BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Empire District Electric Company of Joplin, Missouri for Authority to File Tariffs Increasing Rates for Electric Service Provided to Customers in the Missouri Service Area of the Company	)))))	**Case No. ER-2006-0315**

PREHEARING BRIEF

OF

PRAXAIR, INC. AND EXPLORER PIPELINE COMPANY

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INTRODUCTION

At the outset, Praxair, Inc. ("Praxair") and Explorer Pipeline Company ("Explorer") restate their concerns with the apparent purpose of the ordered prehearing briefs as distinguished from previously-used statements of position. In its April 11, 2006 Order Concerning Test Year and True-Up and Adopting Procedural Schedule, the Commission mandated Prehearing Briefs and also imposed a page limitation on the post-hearing brief under the mistaken belief that "[s]ince the prehearing briefs will cover most of the record, post-hearing briefs need not be lengthy and will be limited to ten (10) pages. Post-hearing briefs will update the prehearing briefs for new evidence adduced at the hearing." (emphasis added). The Commission thereby incorrectly drew an equivalence between prehearing statements of position and the post-hearing briefs provided for by law.

Because prehearing briefs are due prior to the evidentiary hearing and the acceptance of "evidence" into the record, confusion necessarily arises as to the purpose of the prehearing briefs, the questionable legality of such "briefs" in light of the Commission's statutory obligations under Section 536.080 RSMo, and the nature of the "evidence" upon which such "briefs" are to be based. In its April 21, 2006 Limited Application for Rehearing, Reconsideration or Modification, Praxair / Explorer explained their concerns with these pre-hearing "briefs." Now, over 4 months later, Praxair / Explorer's Application for Rehearing has yet to be addressed by the Commission save for a July 10, 2006 Notice of Procedural Change that appears to have been improperly issued under delegation by the Regulatory Law Judge. Nevertheless, Praxair / Explorer, to

preserve our rights to fully brief the evidence of record at the evidentiary hearing, will briefly review those concerns.

Section 536.080.2 RSMo places a statutory obligation on each commissioner to "either hear *all* the evidence, read the *full* record including *all* the evidence, or personally consider the portions of the record cited or referred to in the arguments or briefs." Though use of post-hearing briefs are a statutory alternative to each of the Commissioners hearing *all* or reading *all* the evidence, Section 536.080.1 anticipates that oral arguments will be held or briefs will be filed *after* the Commission has established and closed the record at the hearing. This requirement has been codified by the Commission at 4 CSR 240-2.140(1). To use a phrase currently in vogue in other contexts, the post-hearing briefs allow the parties to "connect the dots" in their respective cases. Obviously, there must be "dots" to "connect."

Thus, this pleading and other similar pleadings submitted today by other parties cannot substitute for the statutory post-hearing brief of Section 536.080.1. Specifically, the reference by any party to "evidence" could of necessity be *only* that party's prognostication of what the evidentiary record will be. Things happen in a hearing. Parties may not offer certain pre-filed testimony. Offered testimony may be stricken or not accepted. A party's position may change as a result of settlement or discovered errors. Thus it is not possible for any party to accurately predict what the evidentiary record will be and what material will become part of the record and be available for inclusion in the briefs. Ultimately, Commission reliance upon such prehearing "briefs," given the fact that "evidence" has not yet been adduced, would be in direct violation of Section 536.080 and potentially Article V, Section 22 of the Missouri Constitution.

Praxair / Explorer's concern is that the Commission's yet-unchanged April 11, 2006 Order implies equivalence between the *pre*-hearing documents that are filed today (8/31/06) and that follows this introduction and the *post*-hearing brief that is the statutory alternative provided in Section 536.080 RSMo. These two documents are, simply, not fungible. Were they fungible, the hearing, including the admission of evidence, and all the associated processes including cross-examination, which, by the way, create the substantial *competent* evidence which the Constitution requires as support for any decision it makes, would be rendered meaningless. That is why a statement that post-hearing briefs can address "new" evidence introduced at the hearing is nonsensical, as there is no "old" evidence.

