interpreted in the same manner as a statute. State ex rel. Laclede Gas Company .v Public Service Commission, 156 S.W.3d 513 (Mo. App. 2005). As the Court in *Laclede* noted,

our role in interpreting the PSP Tariff is to “ascertain the intent of [Laclede and the Commission] from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning.” We can look beyond the plain and ordinary language of the PSP Tariff “only when the meaning is ambiguous or [acceptance of the plain and ordinary language] would lead to an illogical result defeating the purpose of the [tariff].”<sup>5</sup>

10. Using the guidance of the Laclede decision, the Commission may rely solely upon the language of Empire’s approved tariff in determining the intent of Empire and the Commission. Only where that tariff is ambiguous or would lead to an illogical result may the Commission look beyond the tariff to other documents in deducing the intent of the parties.

11. As reflected in Empire’s tariff, the IEC agreed to by the parties and approved by the Commission clearly has a three year term. In regards to the term of the IEC, the Empire tariff is notably brief. Specifically, the tariff provides: “This interim rider shall be in effect from March 27, 2005 through March 26, 2008.” Moreover, when read in context with the remainder of the Empire tariff, any interpretation which leads to a different term would lead to “an illogical result defeating the purpose of the tariff.” Specifically, the Empire tariff mandates a determination of the amount held by Empire under the interim tariff after two years. As such, the Commission’s Order which implicitly permits Empire’s request to terminate its IEC is illogical in that it eliminates the determination mandated to occur after the second year.

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<sup>5</sup> State ex rel. Laclede Gas Company v. Public Service Commission, 156 S.W.3d 513, 521 (Mo.App. W.D. 2005). Citations omitted.

12. Given the clear and unambiguous language used by Empire and approved by the Commission for use in Empire's tariff, any Commission determination that would allow Empire to seek early termination of its IEC is unlawful and should be reversed.

**III. ORDER IS UNLAWFUL IN THAT IT DENIES  
PRAXAIR / EXPLORER OF PROPERTY RIGHTS  
WITHOUT DUE PROCESS OF LAW**

13. As reflected in the Commission's Order Clarifying Continued Applicability of the Interim Energy Charge, "[t]he Stipulation and Agreement was freely negotiated. Consideration was given and received. The Commission approved it and it is binding."<sup>6</sup> Recognizing, as the Commission has, that the Agreement was binding, Praxair / Explorer has a property right in the IEC created therein.

14. By its failure to fully reject Empire's tariffs and strike testimony as requested in Praxair / Explorer's Motion, the Commission has permitted Empire to seek recovery of fuel and purchased power in base rates. Implicit in this decision is Commission authority for Empire to terminate the IEC.

15. By allowing empire to terminate the IEC, Praxair / Explorer was deprived of its property right in the IEC without the procedural due process required under the United States and Missouri Constitutions. Specifically, the Commission should have taken evidence, permitted cross-examination and held a hearing. The Commission's failure to account for such procedure denied Praxair / Explorer its full due process of law.

**IV. ORDER IS UNREASONABLE IN THAT IT  
IS NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL  
EVIDENCE ON THE WHOLE OF THE RECORD**

16. As indicated in Section I, *supra*, the three-year term of the IEC is clearly spelled out in the Stipulation and Agreement filed in Case No. ER-2004-0570. Despite

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<sup>6</sup> Order Clarifying Continued Applicability of the Interim Energy Charge, issued May 2, 2006, at page 3.

this clear indication of intent by the parties, the Commission, by its decision to allow Empire to seek early termination of the IEC and to propose recovery of all fuel and purchased power in base rates, appears to have engaged in the act of interpreting the Stipulation and Agreement.

17. Although case law appears to provide the Commission the latitude to interpret a Stipulation and Agreement, it requires that such an interpretation be based upon competent and substantial evidence. As noted in the procedural history in State ex rel. Riverside Pipeline Company, L.P. et al. v. Public Service Commission of Missouri, 165 S.W.3d 152 (Mo. 2005), the court will reverse and remand where the Commission has engaged in interpretation of a Stipulation without relying upon competent and substantial evidence.

