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**

SUGGESTIONS OF PRAXAIR, INC.
AND EXPLORER PIPELINE COMPANY
OPPOSING MOTION TO LIFT SUSPENSION

COME NOW PRAXAIR, INC. ("Praxair") and EXPLORER PIPELINE COMPANY ("Explorer") and oppose the relief sought by Empire District Electric Company ("Empire") in Empire's May 20, 2004 "Motion to Lift Suspension ("Motion") on the following grounds:

I. INTRODUCTION AND PROCEDURAL BACKGROUND.

On April 30, 2004, Empire filed a new set of tariffs proposing that they be allowed to go into effect 30 days thereafter. This proposed set of tariffs included several provisions that Empire asserted would selectively address fuel cost issues, primarily those associated with natural gas.

On May 5, 2004, the Commission acted to suspend all those tariffs for the full statutory periods of 120 days and six months. In the Suspension Order the Commission also set a hearing schedule, directed that public notice of the filing be given, and established a deadline for interested parties to seek intervention.

Praxair and Explorer both sought intervention. Praxair's May 5, 2004 application was granted on May 20, 2004; Explorer's May 20, 2004 application remains pending.

Now, on May 20, 2004, Empire submits its Motion in which it seeks to "lift" the May 5, 2004 suspension order, but only as to a selected tariff sheet concerning what Empire characterizes as an "Interim Energy Charge" or "IEC." Empire asserts that this charge would be similar to that charge that the Commission approved as part of the ***settlement*** of a corresponding issue in Empire's next-prior rate increase case.

Praxair and Explorer both oppose Empire's Motion on several grounds:

- Empire's Motion is no more than a request for interim rate relief that does not meet the interim relief standard;
- Empire's proposed relief would require an order that would meet the test of being supported by competent and substantial evidence on the whole record;
- The legal basis for Empire's proposed relief is highly suspect and questionable;
- Empire has not met and cannot meet the emergency standard under Missouri law;
- Empire's factual assertions are deficient and require thorough investigation.

II. ARGUMENT.

A. Empire's Motion Is A Request for Interim Relief That Fails To Meet the Interim Relief Standard.

Even cursory examination of the statements supplied in Empire's Motion indicate that the requested relief would be neither warranted or justified. That examination shows:

a. Empire has completely failed to show (or even to assert) that it meets any of the three recognized conditions that would justify emergency interim rate relief under established Missouri law. Empire has not shown or even claimed:

- that additional funds are needed immediately,
- that the need for such funds cannot be postponed, and
- that no other alternatives exist to meet the funding need other than rate relief.

In Re Missouri Public Service Company, 20 Mo.P.S.C. (N.S.) 244 (Missouri P.S.C. Case No. 18,502, 1975).

b. Based on Staff's acknowledged-to-be-cursory review at this point in time, Empire's earnings report shows positive earnings for Q1 of 2004 and certainly does not show any impairment of capital nor of Empire's inability to borrow.

c. Empire's Motion acknowledges its lack of need for relief in its statement that "[i]f the Commission waits the traditional eleven months after Empire's filing to make a decision in this case, significant financial harm ***can*** come to Empire

during the intervening period."[1/] It is only from the ***potential of harm*** that Empire seeks relief. Interestingly, Empire makes not the least suggestion that its overall risk would be affected by such a decision -- but it surely would be, since Empire witnesses doubtless would suggest that the absence of a fuel adjustment clause in Missouri increases risk.

d. Empire's timing is curious. If Empire were in dire financial straits we doubt that it would have waited until after the General Assembly adjourned to seek relief.[2/] As it is, Empire doubtless waited in the expectation that particular legislation would be enacted that would require that a utility seeking to qualify would be required to file a rate case. Now, having come away empty-handed from the General Assembly, Empire wants "its relief," and right now, if you please![3/] Moreover, these selective implementations were not sought until after the legislative session was concluded; no interim application was filed. Only the "alternatives" were submitted.

e. Empire has wholly failed to make any allowance, adjustment or recognition of growth that has occurred in its customer base since its last rate case. In the stillborn

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[1/] Motion, p. 7 (emphasis added).

[2/] Empire could have filed as early as September of last year under the Settlement approved in ER-2002-424.

