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**

TRUE-UP BRIEF

OF

PRAXAIR, INC. AND EXPLORER PIPELINE COMPANY

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ATTORNEYS FOR PRAXAIR, INC. AND EXPLORER PIPELINE COMPANY

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I. INTRODUCTION

COME NOW Praxair, Inc. ("Praxair") and Explorer Pipeline Company ("Explorer"), pursuant to Section 536.080 RSMo, 4 CSR 240-2.140 and authority granted by the Regulatory Law Judge,[1] and submit their True-Up Brief on the issues set forth below. Initial Posthearing Briefs were filed in this matter on October 16, 2006. Praxair / Explorer previously briefed issues based upon the evidence in the record at that time. Since then, the Commission held a True-Up Hearing on November 20, 2006 for the purpose of receiving into evidence the true-up testimony prefiled with the Commission on September 27, 2006.[2] As such, Praxair / Explorer file this brief on those issues for which additional evidence was elicited at the November 20, 2006 true-up hearing. For those issues where no additional evidence was elicited, Praxair / Explorer refers the Commission to the previously filed October 16, 2006 Posthearing Brief. Finally, Praxair / Explorer notes that there are several pending Applications for Rehearing. This brief is filed without prejudice to the positions advanced by Praxair / Explorer in those pending Applications for Rehearing.

II. FUEL AND PURCHASED POWER EXPENSE RECOVERY METHOD

A. INTRODUCTION

Much of the controversy surrounding this case concerns the willingness of Empire to comply with agreements made in the prior rate case and the Commission's willingness to hold it to those obligations. At the true-up hearing, at least one Commissioner appeared to appreciate that the issue of the IEC continuation is not solely an issue of the recovery of fuel and purchased power expense, but rather presents questions regarding

[1] Tr. 1363-1364.

[2] Praxair/Explorer objected to the presiding officer's continued activity in the case and that objection was deemed to be continuing. This brief is submitted subject to that objection.

the degree to which the Commission expects its utilities to comply with the agreements that they have made in prior settlements. Specifically, counsel was queried whether the ratepayers had been "snookered" into leaving a "loophole" that Empire could use to frustrate the clear intent of the IEC agreement.[3]

We are unsure of the sense in which the Commissioner's question employed the word "snooker." American Heritage Dictionary defines "snookered" as "to lead another into a situation." In more common parlance, Snooker is a game played on a billiard table in which a skilled player so "positions" the cue ball following his shot(s) as to deprive their opponent of an open shot. The effectiveness of a "snooker" depends on the other player's observance of the rules: if all that is necessary for the opponent to simply reposition the snooker balls and clear a path for his shot, the rules of the game are frustrated, but that unruly opponent will find few games in the future.

Here the parties willingly reached and made their agreement on the level of the IEC charge that would be implemented in current rates. A better analog to the Snooker game would be that if Empire had taken advantage of the incentive to get its costs below the refund floor, it could have kept all the funds that it had so "earned" and ratepayers would have to absorb the charges down to the refund floor; they would have no shot at them. The "snooker" in this sense depends on Empire's skill and prowess in beating that refund floor with its purchase costs.

If Empire is allowed to terminate the IEC before its three-year term, it may have been the Commission that was "snookered" because: (1) it was ***the Commission*** that had openly solicited the parties to provide it with an IEC mechanism to solve the conundrum of the fuel cost to use in the prior rate case; (2) ***the Commission*** is the agency charged

[3] Tr. 1330.

with protecting these same ratepayers from conduct that it contrary to the public interest; and (3) ***the Commission*** found in its Report and Order that the IEC mechanism "***shall***" be in effect for three years.[4]

A contract is a mechanism to consensually allocate risk. Empire took a three-year risk that its fuel and purchased power costs would rise above the "cap" in exchange for being able to recover costs at the "cap" even though actual costs weren't that high and for the potential that it would be able to lower its costs below the refund floor. On the other side of the deal, ratepayers accepted fuel and purchased power charges at the higher "cap" in exchange for protection through a true-up if costs were less than the cap. Ratepayers also took the risk that, if Empire were able to drive its costs below the refund floor, they would not share in those benefits. The parties believed an appropriate allocation of the risks had been reached. The Commission agreed that their allocation was in the public interest. It is only after the fact that one party seeks relief from the risk allocation that it accepted. Were that allowed, contracts would be meaningless. One would buy a house at one price, only to find at closing that the seller had changed their mind or wanted more. Conversely, no seller could depend on the price they negotiated, because the buyer could claim that, pending closing, the housing market had deteriorated and Blackacre wasn't now worth the conract price.

Dishonoring contract commitments has risks of its own. Settlements at the Commission have often been salutary and in the public interest. In most cases, the financially interested parties are better able to craft a solution to a problem than is the

[4] Tr. 1332-1333.