Then, in January 1999, pursuant to *section 386.510, RSMo 1994*, Riverside and MKP filed a petition for a write of review in the circuit court. The court held that the PSC had “acted unlawfully and/or unreasonably when it failed to make any finding that the 1996 Stipulation and Agreement was ambiguous, yet interpreted the Stipulation and Agreement without hearing any testimony or otherwise receiving any evidence to determine the intent of the parties to the Stipulation and Agreement.” As a result, the court again remanded the case to the PSC.<sup>7</sup>

18. On April 24, 2006, Praxair / Explorer filed its Response of Praxair, Inc. and Explorer Pipeline Company to Motion for Clarification or, in the alternative, Request for Extension to Conduct Further Discovery and Motion For Hearing. As indicated in that pleading, Praxair / Explorer clearly proved that the intent of the parties to the Stipulation and Agreement was for the IEC to last for three years. Despite its clear demonstration of proof, Praxair / Explorer recognized the possibility that the Commission may declare the Stipulation ambiguous and seek to interpret the Stipulation. As such,

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<sup>7</sup> State ex rel. Riverside Pipeline Company, L.P. v. Public Service Commission, 165 S.W.3d 152, 154 (Mo. 2005) (emphasis added).

Praxair / Explorer explicitly requested the opportunity to conduct discovery and requested that the Commission hold a hearing.

19. Despite its request for a hearing, the Commission, by its Order which failed to reject Praxair / Explorer's request to reject certain tariffs and strike testimony, has engaged in the act of interpreting the Stipulation and Agreement. Specifically, despite the explicit provision providing for a three-year term, the Commission has implicitly made the finding that Empire has sought early termination of the IEC and should be permitted to recover fuel and purchased power through base rates. As with the Riverside Pipeline Company case cited previously, the Commission undertook the act of interpreting the Stipulation and Agreement without the benefit of a hearing. Without such a hearing, the Commission has no evidence upon which to base its implicit finding that the intent of the parties was to provide Empire the ability to seek early termination of the IEC.

## **V. THE COMMISSION'S ORDER IS ARBITRARY AND CAPRICIOUS**

20. In its Order Clarifying Continued Applicability of the Interim Energy Charge the Commission noted:

However, Empire **may** have the option of requesting that the IEC be terminated. If the Commission grants that request, once the IEC is terminated, Empire would be able to request an alternative fuel adjustment mechanism.<sup>8</sup>

21. The language that the Commission used in discussing Empire's ability to terminate the IEC is determinative. The Commission used forward-looking language that reflected Empire's future ability *to* exercise its option, specifically the use of the phrase "**may** have the option of requesting". This contrasts with language that would have been

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<sup>8</sup> Clarifying Order at page 3 (emphasis added).

appropriate had the action already occurred, for example: “Empire has exercised its option of requesting”. Necessarily by its language in the Clarifying Order, the Commission has recognized that Empire has not yet properly exercised its option, if such an option exists, to terminate the IEC.

22. Barely a month later, in the current Order, the Commission reversed field and, by allowing Empire to seek recovery of fuel and purchased power in base rates, implicitly found that Empire had already sought termination of the IEC. As mentioned above, since the Commission had not held a hearing or taken evidence, such change in direction is not based upon competent and substantial evidence. As such, the Commission’s current Order is arbitrary and capricious and should be reversed.

WHEREFORE, Praxair / Explorer respectfully request that the Commission issue its Order granting rehearing of the issues addressed in the Commission’s June 15, 2006 Order Rejecting Tariffs and Striking Testimony.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stuart W. Conrad", is positioned above a horizontal line. The signature is stylized with a large, circular initial 'S'.

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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.

A handwritten signature in black ink, appearing to read "David L. Woodsmall", is written over a horizontal line. A vertical red line is positioned to the right of the signature.

David L. Woodsmall

Dated: June 23, 2006