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	))))))	**ER-2004-0570**

APPLICATION FOR REHEARING, RECONSIDERATION OR CLARIFICATION OF PRAXAIR, INC. AND EXPLORER PIPELINE COMPANY

COME NOW Intervenors Praxair, Inc. (Praxair) and Explorer Pipeline Company (Explorer) and pursuant to applicable Commission rules respectfully request that the Commission grant rehearing, reconsideration, or otherwise clarify its March 10, 2005 Report and Order in a manner consistent with the following:

1. These parties did not take independent positions on issues regarding the rate of return on equity. Rather we relied upon the work of Staff witnesses and Office of Public Counsel witnesses to offset Empire's recommendations.

2. Certainly the Commission has administrative discretion to address the capital needs and circumstances of the utilities it regulates. In doing so, however, we believe that the Commission should not depart from long-established administrative principles, both in this state and elsewhere, for subjective, speculative, or uncertain reasons. In the particular circumstances of this case, review of the Report and Order raises our concern that the Commission may have unintentionally rejected

or abandoned the long-established regulatory principles that tended to establish objective boundary conditions on the controversial return on equity issue. Our concern is increased after review of the concurring opinion of Commissioner Appling.

3. The discounted cash flow, or "DCF" method, has long been used in this jurisdiction. It has been used numerous times by the Federal Energy Regulatory Commission and its predecessor agency, the Federal Power Commission, and fully upheld as consistent with the *Hope Natural Gas* and *Bluefield Water Works* cases.

4. What appears in this case to have occurred is a confusion between the identification of comparable companies and earnings for comparable companies. The wide divergence between the recommendations of the Staff and OPC analysts and the recommendations of the witnesses sponsored by the company was with respect to whether the DCF model should have been a "company specific" analysis (Staff/OPC) and a "comparable company" analysis (Empire, et. al.)

5. As we understand the application of the DCF model, a group of representative companies is selected that present comparable risk parameters with the company being reviewed. These comparable risk parameters include nature of business (gas/electric/both), market area characteristics, reasonably analogous capital structure, for electrics, generation mix, and other similar analytical characteristics. Obviously dispute can

arise regarding the inclusion or exclusion of a particular company.

6. When that group is established, the other controversial factor, expectancy as to growth rate is identified, often in the reasonable judgment of the analyst. Then the DCF equation is applied for each company and a range of results is produced to support the analyst's testimony. Sometimes the subject company is included in the comparable group and some analysts exclude the subject company. This approach is radically different than seeking a comparable group of companies and then attempting to average their earnings.

7. The dispute in this case also seems to have been intensified by the use of the DCF model on a company-specific approach rather than applying it to a group of comparable companies which is the more traditional approach. We think that the Commission may have been confused in that it thought that Mr. Vander Weide did not do a DCF model, but in fact he did ***along with*** a market based risk premium analysis. The analysis Dr. Vander Weide did ***not*** use is the comparable earnings analysis.[1/]

8. However, the Report and Order appears to suggest that the comparable earnings approach was the basis of Dr. Vander Weide's recommendation and is the only approach that is acceptable under *Hope* and *Bluefield*. This is simply incorrect as a

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[1/] See Direct testimony of Dr. James H. Vander Weide direct testimony at 47-49.

matter of law and is not supported by the evidence of record. Indeed, Dr. Vander Weide did not perform a comparable earnings analysis in this case, and hundreds of other rate cases from many jurisdictions utilizing the comparable company DCF model approach have been judicially scrutinized since *Hope* and *Bluefield* were issued without any concern that the DCF model violated their tenets.

9. Certainly the Commission can prefer one analyst's view or analysis over that of another. However, whether the ROE the Commission approved finds any support in the record of this case appears questionable. Instead, the Commission appears to have rejected the DCF model while adopting the findings of a witness that supported his recommendation on the results of a DCF model and not a comparable "earnings" approach.

