

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

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| In the Matter of the tariff filing of The |) | |
| Empire District Electric Company |) | |
| to implement a general rate increase for |) | <u>Case No. ER-2006-0315</u> |
| retail electric service provided to customers |) | |
| in its Missouri service area. |) | |

RESPONSE TO ORDER REQUIRING FILING

COME NOW, Praxair, Inc. (“Praxair”) and Explorer Pipeline, Inc. (“Explorer”),
and for their Response to Order Requiring Filing respectfully state as follows:

1. On November 9, 2006, the Commission issued its Order Requiring Filing.
In its Order, the Commission required Praxair / Explorer to respond to three questions
related to Empire’s Motion to Quash Subpoenas issued by the Commission and served by
Praxair / Explorer on certain Empire employees.

I. 20-Day Notice Provision

2. In its Motion, Empire claims that the subpoenas should be quashed in that
Commission Rule 4 CSR 240-2.100(2) states that a subpoena shall not be issued fewer
than twenty (20) days before a hearing. Empire notes that, while the hearing is scheduled
for November 20, 2006, the subpoenas were issued on November 1, nineteen days before
the subject hearing, and just one day following the deferral of the inadequately noticed
October 31 hearing. As such, Empire alleges that the subpoenas should be quashed.
Empire’s argument boils down to form over substance. As the Commission’s General
Counsel recently advised the Commission, “due process is a practical thing. It is
substance, not form that we’re concerned with.”¹

¹ Tr. 1195.

3. On November 7, 2006, the Commission issued its Order Confirming Hearing. In anticipation of that hearing, Praxair / Explorer sought subpoenas on November 1, 2006 and, after receiving counsel's agreement that he would accept service of the subpoenas, served those subpoenas on November 3, 2006. In fact, Praxair / Explorer requested its subpoenas six days before the Commission had even scheduled its hearing² and the day following the previously cancelled hearing. In its effort to raise form over substance, Empire would seek to deny Praxair / Explorer's due process rights by asserting that Praxair / Explorer should have acted even sooner. In fact, by logic

² During the October 31, 2006 "hearing" some discussion took place regarding the possibility of reconvening on November 20, 2006. Nevertheless, it is noted that the Commission can only act through written order (Section 386.280 RSMo). Furthermore, certain Commissioners appeared to be considering an earlier date. Indeed, as the following exchange between Praxair/Explorer counsel and Commission Gaw makes clear, the Commission had made no decision regarding scheduling of a hearing and, in fact, appeared to be leaving the matter of final scheduling open if an earlier date could be arranged by consent.

COMMISSIONER GAW: Just a few questions. Maybe just a couple. Mr. Conrad, can you give me an idea, assuming this matter is put off today, how quickly you might be able to let us know, if there was interest in knowing by anyone, when your witness might be available?

MR. CONRAD: I do -- the -- the quick and honest answer is I do not know how quickly I could establish contact with him in which a decision is made.

COMMISSIONER GAW: I'm not trying to pin you down to a minute or anything. Just is this -- is this a matter of a day or two in order to communicate with him about when he's available?

MR. CONRAD: Well, a day or two to catch up with him --

COMMISSIONER GAW: Yes.

MR. CONRAD: -- to try to find out what his calendar is.

COMMISSIONER GAW: That's what I'm asking.

MR. CONRAD: That's probably the correct answer there.

COMMISSIONER GAW: And I'm not asking you for a commitment here, but if you -- if it's -- if you determine that he is available sooner than 10 days from today, would that make it possible to consider whether or not to have the hearing rescheduled at an earlier time by consent?

MR. CONRAD: If your question is, is it possible, I guess the answer would be yes. But I don't -- I can't opine sitting here the probabilities.

COMMISSIONER GAW: I'm not asking you to. I'm just trying to determine what our drivers are here as far as timing is concerned. Is that the main issue you have in regard to timing at this point, at this stage or is it -- do you anticipate the possibility of sending DRs out going forward?

Empire's argument would deny all parties the right to issue subpoenas because the Commission's 13-day notice could not accommodate the 20-day subpoena issue period. Given the circumstances, Praxair / Explorer acted expeditiously in requesting and serving its subpoenas. Praxair / Explorer notes that 4 CSR 240-2.100(2) provides that a subpoena may issue on less than twenty days notice upon a showing of good cause. Recognizing that the Commission only provided thirteen days notice of the impending hearing and that Praxair / Explorer issued such subpoenas within nineteen days of that hearing, good cause has been shown. Furthermore, Empire has not shown that it has been harmed by the issuance of the subpoenas on less than the prescribed 20 days.

II. RELEVANT INFORMATION

5. In its Motion, Empire argues that the subpoenas should be quashed in that "neither Mr. Gipson nor Mr. Tarter appear to have knowledge relevant to the issues to be heard by the Commission." Empire further asserts that, by calling these subpoenaed witnesses, Praxair / Explorer has violated the Commission Rule which requires the prefilings of testimony (4 CSR 240-2.130).

