

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

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

APPLICATION FOR REHEARING

COMES NOW, Praxair, Inc. (“Praxair”) and Explorer Pipeline, Inc. (“Explorer”), and in support of their Application for Rehearing respectfully states as follows:

1. On December 29, 2006, the Commission issued its Order Granting Expedited Treatment and Approving Tariffs, and Order Approving Tariffs. On November 15, 2007, the Supreme Court ordered the Commission to vacate its December 29, 2006 Order for failure to grant the parties a “reasonable” opportunity in which to seek rehearing. Despite the Commission not providing a “reasonable” opportunity, Praxair / Explorer had nonetheless on January 1, 2007 filed an Application for Rehearing of the December 29 Order. In that application, Praxair / Explorer detailed numerous examples of errors in the Commission’s December 29, 2006. Foremost among these errors is the Commission’s failure to support its findings of fact and conclusions of law with any competent and substantial evidence on the record. In fact, as support for its December 29, 2006 Order, the Commission expressly relied on pleadings of Empire and the Staff.

Despite being given a “do-over” by the Supreme Court, the Commission repeated these same errors in its December 4, 2007 Order Vacating December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs, and Order Approving Tariffs (“Order”). Given the gratuitous findings regarding Empire’s unlawful collection of rates

during the last eleven months, it is unclear whether the Commission was more interested in being there to support Empire's past over-collection of rates rather than fulfilling its statutory and constitutional duties of providing adequate findings of fact that are based upon competent and substantial evidence.

Though provided an opportunity to correct these errors, the Commission still did not hold a hearing for the purpose of accepting evidence regarding the issues of: (1) whether the tariffs comply with the Commission's Report and Order and (2) whether the Staff's assumption as to the discounted present value of purchased power contracts represents an appropriate determination. Given these significant errors, among others, the Commission's Order is inherently unlawful, unjust and unreasonable, and denies the parties rights guaranteed by the Missouri and United States Constitutions as well as due process.

2. The Order is unlawful, unjust and unreasonable in that the Commission has failed to provide adequate findings of fact related to the record as required by law thereby making it impossible for these Intervenors to specify with particularity the factual errors that are contained in such Order. Labeling recitations of pleadings as findings of fact when they are nothing more than descriptions of what one or the other parties contended do not substitute for findings of fact and has repeatedly been ruled as insufficient by Missouri courts. Accordingly, the Order violates these Intervenors' rights to due process as guaranteed by the United State and Missouri Constitutions by attempting to deny them access to the courts and should be set aside as unlawful and unconstitutional forthwith.

3. The Order is unlawful, unjust, unreasonable and unconstitutional in that it completely fails to specify conclusions of law that are drawn from the findings of fact.

4. The Order is unlawful, unjust and unreasonable, is not based upon competent and substantial evidence, is not based upon adequate findings of fact and is an abuse of discretion in that the Commission issued its Order without the benefit of any competent and substantial evidence upon which to determine whether the rates reflected in the tariffs actually comport with the Commission's December 21, 2006 Report and Order. In its Order, the Commission references, as its sole support for its finding, the Staff recommendation filed by the Staff. That pleading, accompanied by an affidavit which was objected to pursuant to 536.070(12), does not constitute competent and substantial evidence.¹

There are fundamental evidentiary problems associated with the Commission relying solely on a party's recommendation / affidavit regarding facts that are in dispute. Reliance on such pleadings, without providing for the statutorily-guaranteed scrutiny of cross-examination, makes the Commission's Order inherently unreasonable and any findings of fact unsupportable. Such scrutiny would provide "evidence" as to the level of revenues reflected in tariffs, the level of regulatory amortizations contained in those revenues, and the rate design methodology used to distribute those revenues between customer classes. To date, the Commission has yet to provide a procedure for the receipt of the "evidence" that would answer these questions. As such, the Commission itself does not and can not know the answers to the very questions it was created to answer.