10. Our concern is simply this: If the Missouri Commission wishes to depart from several decades of regulatory decisions[2/] and reject the DCF model, it should do so plainly

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[2/] There is also an apparent misunderstanding of the common phrase that "the Commission isn't bound by precedent." Properly, this phrase refers to the simple fact that because Empire once received a 10.0 ROE award, it must go forward forever with a 10.0 ROE determination, or because a utility once received a revenue award, it should forever be foreclosed from seeking any relief in the future. However, there is, just as certainly, regulatory precedent, else judicial rejection of decisions that are arbitrary or capricious would never occur (and it does) where regulators depart from long-established principles without preannouncement of such dispositions, articulated and judicially reviewable explanations for such departures, and a clear indication of what is going to be established in the future. As

(continued...)

and openly and indicate its reasoning for doing so. Further, it should do so only if the evidence of record supports such a change of direction. The record in this case does not. In addition, it should clearly articulate the test or tests that it intends to employ in the future. Failure to do so risks having the decision questioned as being arbitrary and capricious.

11. There is yet another concern that is spawned by Commissioner Appling's concurring opinion. He indicates that the parties may have "better luck next time." Problem is, however, that the Commission also has a responsibility to indicate through its decisions what the rules are going to be ***before*** the game begins. It is as though two teams stepped up to play baseball and midway through the third inning the umpires suddenly determined that they would begin to call visiting team players out after only two strikes. Certainly baseball can change the rules, but not in mid-game. At the least this would require that the game be replayed after all were apprised what the new rules were going to be. It does no good to simply respond to the losing teams' complaints that the next time you play you'll know better. This, in fact, is the essence of an administrative decision that is arbitrary and capricious.

[2/] (...continued)
sometimes said, we are supposed to be a government of laws, not of men, and those laws reach down to the administrative level as well.

12. The Commission is obviously concerned that the ROE for this utility is set too low, and this writer recalls the agenda discussion at the ***last*** Empire rate case when that decision was reached. Now the pendulum swings the other direction. Whether it swings too far is beyond the scope of this application and this case, but it is important that in its zeal to increase Empire's ROE that the Commission not discard or do damage to regulatory principles that have well served both utilities and customers for many years and that add some degree of certainty to an otherwise completely subjective issue.

13. It continues to be critical that the Commission articulate findings of fact that lead to the conclusions that the Commission is drawing based on the evidence in the case. A reviewing court will demand no less, and prudent future planning by the parties for future cases as suggested by Commissioner Appling's Concurring Opinion also emphasizes the need for clarity by the Commission in its Report and Order. If parties are unable to discern the basis of the Commission's Report and Order on this issue, they effectively cannot frame any applications for judicial review if they disagree with that basis and this operates to deny them an effective appeal and thus denies procedural due process.

14. It is no less important that the Commission identify the facts that it is finding related to the evidence of record in the case. If particular statements by particular

witnesses are the basis of a finding, that should be stated so that the finding may be verified as supported by competent and substantial evidence on the whole record as required by Article V, Section 18 of the Missouri Constitution. To fail to articulate the evidence supporting its factual findings, as the Commission has unfortunately done, not only are the parties left to puzzle for the factual basis of the Commission's decision for the purpose of planning future proceedings, but any reviewing court will also be forced to comb through the record to try to find support for findings that arguably do not exist at this point in time. For the parties to have "better luck next time," as Commissioner Appling states, the Commission also do its part to make its findings of fact and their relationship to the evidence in the case articulate and clear. Unfortunately, this has not happened.

WHEREFORE these parties respectfully request that the Commission grant rehearing of its Report and Order, reconsider

that decision, or clarify its decision to make certain the basis of its decision that it is not intending to discard the DCF Model or that it is and replacing it with a particular described model that the parties may address and utilize in future cases.

Respectfully submitted,

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ATTORNEYS FOR PRAXAIR, INC. and
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Application for Leave to Intervene either by hand delivery, by electronic means, or by U. S. mail, postage prepaid addressed to all parties by their attorneys of record as provided by the Secretary of the Commission as shown below.

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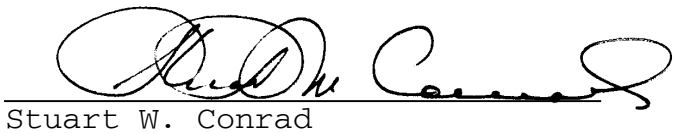

Stuart W. Conrad

Dated: March 25, 2005