**BEFORE THE PUBLIC SERVICE COMMISSION**
**OF THE STATE OF MISSOURI**

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| In the Matter of the Proposed Charges Related to the Fuel Adjustment Clause of The Empire District Electric Company | ) ) ) | **Case No. EO-2009-0349** |

**REPLY TO RESPONSES OF STAFF**
**AND EMPIRE DISTRICT ELECTRIC COMPANY**

COME NOW, Praxair, Inc. and Explorer Pipeline Company ("Industrial Intervenors") and for their Reply to the Responses of Staff and Empire District Electric Company ("Empire") respectfully state as follows:

1. On April 1, 2009, The Empire District Electric Company ("Empire") filed proposed rate schedules to increase rates by $1.92 million associated with an alleged undercollection of fuel and purchased power expense for the period of September 2008 through February 2009. On May 15, 2009, the Industrial Intervenors filed their Motion to Reject Tariffs. That motion, based upon facts provided in sworn testimony offered in a case in which all pending entities (Empire, Staff, OPC and Industrial Intervenors) were a party, revealed that Empire's pending fuel adjustment tariff seeks recovery for the costs for energy designed to replace the energy that was not available to Empire as a result of negligent operating practices at the Iatan 1 unit.

2. On May 20, 2009, Empire and Staff both filed Responses to the Motion to Reject Tariffs filed by the Industrial Intervenors. ***In their Responses, neither Staff nor Empire present facts which dispute the Industrials' allegation that the proposed fuel adjustment tariffs contains costs that are otherwise imprudent.*** In its Response, Staff suggests that issue of the prudence of the included costs should be saved for a later

prudence review.[1] By its suggestion, Staff chooses to ignore the clear mandate contained in Section 386.266.1 that fuel adjustment clauses allow for "periodic rate adjustments outside of general rate proceedings to reflect increases and decreases in its **prudently incurred fuel and purchased-power costs.**" By this provision, the General Assembly clearly evinces its desire that imprudent costs never be passed through the adjustment mechanism. This requirement to only allow recovery of "prudently incurred" fuel and purchased power costs is consistent with the statutory burden of proof (Section 393.150.2) that the utility must show for any proposed rate increase.

3. Interestingly, Empire's initial argument also does not focus on the imprudent nature of the costs. Rather, Empire's argument appears to be surprisingly premised on the notion that the Commission does not have the authority to reject the Empire tariff. Empire claims that, given 4 CSR 240-20.090(4), the Commission can only reject the tariff ***if*** the "Staff's recommendation finds the FAC rate adjustment is not in accordance with the provisions of this rule, section 386.266, or the FAC mechanism established in the most recent rate proceeding."[2] Given Empire's thinking, therefore, since Staff recommended approval of the tariff, the Commission is without authority to grant the relief requested by the Industrial Intervenors. Such a claim, that the Commission is bound by the recommendation of the Staff, epitomizes the notion of the tail wagging the dog. Moreover, such a claim reduces the consumer representatives to a role of mere spectators without the ability to raise concerns outside the scope of Staff's recommendation.

In this case, while Staff has not raised concerns regarding Section 386.266, such concerns have been raised by the Industrial Intervenors. Given that the current tariffs

[1] Staff Response at page 4.
[2] Empire Response at page 3.

include imprudent costs, the Commission should reject such tariffs until such time as Empire files tariffs which removed such costs.

4. Secondly, after analyzing the well-balanced procedure set forth by the Commission in its rules, Empire claims that it "will be denied the right to timely recover its incurred energy costs."[3] Such a statement ignores the very procedure so carefully documented by Empire in its pleading. Specifically, Empire devotes a whole paragraph to the claimed beauty of the true-up and prudency review. Empire claims that, if such costs are determined to be imprudent, the ratepayers will receive a refund of those costs at a later date. Empire completely ignores, however, that the true-up / prudence review can work the other direction as well. Specifically, despite Empire's claims that the costs will be lost forever, the Commission can actually reject those costs at this time, but still allow Empire to recover those costs at a later date based upon a finding of prudence. Industrial Intervenors suggest that, given the unrefuted claims that the tariffs contain imprudent costs, the exclusion of those costs until some later date is the only fair method for treating those costs.

5. Given the relatively recent introduction of fuel adjustment clauses in Missouri, as well as the obvious conflict between the statutory preference for adjustment for "prudently incurred" costs versus the after-the-fact prudence review provided by Commission rule, the Industrial Intervenors suggest that the following procedure appears to be consistent with all aspects of current Missouri law.

First, the utility files tariffs which are only designed to recover prudently incurred costs. The utility should not be permitted to include imprudent costs in the tariffs merely for the benefit of immediate cash flow benefits. Under Empire's stated interpretation of the

[3] Empire Response at page 5.

statute, the utility is currently motivated to include all costs, including those costs which are clearly imprudent, in the interest of boosting short-term cash flows. While Staff and Empire suggest that refunds will include interest at the utility's short-term borrowing rate, such an interest rate is hardly an adequate deterrent to prevent the utility from including imprudent costs. After all, the utility gets the money now, is allowed to invest that money and earn a return at its overall rate of return (including the cost of equity), but then only refund the imprudent amount at the short-term cost of debt. Such a system fails to properly recognize the necessary consumer protections.

Then, absent a prima-facie showing of imprudence, the Commission should approve those tariffs. Where, however, a prima-facie showing of imprudence has been made, the imprudent costs should be excluded from the fuel adjustment tariffs.[4] While the actual prudence determination can be saved for a later date, the exclusion of costs that are subject to a prima-facie prudence challenge is consistent with the statutory burden of proof as well as the General Assembly's preference for adjustment of only prudent costs. In addition, in those situations in which the utility is able to meet its statutory burden of proof and overcome this prima facie showing of imprudence, the utility will still be able to recover these costs through the after-the-fact true-up. Contrary to Empire's unsupportable claims that such costs are lost forever, the utility could still collect those costs plus interest, albeit only at the utility's short-term cost of debt.

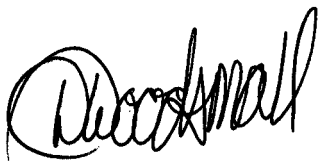
6. It has been repeatedly alleged that Senate Bill 179 was enacted without proper consideration of consumer protections. That said, however, SB179 does not prevent the Commission from implementing such protections. Among the protections that should

[4] A prima-facie showing must go beyond mere allegations. Rather, such allegations should be based upon documented facts. Here, the unrefuted facts are contained in sworn testimony filed with the testimony in a case in which all pending entities are a party.

be provided are those protections designed to keep ratepayers from paying for costs that are subject to a prima-facie attack of imprudence. The utilities would have the Commission believe that an after-the-fact review and the associated threat of interest payments, is enough to protect the consumers. The Commission has repeatedly recognized the shortcomings of the after-the-fact prudency review. Therefore, where there is a prima-facie showing of imprudence, the Commission should reject those costs until such time as the utility is able to show that these costs are indeed prudent.

WHEREFORE, the Industrial Intervenors respectfully request that the Commission reject Empire's fuel adjustment rate schedules and order it to file tariffs which exclude the costs of the extended Iatan 1 HP turbine outage.

Respectfully submitted,



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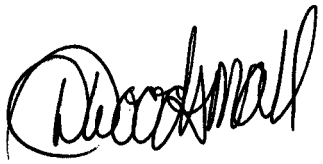
ATTORNEYS FOR PRAXAIR, INC. AND EXPLORER PIPELINE COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing 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: May 20, 2009