

**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)	Case No. ER-2006-0315
retail electric service provided to customers)	
in its Missouri service area)	

EMPIRE’S RESPONSE TO MOTION TO REJECT AND STRIKE

Comes now The Empire District Electric Company (“Empire” or the “Company”), and, for its Response to Motion to Reject Specified Tariff Sheets and Strike Testimony filed by Praxair, Inc. (“Praxair”) and Explorer Pipeline, Inc. (“Explorer”), respectfully states as follows to the Missouri Public Service Commission (“Commission”):

SUMMARY

The Commission should deny the Praxair/Explorer Motion. The Commission can conform the record to the findings made in its Clarifying Order by rejecting the three tariff sheets containing Empire’s ECR proposal (P.S.C. Mo. No. 5, Section 4, 2nd Revised Sheet No. 21; P.S.C. Mo. No. 5, Section 4, Original Sheet No. 22; and, P.S.C. Mo. No. 5, Section 4, Original Sheet No. 23) and issuing an order *in limine*, as described herein. Granting the relief requested by Praxair/Explorer would go beyond the terms of the Clarifying Order and eliminate Empire’s proposals to terminate the existing IEC and to recover its current level of fuel and purchased power costs through base rates.

BACKGROUND

1. On May 2, 2006, effective May 12, 2006, the Commission issued its Order Clarifying Continued Applicability of the Interim Energy Charge ("Clarifying Order"). The Clarifying Order was issued in response to a Motion for Clarification filed by Empire seeking the Commission's guidance with regard to certain provisions of the Stipulation and Agreement approved by the Commission in Case No. ER-2004-0570, the Company's most recent electric rate case.

2. The Clarifying Order recognized that in the currently pending electric rate case, Case No. ER-2006-0315, Empire seeks to terminate the use of its existing interim energy charge ("IEC") and had requested to implement an energy cost recovery rider ("ECR"). In this regard, Empire's proposal to terminate the IEC stands on its own as an independent request irrespective of what the Commission has done or might do with the ECR proposal. In other words, even if the Commission will not authorize an ECR in this case, Empire proposes that the existing IEC be terminated and its current level of fuel and purchased power costs be and recovered through an increase in base rates.

3. Empire, by its Motion for Clarification, suggested there were three questions for the Commission to address:

- May Empire propose that the existing IEC be terminated prior to March 28, 2008;
- May the Commission terminate the existing IEC prior to March 28, 2008; and,
- May Empire propose that the Commission authorize an ECR pursuant to Senate Bill 179.

4. After a discussion of the positions of the various parties, the Commission, by its Clarifying Order, “ordered” that Empire “may not make any request for an energy cost recovery rider while the existing interim energy charge is effective.” Clarifying Order, p. 4. The Commission further stated in the body of the Clarifying Order that “Empire may have the option of requesting that the IEC be terminated. If the Commission grants that request, once the IEC is terminated, Empire would be able to request an alternative fuel adjustment mechanism.” *Id.* at p. 3.

5. This latter finding answered Empire’s first two questions in the affirmative – 1) Empire may propose the early termination of the IEC (which it has done); and, 2) The Commission may terminate the IEC prior to March 28, 2008.

6. Also in the body of the Clarifying Order, the Commission stated that it would “require that Empire remove from its pleadings and other filings in this case the request it consented not to make.” *Id.* at p. 3.

7. On May 26, 2006, Praxair and Explorer filed their Motion to Reject Specified Tariff Sheets and Strike Testimony. This Motion seeks the Commission’s Order rejecting certain tariff sheets and striking certain parts of Empire’s unoffered testimony and directing Empire to revise certain schedules.

DISCUSSION

8. The request made by Praxair/Explorer mischaracterizes the terms of the Clarifying Order and seeks relief not contemplated by the Clarifying Order.

9. Empire’s filing, which initiated this case, proposed that the Company recover its fuel costs through its base rates and that its existing IEC be terminated. Empire further proposed that an ECR, pursuant to Senate Bill 179, be implemented to

allow for adjustments (up or down) to the charges for fuel and purchase power expense on a going-forward basis. The ECR would have benefited the Company by allowing the timely recovery of fuel costs. It would have benefited customers by reducing rates during periods of declining energy prices. The requests to terminate the IEC and to implement an ECR, while related, were separate in that it was contemplated under Empire's proposal that the Commission could both terminate the IEC and reject the ECR.

10. The Clarifying Order contains two primary findings – first, that Empire “may not make any request for an energy cost recovery rider while the existing interim energy charge is effective” and, second, that “Empire may have the option of requesting that the IEC be terminated” in this case.

11. Conforming the record in this case to these findings is fairly simple. Empire's request for an ECR is represented by the following tariff sheets:

P.S.C. Mo. No. 5, Section 4, 2nd Revised Sheet No. 21;

P.S.C. Mo. No. 5, Section 4, Original Sheet No. 22; and,

P.S.C. Mo. No. 5, Section 4, Original Sheet No. 23.