Commission.[5] At the true-up hearing, counsel indicated that, if the Commission does not find that public utilities are to be bound to their bargained-for-agreements, the salutary settlement process long employed at the Commission may become problematic.[6] Utilities, comfortable with the knowledge that the Commission will not hold them to their commitments, will accept any agreements necessary to resolve issues in the short-term. Then, should circumstances change, those same utilities will run before the Commission and ask for relief from the risks they had earlier agreed – for consideration – to accept.[7] With enforcement of contracts dependent on whim, settlement no longer is a practical solution to the problems confronted by the parties and the Commission. Settlements only are viable solution if they are honored and enforced if they are not.[8]

Ultimately, the issue regarding the IEC continuation provides this Commission with the opportunity to show whether it will allow a utility to vitiate a commitment bargained for and for which consideration was given by the ratepayers and approved by the Commission as being in the public interest.

B. THE INTERIM ENERGY CHARGE DOES NOT CONTAIN AN EARLY TERMINATION PROVISION. THE STIPULATION AND AGREEMENT IS NOT AMBIGUOUS IN THAT THE FOUR CORNERS OF THE STIPULATION REVEALS THE INTENT OF THE PARTIES TO IMPLEMENT AN INTERIM ENERGY CHARGE WITH A THREE (3) TERM WITH NO PROVISION FOR EARLY TERMINATION.

See Initial Posthearing Brief filed on October 16, 2006.

[5] The famous Solomonic Solution noted in I Kings 3:16-28 required that the authority figure, King Solomon be willing to "divide the baby" in order that the disputants resolve their own dispute, in that case by the example of the true mother's love for her child, "And all Israel heard of the judgment that the King had judged . . . for they saw that the wisdom of God was in him."
[6] Tr. 1327.
[7] See also, Case No. ER-2006-0314 issue in which KCPL no longer seeks to include a normalized level of off-system sales margin above the line despite an express stipulation to the contrary.
[8] As noted by counsel during questions from the bench, any Commission decision which allows parties to escape from their commitments will naturally call into question the ongoing viability of the KCPL and Empire regulatory plans.

C. IN THE EVENT THAT THE IEC CONTRACT IS FOUND TO BE AMBIGUOUS, WHAT FACTORS SHOULD THE COMMISSION CONSIDER IN INTERPRETING THE CONTRACT?

See Initial Posthearing Brief filed on October 16, 2006.

D. LEGAL BASIS FOR CONTRACT RESCISSION

See Initial Posthearing Brief filed on October 16, 2006.

E. COURTS WILL NOT RESCIND CONTRACTS ON THE BASIS OF MISTAKES REGARDING FUTURE EVENTS.

See Initial Posthearing Brief filed on October 16, 2006.

F. SECTION 386.266.8 EXPRESSLY BARS THE COMMISSION FROM PREMATURELY TERMINATING THE IEC CONTRACT.

See Initial Posthearing Brief filed on October 16, 2006.

G. EMPIRE HAS NOT MET ITS BURDEN OF PROOF OF SHOWING BY "CLEAR AND SATISFACTORY EVIDENCE" THAT AN EARLY TERMINATION PROVISION EXISTS

See Initial Posthearing Brief filed on October 16, 2006.

H. IN THE EVENT THE COMMISSION DETERMINES THAT THE IEC CONTRACT CONTAINS AN EARLY TERMINATION PROVISION, WHAT DETERMINATION MUST THE COMMISSION MAKE?

1. What Standard Should The Commission Apply In Deciding Whether To Prematurely Terminate The IEC Contract?

In its Initial Posthearing Brief, Praxair / Explorer assert that, in the event that the Commission determines that it has authority to terminate the IEC, it should utilize the emergency standard in deciding whether to grant Empire's request for early termination. Over the past 50 years, this Commission has been steadfast in its adherence to the emergency standard in determining whether to grant utilities interim relief from its currently effective tariffs. That standard has served the Commission well in exercising its

statutory duty to provide "substantial justice between patrons and public utilities."[9] Similarly, that standard will assist the Commission in balancing the interests of ratepayers and public utilities in exercising its authority on the current issue.

These parties would not argue that there could never be circumstances under which a utility could be discharged from contractual commitments made, but respect for the process that we all serve counsels that such discharge should not be easily given for "light and transient reasons."[10] Using the established emergency standard as a criterion frames the the question crisply on the need to protect the public's interest in utility service and allows relief only when continued compliance would truly imperil that interest thereby bringing the issue, if factually proven, within the state's police power of the state. Whether the Commission, not being a court, has such power, may be a question to be determined, but assuming that such power exists, it should be exercised responsibly and with full consideration of the rationales and limits of such power and not with tunnel vision that considers only whether one party of the other has "lost money."

2. Empire Has Not Met Its Burden Of Proof To Seek Relief Under The Emergency Standard.

As pointed out in its Initial Posthearing Brief, Praxair / Explorer assert that Empire has not met its burden of proof under the emergency standard used for granting interim relief. Specifically, the evidence indicates that Empire: (1) has continued to be able to access the capital markets; (2) has continued to pay out its regular dividend to shareholders; and (3) continues to provide safe and adequate service.[11] As such, Empire should not be granted interim relief from its bargained-for IEC.