[3/] Empire reminds one of the old line from the impatient penitent: "Lord, give me patience and be quick about it!"

merger between Empire and Aquila, Case No. EM-2000-369, Empire's former President Myron McKinney testified that Empire was continuing to experience growth in the Branson service area[4/] and that growth was becoming "more profitable with time."[5/] It would not be surprising to find that Empire's rate of return had actually increased during the very period of time that it was facing gas cost increases.

f. Empire appears intent on causing its Missouri customers to support its enterprise with conscripted capital that it is fully able to obtain in the capital markets. For example, Praxair competes from its Neosho, Missouri facility with its competitors in surrounding states of Arkansas, Oklahoma and Kansas. We are unable to understand why Praxair's Missouri operation should support lower rates for its competitors in other states.

g. Empire's track record in past interim "emergency" cases is not good. Over the past twenty years, each permanent rate increase proposal that Empire has filed has been accompanied by an interim request. Each interim case has been accompanied by claims of impending doom if relief was not instantly forthcoming. Upon investigation of these claims, however, ***none*** of Empire's interim requests since 1980 have been demon-

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[4/] Case No. EM-2000-369, Transcript Vol. 2, p. 131.

[5/] *Id.*, p. 132.

strated to have been warranted. Yet, Empire has not just remained in business, it has prospered despite its own dire predictions.[6] Empire's demonstrated track record of crying "wolf" and its demonstrated inability to prove that the "wolf" is at the door through making a case for interim relief, inspire neither trust nor confidence in Empire's assertions.

B. The Proposed Relief Would Require an Order That Would Meet the Constitutional Requirement of Competent and Substantial Evidence Upon the Whole Record.

The Commission has already acted to suspend these tariffs. That order became effective May 5, 2004 and no timely rehearing request has been filed. Given the statutory requirements, no rehearing request can be timely filed at this point.[7] The suspension order is now final.

Although Empire cites *State ex rel. Laclede Gas Company v. Public Serv. Comm'n, et al.*,[8] that case provides only support for the proposition that the Commission has authority in an appropriate case to grant interim rate relief,[9] a proposition

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[6] To paraphrase Mark Twain: "The report of my financial exigency has been greatly exaggerated."

[7] Section 386.510 RSMo. 2002.

[8] 535 S.W.2d 561 (Mo. App., D.K.C. 1976).

[9] We hold that the Commission has power in a proper case to grant interim rate increases within the broad discretion implied from the Missouri file and suspend statutes and from the practical requirements of utility (continued...)

that is not seriously questioned here. But *Laclede* does ***not*** provide support for the proposition, newly put in this matter by Empire, that once the Commission acts to suspend proposed utility tariffs, it can revisit that decision without recognizing that in so doing it has established a "contested case" under Missouri law.[10/] And, as should be well recognized, a contested case under Missouri law invokes the protections of Mo. Const., Article V, Section 18's requirement that any final order must be supported by competent and substantial evidence on the whole record.[11/] As even Laclede conceded:

> Appellant has not and does not now contend that Respondent's order would not be based on competent and substantial evidence if the interim rate tests applied by Respondent and

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[9/](...continued)
regulation.

Laclede, supra, at 567.

[10/] (2) "Contested case" means a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing;

Section 536.010(2) R.S.Mo. 2002. *See, State ex rel. Atmos Energy Corp. v. PSC*, 103 S.W.3d 753, 763 (Mo. 2003), *reh'g denied*, 2003 Mo. LEXIS 96 (Mo., May 27, 2003).

[11/] The Missouri Constitution creates a right to judicial review of "final" administrative decisions. Dore & Assoc. Contracting, Inc. v. Missouri Dept. of Labor & Indus. Relations Comm'n, 810 S.W.2d 72, 75 (Mo. App. 1990).

City of Park Hills v. PSC, 26 S.W.3d 401, 404 (Mo. App. 2000)

> the lower Court are the tests lawfully to be applied to interim rates. . . .[12/]

Thus a far different question is presented than that in *Laclede* and *Laclede* gives Empire no support for its Motion.

Empire further references the *Laclede* case to suggest that it supports the Commission "withdrawing" or "recalling" its suspension order. However, *Laclede* characterized the out-of-state procedure that had been cited as a "variant procedure separate from that specifically specified by [Missouri] statutes,"[13/] something less, we think, than a glowing endorsement of Empire's proposal. Moreover, nothing has been provided to demonstrate that either of those states had a Constitutional provision similar to Missouri's Article V, Section 18.