The Commission's rejection of these three tariff sheets would appear to be consistent with its Clarifying Order by eliminating the request for an ECR while the existing IEC is effective.

12. Empire's “request” for an ECR is referenced in certain of the Company's filed, but as yet unoffered, direct testimony. This testimony does not constitute a pleading and is not in evidence, having not yet been offered nor ruled on. Accordingly, there is nothing to strike. Any question related to the need to respond to matters

concerning the proposed ECR could be simply addressed through an order *in limine* holding that testimony that is solely related to the proposed ECR will not be received in evidence¹.

13. This being said, the Praxair/Explorer Motion goes far beyond the Company's ECR proposal and the Clarifying Order and attempts to also nullify Empire's request that the IEC be terminated, a proposal that the Commission has found the Company may make. An example of this is Praxair/Explorer's request that tariff sheet P.S.C. Mo. No. 5, Section 4, 5th Revised Sheet 17 be rejected. Sheet 17 is the tariff sheet designed to terminate the existing IEC – something the Clarifying Order clearly stated that Empire could propose.

14. Similarly, the testimony Praxair/Explorer seeks to “strike” encompasses more than just the proposed ECR. Much of that testimony provides support for Empire's proposal to terminate the existing IEC and to recover current fuel costs in base rates and, therefore, should not be “stricken.” There is also no need to revise or refile any revenue requirement accounting schedules as those schedules support Empire's proposed termination of the existing IEC and the recovery of current fuel costs through base rates.

15. It is clear that Praxair/Explorer, by its Motion, reads the Clarifying Order much more broadly than does Empire and is in essence reasserting the argument that

¹ The Praxair/Explorer Motion ignores the fact that even though the Commission has said that Empire may not request an ECR while its IEC is in effect, this does not necessarily mean that the Company could not be authorized to implement an ECR as a result of this case. The Commission will recall that in Case No. ER-2001-299, an IEC resulted from a stipulation among the parties even though not requested by the Company in its initial filing. The parties in the present case may ultimately recognize the benefits of an ECR which not only provides timely recovery of fuel and purchased power expenses, but also affords customers protection from high fuel prices being locked into base rates during periods of declining energy costs. There are other circumstances under which an ECR might result in this case.

as a result of the last case there exists a three year moratorium² in changes in rates related to fuel cost recovery. The Praxair/Explorer Motion states that “*any discussion of fuel in Empire’s tariffs, pleadings and testimony would necessarily be irrelevant to the current proceeding.*” Praxair/Explorer Motion, para. 5 (emphasis added). Such a claim by Praxair/Explorer is impossible to reconcile with the Commission’s recognition that Empire may propose to terminate the existing IEC and the fact that the Company seeks recovery of its current fuel costs through base rates.

16. Lastly, Praxair/Explorer again veers off course with a discussion of amortization options that were described in the Stipulation and Agreement in Case No. EO-2005-0263 (Empire’s Iatan 2 Regulatory Plan). As stated in Empire’s Reply Concerning Responses to Motion for Clarification, filed in this case on May 1, this option continues to be irrelevant to the issue at hand – that is, how Empire’s current level fuel costs should be recovered. Under no circumstances can it be said that an “amortization” is an appropriate method to recover prudently incurred fuel and purchased power expenses.

WHEREFORE, Empire urges the Commission to deny the Praxair/Explorer Motion.

² Parties have, in the past, expressly described such moratoriums when they have been agreed to and intended by the parties. No such moratorium is found in the pleadings or orders in Case No. ER-2004-0570, and thus none exists.

Respectfully submitted,

/s/James C. Swearengen

James C. Swearengen #21510
Dean L. Cooper #36592
Brydon, Swearengen & England P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
Telephone (573) 635-7166
Facsimile (573) 634-7431
E-Mail LRackers@brydonlaw.com

Attorneys for The Empire District Electric Company

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand-delivered, on this 1st day of June, 2006, to:

General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102
gencounsel@psc.mo.gov

Office of the Public Counsel
P.O. Box 2230
Jefferson City, MO 65102
opcservice@ded.mo.gov

Stuart Conrad
Finnegan, Conrad & Peterson
1209 Penntower Office Center
3100 Broadway
Kansas City, MO 64111
Attorney for Praxair & Explorer
stucon@fcplaw.com

Jim Fischer
Fischer & Dority
101 Madison, Suite 400
Jefferson City, MO 65101
Attorney for KCPL
jfischerpc@aol.com

Diana Carter
Brydon, Swearengen & England
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102
Attorney for Aquila, Inc.
dcarter@brydonlaw.com

Shelley Woods
Attorney General's Office
P.O. Box 899
Jefferson City, MO 65102
shelley.woods@ago.mo.gov
Attorney for DNR
Shelley.Woods@ago.mo.gov

/s/James C. Swearengen