Given that today's pleadings cannot constitute Section 536.080 "briefs," they must necessarily be nothing more than a statement of position, which would make them consistent with previous Commission procedure (See Case No. ER-2004-0570). Because we cannot accurately predict what the record evidence will be in this case, and given the Commission's obligation to base its decision only on competent and substantial evidence *in the record* and the Commission's previously accepted use of position statements, we are submitting this pleading as a position statement tied to the currently-identified issues in the case. We have sought to provide a succinct but accurate statement of our positions in this proceeding. We trust that this statement will be useful to the Commission for the purposes intended.

RATE OF RETURN ISSUES

I. Return on Common Equity:

Praxair / Explorer assert that the standards of Bluefield Water Works and Improvement Company and Federal Power Commission et. al v. Hope Natural Gas Company provide the Commission with direction on the proper return on common equity that should be authorized for Empire shareholders. These cases provide that a fair return would be:

1) A return "generally being made at the same time" in that "general part of the country";

2) A return achieved by other companies with "corresponding risks and uncertainties"; and

3) A return "sufficient to assure confidence in the financial soundness of the utility".

This Commission as well as the overwhelming majority of other state and federal utility commissions have found that this standard is met through a properly conduct Discounted Cash Flow ("DCF") analysis. In this case, Praxair / Explorer believe that such a DCF analysis as well as an analysis of return on equity decisions issued by other state and federal utility commissions will show that Empire should be authorized a return on equity not in excess of 10.0%.

II. Capital Structure:

Pending receipt of evidence and cross-examination at the hearing, we are reserving our position on this issue.

REVENUE ISSUES

III. Off-System Sales:

Pending receipt of evidence and cross-examination at the hearing, we are reserving our position on this issue.

REGULATORY PLAN AMORTIZATIONS

IV. Should Empire's revenue requirement include regulatory plan amortizations? If so, (i) how should Empire's off-balance sheet obligations be valued for purposes of the amortizations and (ii) should the amortized amount by subject to an income tax gross-up?

The Stipulation and Agreement approved by the Commission in Case No. EO-2005-0263 established amortization mechanisms that are in effect for this proceeding. To the extent deemed necessary by the Commission's final decision in this matter as well as the financial metrics contained in the Stipulation and Agreement in Case No. EO-2005-0263, Empire's revenue requirement should include regulatory plan amortizations.

Praxair / Explorer support Staff's methodology for calculation of the regulatory plan amortization amounts as well as its assertion that amortization amounts do not have to be grossed-up for income taxes.

EXPENSE ISSUES

V. Fuel and Purchased Power Expense:

As reflected in Section VI of this pleading, we believe that the Interim Energy Clause approved by the Commission in Case No. ER-2004-0570 continues in effect and as a result establishes the appropriate level of fuel and purchased power expense to be included in base rates in this proceeding. Should the Commission allow Empire to

unilaterally terminate the legal contract identified as the IEC (without prejudice to our rights to challenge such decision), the natural gas price used for calculating the price of Empire's unhedged natural gas supply needs should be based on actual gas prices for the months of January through August 2006 and the futures prices for the remaining months of September through December 2006. Using actual gas prices helps to eliminate the "fear factor" inflation effect routinely seen in futures prices as a result of concerns regarding recent hurricanes and instability in the oil-producing regions in the Middle East. Any greater use of futures prices would result in Empire recovering an inappropriate level of fuel and purchased power expense.

VI. IEC Continuation

A. Is the Commission barred from terminating the Interim Energy Charge by Section 386.266.8?

Section 386.266.8 RSMo (recently enacted as Senate Bill 179) denies the Commission authority to prematurely terminate the Interim Energy Clause that it approved in Case No. ER-2004-0570.

B. Relying upon the four corners of the Stipulation and Agreement, are the terms of the IEC ambiguous?

No. This presents the Commission with a legal question regarding contract construction. Although not a court, the Commission has already found the contract to be valid and binding and supported by consideration. The "four corners" of the Stipulation and Agreement approved by the Commission in Case No. ER-2004-0570 clearly reflect a meeting of the minds by the parties, subsequently ratified by the Commission, that the Interim Energy Clause have a term of three (3) years.

C. In the event that the Stipulation and Agreement is found to be ambiguous, do Empire's actions demonstrate its belief that it was bound to a 3-year term?