Finally, since competent and substantial evidence would be required to support any order on Empire's Motion, mere tendering of evidence with the Commission does not make that evidence competent. Only through the process of generating a record including cross-examination could that evidence become competent. And, holding the hearing, as well as triggering the contested case provisions, also requires that the proceeding be fundamentally fair to all concerned.[14/]. That fair procedure would

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[12/] *Laclede, supra,* at 569.

[13/] *Laclede, supra,* at 568.

[14/] *State ex rel. Fischer v. Missouri Pub. Serv. Comm'n.*, 645 S.W.2d 39, 43 (Mo. App. W.D. 1982)

without question require adequate opportunity for data requests or other discovery as well as cross-examination based thereon.[15/] But this again assumes, *arguendo*, that a *prima facie* case of threatened financial impairment has been made. Here no such case has even been claimed.

C. The Legal Basis for the Relief Sought by Empire's Motion Is Highly Questionable.

Because this case represents such a clear attack on a number of regulatory principles, a brief discussion of the rationale behind those principles appears to be in order.

1. Missouri Is a "File and Suspend" Jurisdiction.

Missouri recognizes two methods by which a rate case may be initiated. The first is by the "file and suspend" procedure; the second is through the "complaint" procedure.[16/] Once

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[15/] Due process requires that administrative hearings be fair and consistent with rudimentary elements of fair play. Tonkin v. Jackson County Merit System Commission, 599 S.W. 2d 25, 32-33[7] (Mo. App. 1980) and Jones v. State Department of Public Health and Welfare, 354 S.W. 2d 37, 39-40[2] (Mo. App. 1962). ***One component of this due process requirement is that parties be afforded a full and fair hearing at a meaningful time and in a meaningful manner.*** Merry Heart Nursing and Convalescent Home, Inc. v. Dougherty, 131 N.J. Super. 412, 330 A. 2d 370, 373-374[7] (Ct. App. Div. 1974).

State ex rel. Fischer v. Public Service Com., 645 S.W.2d 39, 43 (Mo. App. W.D. 1982) (emphasis added).

[16/] *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20 (Mo. *en banc* 1975), *cert. denied*, 429 U.S. 822, 97 S.Ct. 73, 50 L.Ed.2d 84 (1976).

a utility files for changed rates, the Commission has discretion to suspend effectiveness of the filing and direct an investigation or hearing or allow it to go into effect without such a hearing or investigation.[17/]

2. The Commission May Act to Suspend A Filing or Allow It to Become Effective, But All Relevant Factors Must Be Considered.

Even under the file and suspend method, the Commission "must of course consider all relevant factors including all operating expenses and the utility's rate of return, in determining that no hearing is required and that the filed rate should not be suspended."[18/] The Court held that Section 393.270(4) required consideration of all facts having any bearing upon the establishing of a proper maximum price.[19/]

> [N]either impulse nor expediency can be substituted for the requirement that such rates be 'authorized by law' and 'supported by competent and substantial evidence upon the whole record.'[20/]

[17/] *Id.*, at 28; *May Department Stores Co. v. Union Electric Co.*, 107 S.W.2d 41 (Mo. 1937).

[18/] *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. *en banc* 1079) ("*UCCM*").

[19/] *Id.*, at 56.

[20/] *State ex rel. Missouri Water Co. v. Public Service Commission*, 308 S.W.2d 704, 720 (Mo. 1957).

UCCM cited *Missouri Water* for the above statement and for the holding that consideration of all relevant factors is required, even if a rate is not suspended. The question becomes, under what, if any, circumstances, are there exceptions to this rule.

D. Empire Has Not Met the Emergency Standard Under Missouri Law.

Interim cases have rarely made it to reviewing courts. Generally review is denied on the basis that any interim issues were mooted by a subsequent permanent rate increase.[21/]

In this sense, Empire's *Laclede* case is an exception. The court granted review of an interim case ruling because the question was of recurring nature and great public concern. The Commission had ***denied*** interim relief to Laclede,[22/] but argued to the Court that its power to ***grant*** interim relief should be inferred from Sections 393.140(1) and 393.150, R.S.Mo., the sec-

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[21/] *See, e.g., State ex rel. Capital City Water Co. v. Public Service Commission*, 252 S.W.2d 252 (Mo. *en banc* 1923); *State ex rel. American District Telegraph Co. v. Public Service Commission*, 641 S.W.2d 779 (Mo. App., W. D. 1982).

