BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of the Tariff Filing of the Empire District Electric Company of Joplin, Missouri To Implement a General Rate Increase for Retail Electric Service Provided to Customers In the Missouri Service Area of the Company	)))))	**Case No. ER-2006-0315**

RESPONSE OF THE EMPIRE DISTRICT ELECTRIC COMPANY TO THE APPLICATION FOR REHEARING FILED BY PRAXAIR, INC., AND EXPLORER PIPELINE COMPANY

The Empire District Electric Company ("Empire" or "Company"), by and through the undersigned counsel, and for its response to the "Application for Rehearing" filed by Praxair, Inc., and Explorer Pipeline Company (jointly "Praxair/Explorer") on November 22, 2006, respectfully states as follows to the Missouri Public Service Commission ("Commission").[1]

1. Empire recognizes that the Commission is undoubtedly weary of the constant stream of pleadings that have been filed in this docket by certain parties. The failure of Praxair/Explorer to negotiate a rate moratorium in the last case does not justify this conduct. The Company understands if the Commission believes that the continual bickering has risen to the level of an annoyance, and Empire has attempted to exercise restraint in this regard only responding when considered absolutely necessary. But because the most recent Praxair/Explorer pleading so misinforms and misleads the Commission, this is one of those occasions when the allegations of those parties cannot go unchallenged.

2. On November 1, 2006, Praxair/Explorer sought subpoenas to

[1] As noted in the Commission's November 16, 2006, "Order Quashing Subpoenas," rehearing is not available for interlocutory orders. Accordingly, the relief sought by Praxair/Explorer is more properly characterized as reconsideration and not rehearing.

compel the attendance and testimony of two witnesses – William Gipson, Empire's Chief Executive Officer, and Todd Tarter, the Company's Manager of Strategic Planning – at a November 20, 2006, hearing that was scheduled by the Commission for the limited purpose of "allowing Parties to cross-examine witnesses on the subjects of corporate allocations, regulatory plan amortizations and any true-up testimony." In response to Praxair/Explorer's request, on November 3, 2006, Empire filed its "Objection and Motion to Quash Subpoenas or, in the Alternative, Motion to Continue Hearing."

3. On November 16, 2006, the Commission issued its order granting Empire's motion to quash the subpoenas. The Commission determined that because neither Messrs. Gipson nor Tarter had pre-filed testimony on any of the issues to be considered at the November 20th hearing, it would not be necessary for them to appear. The Commission also determined that, because the filing of a non-unanimous stipulation does not require further testimony on the issues addressed therein, no party would be prejudiced if no witness was called on the "stipulated" issues of corporate allocations and regulatory plan amortization. The evidentiary record on these issues had already been fully developed prior to the November 20th hearing and counsel for the various parties were free to argue, during oral argument that was also scheduled for November 20th, whether that record adequately supported the position(s) taken by any party, either individually or as part of any multi-party stipulation.[2] The Commission's order quashing the

[2] Because Praxair/Explorer objected to both the stipulation relating to corporate allocations and the stipulation relating to regulatory plan amortization, the current status of those stipulations is governed by 4 CSR 240-2.115(2)(D). That rule states that the stipulations are to be

subpoenas also implicitly recognized that Praxair/Explorer's rights would be further protected by the fact that Praxair/Explorer can appeal the final order regarding these issues if they believe it is not supported by competent and substantial evidence or is not adequately explained through appropriate findings of fact and conclusions of law.

4. Praxair/Explorer now complains that the Commission's order quashing the subpoenas is unlawful because: 1) it denies the movants' right, under Section 536.070, RSMo 2000, to call and examine witnesses; and 2) it denies the movants' constitutional right to due process. Both of these arguments are unfounded and should be rejected.

5. In evaluating Praxair/Explorer's arguments – which primarily, if not exclusively, relate to the "Nonunanimous Stipulation and Agreement Regarding Regulatory Plan Amortizations" that was entered into among the Company, the Commission Staff, and the Office of the Public Counsel – the Commission must keep one fact clearly in mind: Contrary to the gross misrepresentation of Praxair/Explorer, Empire's position regarding the role that regulatory plan amortization should play in this case has not changed since it was first articulated in Mr. Gipson's rebuttal testimony. For Praxair/Explorer to suggest otherwise strains credulity and misleads the Commission. That position is as follows: *The amortization mechanism was designed to maintain certain S&P ratios during the construction of Iatan 2. It was not designed as a substitute for timely recovery of prudently incurred fuel and purchased power costs or a fair rate of return on*

---

considered to be "merely a position of the signatory parties . . . except that no party shall be bound by [the stipulation and agreement]. All issues shall remain for determination after hearing."

equity.[3] *If, however, because of the manner in which the Commission resolves the contested issues in this case, the calculations agreed to in Case No. EO-2005-0263 warrant an amortization adjustment, the Commission should include such an adjustment when calculating the revenue requirement used to base rates set in this case.* In addition to Mr. Gipson's rebuttal testimony, this position was clearly stated in the Company's pre-hearing brief;[4] in its opening statement;[5] during Mr. Gipson's cross-examination on September 11, 2006;[6] in Empire's post-hearing brief;[7] during the cross-examination of Empire's witness, Scott Keith, at the November 20th hearing;[8] and, finally, during oral argument of that issue.[9]