6. As a general matter, Praxair / Explorer points out that Section 536.070 RSMo provides parties with broad rights to call, cross-examine, impeach and rebut witnesses. These rights cannot be limited by a stretched reading of the Commission's Rules of Practice and Procedure. Specifically, that statutory section provides that:

Each party shall have **right to call** and examine witnesses, to introduce exhibits, **to cross-examine** opposing witnesses on any matter relevant to the issues even though that matter was not the subject of the direct examination, **to impeach** any witness regardless of which party first called him to testify, and **to rebut** the evidence against him. (emphasis added).

Relevant Information Sought – Todd Tarter

7. In its Motion Empire notes that the November 20, 2006 hearing is to be limited to the issues of: (1) corporate allocations; (2) regulatory plan amortizations; and (3) true-up testimony. Empire then claims that “Mr. Tarter has not offered or prepared testimony on any of the three subjects for the hearing” and would not “appear to have knowledge relevant to the issues to be heard by the Commission.”

8. Empire’s assertions are based upon the erroneous understanding that “true-up” is an issue. In actuality, “true-up” is a process by which “issues” are updated. As such, parties do not cross-examine on the issue of “true-up”. Rather, the parties cross-examine on issues that are subject to “true-up.” Only by confusing the concepts of “true-up” and “issue” is Empire able to assert that Mr. Tarter has not “prepared testimony on any of the three subjects identified for the hearing.”

8. As indicated on each of his pieces of prefiled testimony, Mr. Tarter testified on the issue of “fuel and purchased power expense.”³ In fact, Mr. Tarter was Empire’s primary witness on the issue of fuel and purchased power expense.

9. On September 27, 2006, Empire filed the True-up Testimony of W. Scott Keith. As reflected on its cover page, Mr. Keith’s testimony specifically addresses the issues of “Cost allocation, Off-system sales and **Fuel and Energy costs** and Amortization.” In essence, despite Mr. Keith *not previously testifying* on the issue of fuel and energy costs, Empire seeks to substitute a new witness on the issue of fuel and purchased power expense at the true-up hearing. By issuing its subpoenas, Praxair / Explorer merely seeks to cross-examine Empire’s primary witness on the issue of fuel and energy costs.

³ Exhibits 15-18.

Relevant Information Sought – William Gipson

10. Unlike its argument regarding Mr. Tarter, Empire acknowledges that Mr. Gipson did prefile testimony on the issue of regulatory plan amortizations. Empire asserts, however, that Mr. Gipson has “stood cross-examination without reservation in regard to that testimony, including regulatory plan amortization and has been excused by the Commission as to all issues.” As such, Empire asserts that the subpoena regarding Mr. Gipson should be quashed.

11. Again, Empire’s assertions are based on a misunderstanding of the nature of the issues to be addressed at the hearing presently scheduled for November 20. Empire appears to argue that the hearing is limited to addressing the issue of regulatory plan amortizations as framed in the context of Mr. Gipson’s prefiled testimony. This is inaccurate.

12. On October 27, 2006, Empire executed and filed, with the Staff and Office of the Public Counsel, a Non-Unanimous Stipulation and Agreement Regarding Regulatory Plan Amortizations. As reflected in 4 CSR 240-2.115(2)(D), this non-unanimous stipulation and agreement “shall be considered to be merely a position of the signatory parties to the stipulated position.” Therefore, while Empire witnesses may have previously stood cross-examination related to the positions reflected in their *prefiled* testimony, these witnesses have not yet been cross examined regarding Empire’s *position* as reflected in the non-unanimous stipulation and agreement. Given that the non-unanimous stipulation and agreement now represents a *modification* of Empire’s prefiled position, Praxair / Explorer is entitled to inquire regarding that new position. *State ex rel. Fischer v. Public Service Commission*, 645 S.W.2d 39 (Mo.App. 1982). As such, Empire’s motion should be denied.

III. CONTINUANCE OF PROCEEDING

13. Finally, Empire requests, in the alternative, that the Commission continue this hearing until November 21, 2006 in order to accommodate a previous engagement scheduled by Mr. Gipson. Praxair / Explorer has *no objection* to the Commission continuing this matter provided that the subpoenaed witnesses are directed to appear at the hearing that is continued without objection but at Empire's request.

WHEREFORE, Praxair / Explorer respectfully request that the Commission deny Empire's Motion to Quash the Subpoenas issued on November 3, 2006.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David L. Woodsmall", is positioned above a horizontal line. A vertical red line is located to the right of the signature.

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ATTORNEYS FOR PRAXAIR, INC. and
EXPLORER PIPELINE, INC.

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 "David M. Hall", is written over a horizontal line. A vertical red line is positioned to the right of the signature.

Dated: November 13, 2006