[22/] Laclede argued that it had: suffered a decline in rate of return on total capital and equity; incurred higher cost of debt; experienced decreases in operating income; experienced loss of load; that earnings per share had dropped from $2.46 to $2.14 in less than one year (1973) and was projected to fall to $1.67 in the next fiscal year; that Laclede stock had fallen in value and was selling below book; that interest coverage on indentures had fallen. The Court, however, noted that: Laclede could still arrange debt financing; that denial would not result in insolvency, inability to serve present customers, or inability to pay dividends; that salaries hadn't been reduced or personnel terminated; and bond ratings wouldn't be affected.

tions establishing the "file and suspend" method. Importantly, the Commission argued to the court that "in reliance upon the quoted statutory provisions, ***it had adopted a rule*** in *Re: Southwestern Bell Tel. Co.,* 2 Mo.P.S.C. (N.S.) 131, under which it can and has granted special interim relief in ***emergency*** situations."[23/]

The *Laclede* court noted two Commission rulings where interim emergency relief had been granted,[24/] reviewed a few decisions from other jurisdictions and then held:

> We hold that the Commission has power **in a proper case** to grant interim rate increases within the broad discretion implied from the Missouri file and suspend statutes and from the practical requirements of utility regulation.[25/]

The more recent *UCCM* case, *supra*, confirmed the holding in *Laclede*, and stated that "[a]n interim rate increase may be requested **where an emergency need exists**."[26/] *UCCM* also held that the failure of the Commission to consider all relevant factors, including those that would establish a framework "in

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[23/] *Id.*, at 566 (emphasis added).

[24/] The cases were: *Re: Sho-Me Power Corp.*, Case No. 17,381 (1972) (applicant operating at a loss of over $70,000 per month and had paid no dividends for five years); and *Re: Missouri Power & Light Co.*, Case No. 17,815 (1973) (relief necessary to avoid a "threat to the company's ability to render adequate service").

[25/] *Laclede, supra*, at 567 (emphasis added).

[26/] *UCCM, supra*, at 48 (emphasis added).

which to determine if overall rates are reasonable,"[27] and therefore invalidated the electric fuel adjustment clause.

E. The Emergency Standard Should Be Retained.

1. The Emergency Interim Relief Standard Is Required By Missouri Law.

The conclusion from the above cases is rather straightforward. *Inter alia, UCCM* holds that the Commission must consider all relevant factors before fixing a rate, or even before allowing a filed rate to go into effect without suspension. *UCCM* also explicitly confirms the earlier *Laclede* case dealing directly with interim relief, that the Commission, ***in a proper case***, has the authority to grant interim relief. Indeed, *UCCM* further supports this conclusion by its reference to *Laclede* later in the opinion where, after ruling that the fuel adjustment clause was unlawful, the Court said:

> If the electric companies are faced with an "emergency" situation because of rising fuel costs, ***they can take advantage of the method set up by the legislature to deal with such situations*** and file for an interim rate increase on the basis of an abbreviated hearing [citing *Laclede*].[28]

Since the *UCCM* court cites *Laclede* when referring to an "emergency situation," the question then becomes: What constitutes a "proper case" under *Laclede* and *UCCM*? Since in the

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[27] *UCCM, supra*, at 57,

[28] *UCCM, supra*, at 57 (emphasis added).