6. The Commission should also take note of the fact that the "Nonunanimous Stipulation and Agreement Regarding Regulatory Plan Amortizations" does not reflect a change in Empire's fundamental position, as stated above. Instead, the stipulation deals only with three issues that are ancillary to that position: 1) how the amortizations should be booked; 2) whether the amount of the amortizations that are allowed should be "grossed-up" for tax purposes; and 3) whether the amortization calculation should be based on a capital structure that is adjusted to eliminate the effects of the Company's recent acquisition of Aquila, Inc.'s, Missouri gas operations. Moreover, each of these ancillary issues is germane if and only if the Commission determines that, as a

---

[3] Exhibit 7, p. 2.
[4] *Pre-Hearing Brief of The Empire District Electric Company*, p. 18.
[5] Transcript, p. 533.
[6] Transcript, pp. 593-94, 599-602
[7] *Post-Hearing Brief of The Empire District Electric Company*, pp. 27-28.
[8] Transcript, pp. 1253-54.
[9] *See* Transcript, pp. 1316-17.

result of its decisions on the contested issues in the rate case, a regulatory plan amortization adjustment is required.

7. In light of these facts, Praxair/Explorer's contention that "the non-unanimous Stipulation and Agreement constitutes a change in position from Empire's prefiled testimony and that Praxair/Explorer was not informed of this change in position until after the evidentiary hearing" is not only completely without merit, but fails the "integrity test" touted by those parties at the commencement of the hearing in this case. The truth of the matter is that Praxair/Explorer had ample and adequate opportunity to examine the Company's witnesses – including both Messrs. Gipson and Tarter, the objects of the contested subpoenas – during the evidentiary hearings that were held prior to November 20th. If Praxair/Explorer failed to do so, they cannot now claim that due process considerations require the Commission to give them yet another "bite at the apple."

8. Praxair/Explorer's due process claims also ignore the fact that all parties were afforded the opportunity at the November 20th hearing to orally argue their respective positions on any of the issues under consideration at that hearing. As noted in its order quashing the subpoenas, the Commission allowed oral argument because evidence supporting non-unanimous stipulations is not, generally, offered. If, for example, Praxair/Explorer believed that, absent additional testimony from Messrs. Gipson and Tarter, Empire had failed to satisfy its burden of proof with respect to the issue of regulatory plan amortization, the movants were given the opportunity to make that argument, or any other

argument they deemed to be relevant and appropriate. Therefore, by giving Praxair/Explorer the opportunity to present oral argument regarding Empire's position on the issue of regulatory plan amortizations, the Commission fully satisfied the movants' due process rights with respect to that issue.

9. The argument that the Commission's order quashing subpoenas denied Praxair/Explorer's statutory rights under Chapter 536, RSMo 2000, is equally unfounded. Section 536.070, RSMo 2000, does not vest parties to administrative proceedings with unbridled subpoena rights, as Praxair/Explorer contends. Although there is *dictum* in a decision of the Missouri Supreme Court suggesting otherwise,[10] a subsequent decision by the Missouri Court of Appeals, Eastern District, shows that courts in Missouri have not interpreted or applied the right to subpoena conferred by Section 536.070, RSMo 2000, as expansively as Praxair/Explorer suggests. In *Hanlon v. Board of Education of the Parkway School District*, 695 S.W. 2d 930 (1985), the court rejected the appellant's claim that her request for subpoenas pursuant to Section 536.070, RSMo 2000, was unlawfully denied. Among the reasons cited by the court for its decision was the fact that another witness was available to be cross-examined on the same issues as the witness the appellant had sought to subpoena. The court therefore concluded that the denial of a subpoena did not result in prejudice to the appellant's case.[11] If, as Praxair/Explorer contends, a party's right to subpoena witnesses under Section 536.070, RSMo 2000, is truly unfettered, the *Hanlon*

[10] See *Collins v. Dir. of Rev.*, 691 S.W.2d 246, 254-55 (1985). *Collins* was quoted, with approval, in *Stewart v. Dir. of Rev.*, 702 S.W.2d 472, 475 (1986), which is cited in Praxair/Explorer's motion.

[11] 695 S.W.2d at 933.

court could not have reached the decision it did.

