

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

In the matter of The Empire Dis- )  
trict Electric Company of Joplin, )  
Missouri for authority to file )  
tariffs increasing rates for elec- ) ER-2006-0315  
tric service provided to customers )  
in the Missouri service area of the )  
Company )

RESPONSE OF PRAXAIR, INC. AND EXPLORER PIPELINE  
REGARDING REQUESTED PROPOSED ORDERS

COME NOW Praxair, Inc. and Explorer Pipeline and through their attorney of record respond to the Commission's directive of January 3, 2008 as extended by subsequent order to January 18, 2008 as follows:

1. On October 30, 2007, the Missouri Supreme Court ordered the Commission to vacate its unlawful order of December 29, 2006 that purported to approve new tariffs for Empire District Electric Company.

2. Rather than simply and directly comply with the Court's Order, the Commission chose to attempt to both vacate that order and simultaneously attempt to reinstate it so as to attempt to preserve unlawfully collected interim revenue for Empire District.

3. At least in this attempt, the Commission provided other parties with time for applications for rehearing to be prepared and filed.

4. In its Application for Rehearing, the Office of the Public Counsel identified numerous errors in the attempted retroactive order including the complete failure of the Commission to recognize that by its unlawful attempt to retroactively reinstate a vacated order it had overruled several tariffs that had been filed in the interim period.

5. These parties timely filed their Application for Rehearing and an accompanying Motion for Stay identifying other errors that the Commission had committed in its attempt to retroactively protect its favored utility Empire District at the expense both of the law and customers.

6. Both the Office of the Public Counsel's and these parties Applications for Rehearing still pend before the Commission. Under the current interpretation erroneously employed by the Commission, these parties are unable to obtain judicial review and relief until those pending applications are denied by the Commission.<sup>1/</sup>

7. Pursuant to Section 386.510 RSMo., timely applications for rehearing having been filed with the Commission, the Commission has the option of granting these applications for review, thereby setting aside its attempt at retroactive rate

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<sup>1/</sup> In Case No. WD68727 now pending before the Missouri Court of Appeals, Western District, other parties in another matter have raised whether the Commission can issue a final order approving permanent nonrefundable rates into effect without an obligation of refund while at the same time control access to the court house and unconstitutionally preclude judicial review of its orders by refusing to deny pending applications for rehearing.

making, and thereafter acting expeditiously to take up and rule finally on the matters presented, or deny the pending applications for rehearing, thereby permitting the applicant parties to seek judicial review and relief of the Commission's attempted retroactive Order.

8. The Commission has only those powers granted to it by the General Assembly and those that are necessarily incident to those powers. It has no power to issue orders or to take actions other than those authorized by the General Assembly.

9. These parties have timely and lawfully submitted to the Commission through their several Applications for Rehearing the various errors that they believe the Commission has committed throughout the course of this proceeding including its most recent unlawful attempt to override the Missouri Supreme Court's Order of Vacation.


10. Inspection of Sections 386.500 through Section 386.530 does not reveal that the General Assembly has authorized the Commission to take action regarding timely filed Applications for Rehearing other than granting them, thereby setting aside the order as to which Rehearing is granted, or denying them. No statutory authority is provided for the Commission to direct parties who have timely applied for rehearing to make further filings such as proposed orders to correct the errors they have identified in their applications nor to make other filings to the Commission. No statutory authority is provided to the Commission to conduct further activity in the case such as convening "con-

ferences" to consider how Empire can retain its unlawfully collected revenues or order other hearings or meetings while refusing to rule on the pending applications for rehearing by granting or denying them. Accordingly the Commission is without authority under its rules and under governing law and the Missouri Constitution to add requirements to amend the existing statutory structure regarding applications for rehearing. Indeed, its order "directing" parties to file proposed orders and the proposed orders themselves is *ultra vires*.

11. Accordingly, these parties respectfully decline to supplement their applications for rehearing whether in the form of submitting proposed orders to "fix" the errors that they have identified in their applications for rehearing or to make other supplemental filings in addition to their timely filed applications for rehearing.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.



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ATTORNEY FOR PRAXAIR, INC. and  
EXPLORER PIPELINE

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 "Stuart W. Conrad", written over a horizontal line.

Stuart W. Conrad

Dated: January 18, 2008