Laclede case the Commission itself asserted that it had established a "rule" in the Southwestern Bell case, and since the *Laclede* court ***affirmed*** the Commission's denial of interim relief to Laclede, finding no imminent financial or service threat (thus affirming, at least in that circumstance, the Commission's own application of its rule), we conclude that ***the "emergency" test is inextricably tied to the preservation of the utility as an operating financial entity, and the preservation of its ability to provide safe and adequate service to its customers***.[29/]

Laclede also shows that declines in rates of return do not, by themselves, demonstrate impending financial doom. Something other than "rising fuel costs" is also required to justify interim relief. The *UCCM* court noted that the electric companies could seek interim relief if they were "faced with an 'emergency' situation ***because of*** rising fuel costs." While rising fuel costs might ***cause*** an emergency, they do not ***establish*** an emergency.[30/]

[29/] Consistent with this interpretation, in *Re: Raytown Water Company*, 3 Mo.P.S.C. (N.S.) 18 (1994), the Commission ***approved*** interim relief because otherwise the utility would have been unable to arrange the short term borrowing necessary to "ensure that its customers receive safe and adequate service." In the earlier case of *Re: Empire District Electric Company,* 24 Mo.P.S.C. (N.S.) 376 (1981) the Commission ***denied*** interim relief because there had been no showing that the utility's financial integrity or its ability to render safe and adequate service would be threatened by the denial.

[30/] *UCCM, supra*, at 57 (emphasis added).

2. The Emergency Standard Is Sound Public Policy.

The *UCCM* court expressed preference for the rate case method because it involved other parties in the process.[31/] This regulatory structure, which some might label cumbersome, was designed to protect consumers against exploitation were competition is inherently unavailable or inadequate, and to insure that utilities serve the public interest.[32/]

The *Laclede* court recognized that the Commission needed a means to deal with emergency conditions. It confirmed the Commission's principle that the purpose of an expedited interim hearing is to ascertain whether emergency conditions exist that would impair a utility's ability to render adequate service or imperil its financial integrity.[33/]

Here, then, is the public policy conundrum: On one hand, an abbreviated investigatory/hearing procedure sacrifices the confidence derived from a fully developed investigation and hearing. On the other hand, to require a full investigation and hearing might result in the collapse of a utility. The compromise that the Commission has drawn for the past 50 years is: Is the exigency faced by the utility so imminent, so threatening, and so potentially damaging to the public it serves that the

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[31/] *UCCM, supra*, at 49.

[32/] *UCCM, supra*, at 48.

[33/] *Laclede,* 535 S.W.2d at 568.

public interest in the preservation of safe and adequate utility service outweighs the ***competing public interest*** in a full-blown evidentiary proceeding.

It follows then that, ***absent*** compelling emergency conditions, there is no justification to cut short the preferred full rate case procedure with all its analytical and procedural protections. Even *Laclede* expressed a preference for the full procedure absent exigent circumstances.[34/] The present emergency standard is not rigid; cases show that there is still ample room for Commission consideration of utility-specific factors and conditions. But demonstration of an emergency situation representing imminent impairment of financial viability or imminent jeopardy to safe and adequate service is the *sine qua non* of interim relief in Missouri. As such it is fully consistent with rational public policy and should be retained.

[34/] Rather than helping Laclede, this reference simply emphasizes the desirability of leaving the whole question of just and reasonable rate (unless imperative facts require to the contrary) to the permanent rate proceeding in which all the facts can be developed more deliberately with full opportunity for an auditing of financial figures and a mature consideration by the Commission of all factors and all interests.

State ex rel. Laclede Gas Co. v. Public Service Com., 535 S.W.2d 561, 574 (Mo. App. W.D. 1976)

F. Application of the Interim Emergency Standard to Empire Finds Empire Wanting.

Taking its evidence at face value, Empire has only claimed that its fuel costs have risen, but perhaps not beyond a level which Empire could have prevented or significantly mitigated by hedging or prudent purchasing. Management failures do not justify interim relief. Empire is not imperiled, financially or otherwise. Empire does not claim that it meets either an "emergency" or "near emergency" test.

These facts put Empire close to the situation of Laclede discussed in *Laclede, supra*. Like Empire, Laclede conceded that it had not met the emergency standard, but contended its income during the test year would not produce the return allowed by the Commission's last rate order in 1969. Like Empire, Laclede's claim was based on a stipulation with language remarkably similar to that approved in Empire's last rate case. The *Laclede* court held that the Commission had made no determination in the prior case of a "minimum" return or that any particular return figure might not also be reasonable.

> Particularly in view of the nature of the 1969 rate order and the reservations specifically contained therein and which have been quoted above, ***Laclede simply cannot hold too closely to a contention that any variation from the 1969 rate of return must necessarily be unjust and unreasonable.***[35/]

[35/] *Id.*, at 573 (emphasis added).