(i) What is the practical construction that Empire has given to the agreement?
(ii) What is the burden of proof of ambiguity and on whom does it rest?
(iii) What is the significance of the burden of proof?

The IEC contract is not ambiguous and reflects the parties' meeting of the minds of a three (3) year IEC contract. Nevertheless, if the Commission finds that the Stipulation and Agreement is ambiguous, and without prejudice to our position that this is a legal question, it may consider evidence designed to determine the intent of the parties. Empire's actions leading up to the execution of the Stipulation and Agreement and following its execution both indicate that it believed that the IEC would have a three (3) year term.

The Commission's Report and Order which approved the IEC Stipulation and Agreement, the Order Approving the Tariffs filed in conformance with that Report and Order, and the currently effective tariffs all reflect an IEC terminating in 2008. Accordingly, the burden of proof is on the party adverse to the Commission orders and tariffs. As such, pursuant to Section 386.430, the burden of proof to show that the IEC should be prematurely terminated is on Empire. The significance of this burden will be made readily apparent at the hearing when it is shown that Empire has not met its burden of proof.

D. Has Empire properly applied to terminate the Interim Energy Clause, approved by the Commission in Case No. ER-2004-0570?

No. Commission Rule 4 CSR 240-2.060 provides for the use of applications wherever a party requests relief under statutory or other authority. Unlike Empire's use of filed tariff sheets in the current proceeding, the use of an application for seeking such relief is appropriate when one recognizes that tariff sheets may be allowed to go into effect by operation of law. In such case, a utility could simply cancel a contract by filing a single sheet of paper which would, unlike the application process, deny other interested parties due process of law. Therefore, in order to protect all parties' interests, relief from a Commission approved incentive / performance based plan should be contained in an application. This requirement would also provide for symmetry among the parties. The other parties to the Stipulation and Agreement approving the IEC are not permitted to file tariff sheets seeking discontinuance of the IEC. They would necessarily be required to file either an application or complaint. It would be fundamentally inequitable to allow Empire to seek discontinuance by merely filing tariff sheets.

E. What standard should the Commission apply in deciding whether to prematurely terminate the IEC?

As the Commission has previously recognized, the IEC contained in the Stipulation and Agreement in Case No. ER-2004-0570 "was freely negotiated. Consideration was given and received. The Commission approved it and it is binding."[1] Although the Commission has a continuing responsibility to ensure that regulated utilities are providing safe and adequate service at just and reasonable rates, and inherent in this responsibility is some concern for the financial health of the utilities it regulates, the

[1] Order Clarifying Continued Applicablity of the Interim Energy Charge, Case No. ER-2006-0315, issued May 2, 2006 at page 3.

Commission should use a high standard in determining whether to allow Empire to seek early termination of the IEC. Of course, Empire has not applied for such a termination, so in one sense, this question may be moot.

By analogy, the Commission utilizes the "emergency" standard in determining whether a utility's financial condition is so perilous that it should have interim rate relief to enable it to continue to provide safe and adequate service. Such a standard would be equally applicable to the case at hand and Praxair / Explorer recommend that the Commission utilize such standard in determining whether to allow Empire to prematurely terminate the IEC, should this question be reached under a proper application for relief by Empire.

F. What would be the extent of Empire's financial harm if it were bound to the remaining term of the IEC?

(i) What is the comparative financial harm that would be experienced by the ratepayers if the Stipulation and Agreement were prematurely terminated?

Given the applicability of the regulatory amortization mechanism discussed in Section IV, Empire is assured of revenues and cash flow sufficient to meet the financial metrics necessary to maintain an investment grade credit rating. With the applicability of these amortization mechanisms, Empire faces no financial harm whatever if held to the agreement that it made for the remaining term of the IEC. Accordingly, Empire cannot meet the emergency standard that should be utilized by the Commission in deciding whether to allow Empire to prematurely terminate the IEC, had it even applied for such relief.