¹ Section 536.070(12) provides that an affidavit, to which an objection has been lodged, may not be used. Moreover, this section guarantees other parties the right to cross examine the affiant. In this case, despite the objection to the affidavit, the Commission has not provided an opportunity to cross-examine the Staff witness who executed the affidavit.

5. The Order is unlawful, unjust and unreasonable, is not based upon competent and substantial evidence, is not based upon adequate findings of fact and is an abuse of discretion in that the Commission's Order claims to "re-approve" the tariffs sheets filed by Empire. Such a finding is contrary to the Supreme Court's mandate to *vacate* the December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs. Once vacated, the tariffs were never originally approved. Therefore, it is impossible for this Order to "re-approve" those tariffs. For all intents and purposes, given the vacation of the December 29, 2006 Order, those tariffs are originally approved by this December 4, 2007 Order.

6. The Order is unlawful, unjust and unreasonable, is not based upon competent and substantial evidence, is not based upon adequate findings of fact and is an abuse of discretion in that the Commission's Report and Order neglected to find a particular level of revenue increase that was just and reasonable and thus failed to find that these tariffs are just and reasonable. In addition, as pointed out in previous pleadings, the Commission's Report and Order failed to make any findings of fact / conclusions of law related to the issues of off-balance sheet obligations and corporate allocations. Recognizing that the Commission is the sole party with authority to determine just and reasonable rates, and that the Commission has yet to exercise that authority with respect to certain issues that are a prerequisite to any determination of just and reasonable rates, any Order Approving Tariffs would necessarily be an abdication of this Commission's authority. Without the benefit of proper findings as to these particular unaddressed issues as well as the appropriate level of just and reasonable revenues, it is

impossible for any party to prepare tariffs that would produce an indeterminate amount of revenue.

7. The Order is unlawful, unjust and unreasonable, is not based upon competent and substantial evidence, is not based upon adequate findings of fact and is an abuse of discretion in that the Order provides for rates to go into effect in less than 30 days in violation of Section 393.140(11) RSMo. That section guarantees 30 days notice on all tariff changes unless shortened for good cause shown. In its Order, the Commission makes a gratuitous finding, without any evidentiary support, that good cause exists for such rates to be effective on an expedited basis. The Commission, however, failed to state what the good cause is or what evidence supports such a finding. In light of that fact that parties raised timely issues as to whether these tariffs actually comply with the Report and Order, no good cause could possibly exist, other than the Commission's desire to legitimize Empire's past unlawful over-collection of rates, for the Commission to hurriedly approve tariffs without accepting evidence upon which it could determine whether the tariffs are actually compliant.

7. As further support for this Application, and to the extent necessary to preserve their rights under Section 386.500-520 with respect to both the December 21, 2006 Report and Order and this new December 4, 2007 Order, these parties incorporate by reference the following Applications for Rehearing, as though each separate paragraph and portion of each separate pleading were fully set out herein:

- 1) Application for Rehearing timely filed on February 17, 2006;
- 2) Application for Rehearing timely filed on April 21, 2006;
- 3) Application for Rehearing timely filed on June 23, 2006;

- 4) Application for Rehearing timely filed on July 19, 2006;
- 5) Application for Rehearing timely filed on September 8, 2006;
- 6) Application for Rehearing timely filed on October 20, 2006;
- 7) Application for Rehearing timely filed on November 22, 2006;
- 8) Application for Rehearing timely filed on December 29, 2006; and
- 9) Application for Rehearing timely filed on January 18, 2007.

WHEREFORE Rehearing of the Order should be ordered and a new Order issued which provides for proper procedure and notice, allows for the receipt of evidence, and is consistent with governing law, commission precedent and the evidence received.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David L. Woodsmall", is written over a horizontal line. The signature is enclosed in a rectangular box with a red vertical line on the right side.

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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 L. Woodsmall". The signature is written in a cursive style with a large initial "D".

David L. Woodsmall

Dated: December 13, 2007