Since by the time the interim case was before the court, the permanent case had been decided, Laclede argued that the Commission's finding of a higher rate of return supported its interim case. The Court, however, pointed to this as a strong reason the whole question of just and reasonable rates should be left to a full rate proceeding in which all facts can be developed with a full opportunity for audit and a mature consideration by the Commission "unless ***imperative facts*** require to the contrary."[36/] The Court ruled that Laclede had not met its burden. Neither has Empire.

G. Empire's Factual Assertions Are Deficient.

Empire's Motion is filled with factual assertions that are certainly at this time open to serious questions. At a minimum, these include:

- No "increase[s] in fuel and purchased power costs" have been proved.[37/] Empire cites no level of current purchased power and fuel costs to support its unverified statement. Because the last case was a settled case on this issue, there is no basis on which Empire may assert an "increase."

[36/] *Id.*, at 574 (emphasis added).

[37/] Motion, p. 2.

- Empire asserts that its "twelve-month ending forecast . . . uses the traditional production cost modeling approach."[38/] *First*, there is no "traditional" production cost modeling approach. *Second*, experience amply demonstrates that even if parties use the same computer model, they often reach different results because of different assumptions regarding inputs. There is no "one size fits all" as Empire urges. The issue engenders substantial controversy.

- Empire asserts that its additions of gas-fired electric generation are "consistent with state, regional and national trends."[39/] This is not a self-evident truth. There is certainly dispute about "trends" regardless of their scope and Empire's actions may or may not be "consistent" with such "trends," whatever they may be. Again, such statements are not self-evident, yet no proof is offered. An *ad populum* fallacy does not support a claim for millions in rate relief. Moreover, nothing here addresses the question of pru-

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[38/] Motion, p. 2.

[39/] Motion, p. 3.

dence both in selection of means and in the implementation of the selected means.

- Empire asserts that its capacity additions "were viewed as more friendly to the environment." Unstated in this assertion is who it is that is "viewing" the additions. Identification of many specifics are required before the Commission is in a position to evaluate the veracity of this statement.

- Empire asserts a gas burn of 6.5 million MMBtu in 2003. Then Empire asserts that "under normalized weather conditions" Empire could "***easily*** burn nearly 10 million MMBtu in a year.[40/] What does "easily" mean? Could it mean without regard to other prices or more reasonably priced alternatives? The problem with a stand-alone fuel cost number is that it is a multi-variant formula that requires many inputs including assumptions about purchased power costs in the region as well as the costs or prices of alternative fuels. The problem that focusing on a single input in that equation

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[40/] Motion, p. 3 (emphasis added).

causes is that it may distort the decision-making process so that the utility can "game" its purchases to minimize cost while shifting risk to ratepayers. Further, what constitutes "normalized weather conditions" or the path to that goal are often hotly disputed. There is no one true answer.

- Empire suggests that an upward change of $1/MMBtu "could" reduce retained earnings by $6.4 million. Correspondingly, inclusion of a gas cost that was $1/MMBtu too high would cost ratepayers an additional $6.4 million per year.[41/] Although Empire appears to recognize this, the implications of such choices appear lost to Empire and requires exploration. Moreover, fuel "models" that we have seen are multi-variable and these changes to gas costs would have other impacts as well, perhaps some offsetting. Sadly, generation and purchased power calculations are not actually "all other things being equal."

[41/] Motion, p. 3.

- Empire notes that it has used hedging strategies to remove volatility.[42/] In Empire's last rate case, it opted to cancel the then effective IEC arrangement roughly one year early, asserting that its hedging activities had been so successful that it no longer needed the mechanism.[43/] What has changed? Did Empire abandon the hedging strategy it touted in the last case? Did it change it? If so, why? If not, why is there a need for the requested relief? These questions are not answered by the motion.

- Empire appears to approach the issues raised by its request as though its testimony is the final word on the matter. To the contrary, Empire's testimony has often been contradicted and, in any event, has not been tested by either discovery or cross-examination. Whether or not it ever will be, it is not competent evidence at this point in time. This point will be addressed again, *infra*.

[42/] Motion, p. 4.

[43/] A copy of a selected portion of Mr. Beecher's testimony from the prior case is attached to this response as Appendix A.