On the other hand, the comparative financial harm to the ratepayers is large. As reflected in the Stipulation and Agreement implementing the IEC, ratepayers (both

industrial and residential) agreed to forego their right to judicial review of any Commission order implementing the IEC. Given the absolute prohibition against single issue ratemaking and fuel adjustment clauses, this was a significant concession on the part of these ratepayers. Such consideration can *never* be returned to the ratepayers. In addition, ratepayers have provided significant revenues and cash flow under the IEC to which Empire would not otherwise have been entitled without the implementation of the IEC. While this monetary consideration can be taken back from Empire, given the continual change in customers in and out of Empire's service territory, it is impossible to return this consideration to the proper ratepayers. Moreover, the Commission is not a court and cannot issue money judgments. Thus the Commission simply does not have the power to restore the ratepayers to the *status quo ante* and thus must hold Empire to the terms of the contract that it negotiated.

Finally, the comparative harm associated with Empire's attempt to undermine the integrity of the Commission's regulatory process and procedure is deeply disturbing. In recent years, Empire has continually sought Commission protection from the decisions of its management. As reflected in Section IV, Empire management now seeks to retreat from the regulatory plan and amortization mechanism that it agreed to with interested parties. Any Commission decision to allow Empire to disavow itself of the actions of its management in agreeing to a three (3) year IEC will inevitably lead to distrust in the Commission's process and procedure and will result in the implementation of rates at a level much higher than otherwise agreed to by Empire management.

G. In the event that Empire is permitted to prematurely terminate the Interim Energy Clause, what amount of revenues collected by Empire under the IEC should be refunded to customers?

In the event that the Commission allows Empire to prematurely terminate the IEC, it has essentially undertaken the judicial role of rescission of a contract that it has previously found to be "binding". In the event of rescission, courts have sought to return the parties to their position prior to the contract. In this case, Empire should be required to return all revenues collected pursuant to the IEC.

VII. Gain from Unwinding Forward Natural Gas Contract:

In the event that the Commission permits Empire to prematurely terminate the IEC, then Empire should be required to reflect in its entirety the gain realized from the unwinding of the forward natural gas contract. Should the Commission, however, find that Empire is bound by the terms of the IEC, then the issue of any gain will be determined at the point in time in which Empire is required to replace the gas covered by the forward natural gas contract in question.

VIII. Incentive Compensation:

Praxair / Explorer support the position of Staff on this issue.

IX. Low Income Assistance Program:

The parties are engaged in discussions surrounding this issue, but have not yet concluded those discussions. Without prejudice to those discussions, Praxair / Explorer takes no position on this issue so long as the costs of implementing this program are not imposed on industrial customers. The benefits of this program are realized entirely by residential customers and should not be borne by industrial customers. The Commission does not have authority to impose a tax.

X. Unspent Funding of Current Energy Efficient and Affordability Programs:

The parties are engaged in discussions surrounding this issue, but have not yet concluded those discussions. Without prejudice to those discussions, Praxair / Explorer believe that the appropriate handling of any unspent funds collected or retained from these programs should be disbursed pursuant to the terms of the Stipulation and Agreement that established them and the current tariffs approved pursuant to that Stipulation and Agreement (Case No. ER-2002-424). As with the Stipulations which created the IEC and the regulatory amortizations, absent agreement of all signatories or non-objection of other parties in that proceeding, the party seeking to modify the contract should be under a heavy burden to convince the Commission of the necessity for modification / rescission of the settlement agreement.,

CLASS COST OF SERVICE / RATE DESIGN

XI. Rate Design / Cost of Service:

A. How should any revenue increase for Empire that results from this case be implemented in rates?

The parties are engaged in discussions surrounding this issue, but have not yet concluded those discussions. Without prejudice to those discussions, Praxair / Explorer assert that any rate increase be implemented across all rate schedules on an equal percentage basis.

B. What level of revenue credits should be recognized for purposes of allocating any revenue requirement increase?

The parties are engaged in discussions surrounding this issue, but have not yet concluded those discussions. Without prejudice to those discussions, any revenue requirement increase should properly recognize the interruptible nature of the capacity utilized by Praxair, Inc.

WHEREFORE, Praxair / Explorer respectfully submit the foregoing "prehearing brief" as ordered in the Commission's April 11, 2006 Order Concerning Test Year and True-Up and Adopting Procedural Schedule.

Respectfully submitted,

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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.

David L. Woodsmall

Dated: August 31, 2006