10. The holding in *Hanlon* is particularly applicable to the issues raised by Praxair/Explorer's motion because, in addition to their earlier opportunity to cross-examine both Messrs. Gipson and Tarter, Praxair/Explorer had the ability to cross-examine two additional witnesses at the November 20th hearing. Although Scott Keith, for Empire, filed only minimal testimony on the issue of regulatory plan amortization, Mark Oligschlaeger, for the Commission Staff, included an extensive discussion of that issue in his pre-filed true-up testimony. In addition, on October 30, 2006, the Commission Staff filed "Staff Suggestions in Support of Nonunanimous Stipulation and Agreement Regarding Regulatory Plan Amortizations and Response to Order Setting Hearing," which described in detail the terms of the stipulation and how the Commission Staff arrived at its position on the issue. Because a knowledgeable witness was otherwise available to Praxair/Explorer, the Commission's decision to quash the requested subpoenas did not violate Section 536.070, RSMo 2000, or result in any prejudice. Any questions that Praxair/Explorer reasonably could have had regarding the issue of regulatory plan amortizations could have been directed to the witnesses who appeared at the November 20th hearing, particularly Mr. Oligschlaeger.

11. Praxair/Explorer has been afforded "a full and fair hearing" regarding the issue of regulatory plan amortizations, as required by *State ex rel. Fischer v. Public Service Commission*, 645 S.W. 2d 39, 43 (Mo.App. 1982). Those parties had a right to introduce evidence from their own witnesses, to cross-examine the witnesses offered by the other parties, to fully brief the issue,

and, finally, to orally argue the issue at the November 20th hearing. Beyond bald assertions that their statutory and constitutional rights have been violated, Praxair/Explorer has offered no explanation as to why the testimony of Messrs. Gipson and Tarter was necessary or critical or how the absence of these witnesses at the November 20th hearing prejudiced the movants' case. Absent such a showing, and in light of the applicable facts and law, Praxair/Explorer's claims that their legal rights have been violated stand unsubstantiated. Simply stated, Praxair/Explorer has failed to demonstrate how the Commission's order quashing subpoenas constitutes error or prejudice. Accordingly, the Commission should reject Praxair/Explorer's request for rehearing of that order.

WHEREFORE, for the reasons stated above, Empire requests that the Commission deny Praxair/Explorer's motion for rehearing of the order quashing subpoenas.

Respectfully submitted,

BRYDON, SWEARENGEN & ENGLAND, P.C.
James C. Swearengen MBE#21510
Dean L. Cooper MBE#36592
L. Russell Mitten MBE#27881
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
(573) 635-7166
(573) 635-7431 (facsimile)
lrackers@brydonlaw.com

ATTORNEYS FOR THE EMPIRE DISTRICT ELECTRIC COMPANY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing document was served upon the following by electronic mail, facsimile or U.S. mail, postage prepaid, this 4th day of December, 2006:

Missouri Public Service Commission
General Counsel Office
P.O. Box 360
200 Madison Street,
Suite 800
Jefferson City, MO 65102
GenCounsel@psc.mo.gov

Office Of Public Counsel
Mills, Lewis
P.O. Box 2230
200 Madison Street
Suite 650
Jefferson City, MO 65102
opcservice@ded.mo.gov

Dennis Frey
P.O. Box 360
200 Madison Street, Suite 800
Jefferson City, MO 65102
Denny.Frey@psc.mo.gov

Aquila Networks
Carter, Diana
P.O. Box 456
312 E. Capitol Avenue
Jefferson City, MO 65102
DCarter@brydonlaw.com

Empire District Electric Company
Dean L. Cooper
Diana Carter
James C. Swearengen
Janet E. Wheeler
P.O. Box 456312 East Capitol
Jefferson City, MO 65102
dcooper@brydonlaw.com
DCarter@brydonlaw.com
lrackers@brydonlaw.com
janetwheeler@brydonlaw.com

Explorer Pipeline
David Woodsmall
428 E. Capitol Ave., Suite 300
Jefferson City MO 65102
dwoodsmall@fcplaw.com

Explorer Pipeline
Stewart Conrad
3100 Broadway, Suite 1209
Kansas City MO 64111
stucon@fcplaw.com

Kansas City Power & Light Company
James M. Fischer
101 Madison--Suite 400
Jefferson City, MO 65101
jfischerpc@aol.com

Kansas City Power & Light Company
Curtis Blanc
1201 Walnut, 20th Floor
Kansas City MO 64106
Curtis.Blanc@kcpl.com

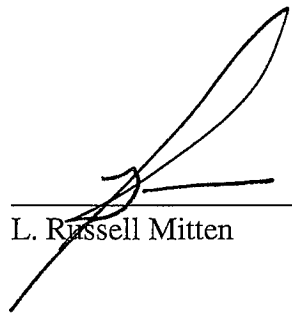
Kansas City Power & Light Company
William G. Riggins
1201 Walnut
Kansas City MO 64141
bill.riggins@kcpl.com

Missouri Department of Natural Resources
Shelley Woods
P.O. Box 899
Jefferson City, MO 65102-0899
shelley.woods@ago.mo.gov

Praxair, Inc.
David Woodsmall
428 E. Capitol Ave., Suite 300
Jefferson City, MO 65102
dwoodsmall@fcplaw.com

Praxair, Inc.
Stuart W. Conrad
3100 Broadway, Suite 1209

Kansas City, MO 64111
stucon@fcplaw.com



L. Russell Mitten