H. Empire's Asserted "Legal Basis" For the IEC Is Questionable.

1. *Midwest Gas Users* Does Not Support Empire's Claims.

Empire appears to pin its hopes on *Midwest Gas Users' Association*,[44/] Empire misreads both the holding and the scope of that case. *Midwest* involved the purchased ***gas*** adjustment clause for local gas distributors. Empire fails to note that the court's distinction for the PGA went beyond finding that the PGA was not a "formula" but rather focused on the nature of the direct pass-through of the cost of the commodity that was purchased and resold. Empire's electric customers are not purchasing natural gas. Rather they are purchasing electric energy that may at a given point be obtained from generation ***using*** natural gas, coal, oil or may be purchased from other sources at prices that vary depending on the source of that generation. There is no "dollar for dollar" relationship between the purchase of an MMBtu of natural gas and the provision of a killowatthour of energy. Yet the LDCs in *Midwest* grounded their argument supporting the PGA on precisely that "dollar for dollar" passthrough -- an argument that the court accepted.[45/] More-

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[44/] 976 S.W.2d 470 (Mo. App. W.D. 1998).

[45/] The portion referenced in the Motion at p. 5 makes this clear:

(continued...)

over, the court was obviously intimidated by the size of the gas bills that were argued would be put at risk by the invalidation of the PGA[46] -- a factor not in issue here. Finally, the *Midwest* court specifically noted that the PGA did not violate the rule against retroactive ratemaking because the ACA mechanism dealt only with future customers;[47] here Empire would retroac-

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[45](...continued)

> By allowing a PGA, the PSC is necessarily determining that due to the unique nature of gas fuel costs, including the fact that natural gas is a natural resource, not a product which must be produced with labor and materials, the fuel cost component of the rate must be treated differently than other components because it is different. ***It has therefore provided a mechanism which allows fuel cost increases to be passed on, and fuel cost savings to be passed on, in the amount incurred.***

Midwest, supra, at 480 (emphasis added).

[46] The Commission finds that the elimination of the PGA/ACA mechanism could result in large windfall profits to Missouri Gas Energy at the expense of ratepayers or losses so large as to threaten the financial viability of Missouri Gas Energy.

Midwest, supra, at 475:

[47] By contrast, the FAC allowed electric utilities to recover after-the-fact for costs previously incurred but not permitted to be collected under a prior FAC. This was considered to be improper retroactive ratemaking because it changed a rate after it had been established and paid.

. . . .

The adjustments permitted under both the PGA and the ACA are applied only to future customers on future bills. The companies are not allowed to adjust the amount charged to past customers either up or down.

(continued...)

tively change the amount that existing customers would pay for energy by a true-up process and refund.[48/] Formula or no, Empire's proposed IEC is a far different mechanism than the PGA.[49/] Any comparison between this proposal and *Midwest Gas Users* is apples to oranges.

2. *Midwest Gas Users* Cannot Overrule UCCM.

In any event, the UCCM case remains and prohibits the electric fuel adjustment proposed by Empire absent agreement of the parties. *Midwest Gas* is a Court of Appeals decision; UCCM is a statement by our Missouri Supreme Court. *Midwest Gas* cannot overrule or change the UCCM decision.

[47/](...continued)

Midwest, supra, at 480-81 (emphasis added).

[48/] Empire's proposed IEC includes the following statement:

> Such refunds, if any shall be based upon the billing units of the customer to which these amounts were applied. Any refund will appear as a one-time credit on the customer's bill.

Proposed 4th Revised Sheet 17.

[49/] Indeed, the mechanism that was the result of the settlement in Empires's next prior rate case also was retroactive. However, all the parties agreed to that mechanism in the context of a non-precedental settlement. No support is provided for such a mechanism absent agreement of the parties to the rate case.

I. Empire's Request for a Technical Conference Should Be Rejected.

Empire's Motion is no more than a request for interim relief in a different wrapper. Absent a colorable showing (or even an assertion) of threatened financial impairment within the meaning of Missouri regulatory principles, there is simply no reason for a "technical conference" nor is there anything to rationally discuss. These intervenors are not eager to discuss justified and appropriate relief in the context of the rate case, and ***at the appropriate time***, we are unwilling to be hustled or bootstrapped into such a process ahead of audit, data requests, or even an approximation of Empire's current financial status. If Empire has a financial exigency, let it be claimed, and if claimed, proved.

