

**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 TO DISQUALIFY**

COMES NOW, Praxair, Inc. ("Praxair") and Explorer Pipeline, Inc. ("Explorer"), pursuant to 4 CSR 240-2.120, and in support of their Motion to Disqualify respectfully state as follows:

1. On October 12, 2006, the Regulatory Law Judge in the above-captioned matter issued an Order Admitting All True-Up Testimony Into The Record. That Order, in the absence of a hearing and without any recognition of the due process rights of the parties, purported to admit all true-up testimony into evidence.

2. On October 20, 2006, Praxair / Explorer filed their Application for Rehearing. In that Application, Praxair / Explorer pointed out that the Commission's Order was unlawful in that it denied the parties' fundamental rights of due process as provided by Article V, Section 18 of the Missouri Constitution. These due process rights have been enumerated at Section 536.070 RSMo:

Each party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not the subject of the direct examination, to impeach any witness regardless of which party first called him to testify, and to rebut the evidence against him.

3. On October 24, 2006, despite the previously issued Order Admitting All True-Up Testimony Into The Record, the Regulatory Law Judge issued an Order Setting



Hearing.<sup>1</sup> In that Order, the Regulatory Law Judge scheduled a hearing for October 31, 2006, for the purposes of “allowing parties to cross-examine witnesses on the subjects of corporate allocations, regulatory plan amortizations and any true-up testimony.” Recognizing that the Order Setting Hearing, despite its caption, grants the relief sought in the Application for Rehearing, it is necessarily a *de jure* and *de facto* Order Granting Rehearing.<sup>2</sup> “A pleading is judged by its subject matter not its caption.” *State ex rel. AG Processing Inc. v. Thompson*, 100 S.W.3d 915, 920 (Mo.App. 2003) (citing to *Worley v. Worley*, 19 S.W.3d 127, 129 (Mo. banc 2000)). In similar fashion, a Commission order will necessarily be “judged by its subject matter not its caption.”

4. Section 536.083 RSMo provides that “no person who acted as a hearing officer or who otherwise conducted the first administrative hearing involving any single issue shall conduct any subsequent administrative rehearing involving the same issue and same parties.” Recognizing that the November 20, 2006 hearing involves the “same issue and same parties”, the regulatory law judge Colleen M. Dale is statutorily barred from presiding over or participating in the remainder of this proceeding.

5. Consistent with Section 536.083 RSMo, the Commission has promulgated 4 CSR 240-2.120(2) which provides a procedure by which a party can seek to disqualify a presiding officer.

Whenever any party shall deem the presiding officer for any reason to be disqualified to preside, or to continue to preside, in a particular case, the

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<sup>1</sup> There are other fundamental issues raised by the Order Setting Hearing. Specifically: (1) whether the Order was “expressly authorized” by the Commission as required by Section 386.240 RSMo; (2) whether the Order has been “approved by the Commission” as required by Section 386.240 RSMo and (3) whether, under Section 386.500, the presiding officer can issue an order which addresses the merits of a pending Application for Rehearing. These issues are not the subject of this Motion.

<sup>2</sup> Praxair / Explorer note that the October 31, 2006 hearing was cancelled due to inadequate notice under Section 536.067(4) RSMo. That hearing was subsequently rescheduled for November 20, 2006. *Order Confirming Hearing*, issued November 7, 2006. Nevertheless, that November 7, 2006 Order is still a *de facto* and *de jure* Order Granting Rehearing in that, despite its caption, it grants the relief sought in Praxair / Explorer’s October 20, 2006 Application for Rehearing.



party may file with the secretary of the commission a motion to disqualify with affidavits setting forth the grounds alleged for disqualification. A copy of the motion shall be served by the commission on the presiding officer whose removal is sought and the presiding officer shall have seven (7) days from the date of service within which to reply.

6. In an effort to gain clarification of the status of their October 20, 2006 Application for Rehearing, and to give the Commission an opportunity to take up the October 20, 2006 Application for Rehearing at a scheduled agenda session, Praxair / Explorer filed a Motion for Expedited Treatment of Application for Rehearing on November 9, 2006. On November 14, 2006, the Commission took up certain matters pending in this proceeding but failed to take up or, upon information and belief, discuss in the public agenda session either the October 20, 2006 Application for Rehearing or the November 9, 2006 Motion for Expedited Treatment.

7. The matter is presently set for hearing on November 20, 2006. Action concerning the status of the presiding officer is, accordingly, deserving of expedited consideration by the Commission.

WHEREFORE, Praxair / Explorer respectfully request that the Commission serve this motion on the presiding officer in the above-captioned proceeding, Colleen M. Dale, and following her reply, issue its Order disqualifying her from further participation in this matter.



Respectfully submitted,

A handwritten signature in black ink, appearing to read "Woodsmall". The signature is stylized with a large, circular initial "W" and a long, sweeping horizontal stroke at the end.

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David L. Woodsmall, MBE #40747  
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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". The signature is written in a cursive, flowing style with a large initial "D".

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David L. Woodsmall

Dated: November 14, 2006

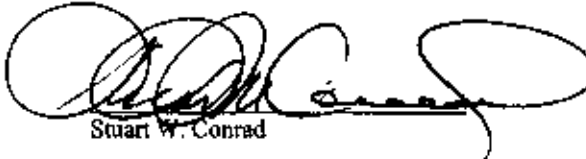


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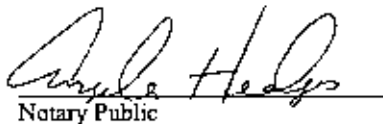
STATE OF MISSOURI )  
COUNTY OF JACKSON )

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Stuart W. Conrad, being first duly sworn, on his oath and as an attorney licensed by the State of Missouri and in good standing states that he has knowledge of the matters stated herein, and that said matters are true and correct to the best of his knowledge and belief except those stated to be upon information and belief and as to those he believes them to be true.

  
Stuart W. Conrad

Subscribed and sworn to before me this 14th day of October, 2006.

  
Notary Public

My Commission Expires: 8-15-2009