III. CONCLUSION.

Empire's Motion is no more than a renewed attempt to seek interim relief that Empire neither deserves or claims to need. The Motion is also an untimely attack upon the suspension order.

A whole panoply of factual issues remain to be resolved and doubtless will be in the usual course of events. Empire's ill-conceived attempt to do an "end run" around the interim rate relief standard should be recognized for what is it and rejected.

Given the lack of even a claim of need for interim relief, the request for a technical conference is an unnecessary and futile waste of time and should be rejected.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.

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ATTORNEYS FOR PRAXAIR, INC. and
EXPLORER PIPELINE COMPANY

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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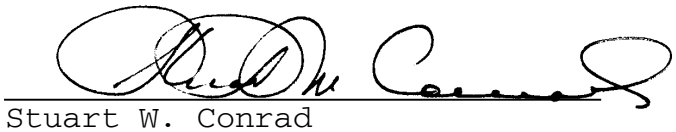

Stuart W. Conrad

Dated: June 1, 2004

APPENDIX A

ER-2002-424
Beecher Supp. Direct
3-26-2003

Q. IS THERE AN ALTERNATIVE MANNER IN WHICH FUEL AND PURCHASED POWER EXPENSES MIGHT BE INCLUDED IN THIS CASE?

A. Yes. In Empire's last Missouri rate case (Case No. ER-2001-299), a rider termed the IEC was incorporated in Empire's rates to specifically address the volatility and unpredictability of natural gas prices. In addition to a fixed amount of fuel and purchased power expense that Empire is allowed to recover through its rates, the IEC adds an additional charge which is subject to true up and refund to account for the volatility and unpredictability of natural gas prices. I will explain more of the process later in my supplemental direct testimony, but basically it is a good method to remove a portion of the volatility that can negatively affect Empire and its ratepayers.

Q. WHAT HAS EMPIRE DONE SINCE THE LAST RATE CASE TO ALLEVIATE SOME OF THE RISK DUE TO VOLATILE NATURAL GAS PRICES?

A. Over the past year, Empire has implemented an Energy Risk Management Policy and added staff that specifically focuses its efforts on the purchasing and hedging of power and natural gas. The Energy Risk Management Policy sets targets as to how much natural gas Empire must have hedged at any point in time. In general the Risk Management Policy brings more sophistication and discipline to our fuel procurement.

Q. YOU MENTION THE TERM "HEDGED." PLEASE EXPLAIN THE TERM "HEDGED."

A. Specifically, I mean protected against the risk of upward price movements. Empire's Risk Management Policy allows the utilization of traditional physical purchases and the utilization of financial tools such as call options, collars, swaps, and futures contracts to protect against upward price movements.

Q. WHAT ARE THE RISK MANAGEMENT POLICY TARGETS?

A. The policy requires that we meet the following hedging targets:

Year 1	60-80 percent
Year 2	40-60 percent
Year 3	20-40 percent
Year 4	00-20 percent

By way of example, by the end of 2001 our policy required that we have 60-80 percent of 2002 gas needs hedged, 40-60 percent of 2003, 20-40 percent of 2004, and 0-20 percent of 2005. In simplistic terms, we are simply dollar cost averaging. This strategy will remove volatility for both Empire and our customers.

Schedule BPB-1, attached to this supplemental direct testimony, shows Empire's natural gas positions as of March 25, 2002.

AFFIDAVIT

STATE OF MISSOURI)
) ss
COUNTY OF JASPER)

On the 26th day of March, 2002, before me appeared Brad P. Beecher, to me personally known, who, being by me first duly sworn, states that he is the Vice President – Energy Supply of The Empire District Electric Company and acknowledged that he has read the above and foregoing document and believes that the statements therein are true and correct to the best of his information, knowledge and belief.

Brad P. Beecher

Brad P. Beecher

Subscribed and sworn to before me this 26th day of March, 2002

Patricia A. Settle

Patricia A. Settle, Notary Public

My commission expires: August 16, 2002

PATRICIA A SETTLE
Notary Public - Notary Seal
STATE OF MISSOURI
JASPER COUNTY
MY COMMISSION EXP. AUG. 16,2002