[9] Section 386.610 RSMo.
[10] Jefferson, T., Declaration, July 4, 1776.
[11] See, Praxair / Explorer Initial Posthearing Brief at page 57.

In contrast to the well established emergency standard, Empire asserts that the Commission should utilize the more nebulous "just and reasonable" standard. Contrary to the emergency standard, there appears to be a dearth of Commission decisions which provide substance to the "just and reasonable" standard. Nevertheless, Empire argues that Empire has met this standard simply because Empire has "lost money" under the IEC. Yet, that risk is the very essence of the IEC settlement. It is certainly within the contemplation of the parties that the cost might rise above the cap (which risk Empire accepted) or below the refund floor (which risk the ratepayers accepted). That balance should not be disturbed simply because one party or the other experiences "remorse" at the deal they made, and then only several months into that deal.

As pointed out at the true-up hearing, there is no evidence in the record to support a finding that Empire will not be able to recover its prudently incurred fuel and purchased power expenses in the future under the IEC mechanism.[12] While evidence does suggest that Empire has, on a historical basis, not recovered the entire level of its fuel and purchased power expense, the evidence also suggests that this under-recovery is caused by the run up in natural gas costs resulting from Hurricanes Katrina and Rita.[13] Therefore, any under-recovery was entirely a function of the timing of the implementation of the IEC and not a result of the ***structure*** of the IEC. Now that natural gas prices have returned to more normal levels, the IEC is working possibly to Empire' advantage. In fact, evidence provided at the true-up hearing indicates that Empire has actually over-recovered fuel and purchased power expenses under the IEC in three of the

[12] Tr. 1307.
[13] Exhibit 60, Schedule 2; Tr. 1307.

last six months.[14] Four innings into the 5th game of the recent World Series had the Tigers leading the Cardinals. Had the game been called at that point, there is no knowing what might have happened in games 6 or 7. Fortunately for the Cardinals, the umpires allowed the game to proceed for the full nine innings.

Praxair / Explorer continue to assert that the Commission should utilize the emergency standard. That is the appropriate point of balance in these circumstances. Under that standard, the evidence does not support a finding that Empire has met. On the other hand, Empire asserts that the Commission should use the more nebulous "just and reasonable" standard. Nevertheless, the evidence again does not support a finding, on a going forward basis, that the IEC will not allow Empire to recover its fuel and purchased power expenses. As such, the Commission should deny Empire's request.

3. What Would Be The Extent Of Empire's Financial Harm If It Were Bound To The Remaining Term Of The IEC Contract?

See Initial Posthearing Brief filed on October 16, 2006.

4. What Is The Comparative Harm That Would Be Experienced By The Ratepayers If The IEC Contract Were Prematurely Terminated?

See Initial Posthearing Brief filed on October 16, 2006.

I. IN THE EVENT THAT THE COMMISSION PERMITS EMPIRE TO PREMATURELY TERMINATE THE IEC CONTRACT, WHAT AMOUNT OF REVENUES COLLECTED BY EMPIRE UNDER THE IEC CONTRACT SHOULD BE REFUNDED TO CUSTOMERS?

See Initial Posthearing Brief filed on October 16, 2006.

J. RESPONSE TO EMPIRE'S PREVIOUSLY STATED POSITIONS

See Initial Posthearing Brief filed on October 16, 2006.

[14] Exhibit 146; Tr. 1227.

III. FUEL AND PURCHASED POWER EXPENSE

In the event that the Commission permits Empire to prematurely terminate the IEC mechanism, Praxair / Explorer, without prejudice to its position regarding the continuation of the IEC contract, maintain that the gas prices contained in its prefiled testimony are the most appropriate to utilize in setting the forward looking rates in this case.

Unlike Empire, Praxair / Explorer assert that, because of the fear factor of hurricanes and Middle East instability, the Commission should not rely solely on the ***futures*** price of natural gas. Staff concurs in Praxair / Explorer's position. "The natural gas futures market is not an accurate predictor of actual future natural gas prices."[15]

Instead of relying on futures gas prices, Praxair / Explorer suggest that the Commission utilize actual costs for those months in 2006 where costs are known (i.e., January – September 2006) and only use the futures price for those months where actual natural gas costs are not known (October – December 2006).[16] By utilizing these actual costs for known months, the Commission eliminates, to the extent possible, the inflationary effects of "fear factor" in the futures market. This methodology leads to an unhedged natural gas price of $6.07 / MMBtu[17] and result in a reduction in Empire's claimed level of fuel and purchased power cost of $10.387 million.[18] Praxair / Explorer urge the Commission, in the event that it permits Empire to terminate the IEC contract, to adopt its position regarding the establishment of a natural gas price for unhedged natural gas needs.

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[15] Exhibit 69, page 5.
[16] Exhibit 88 at page 7, Exhibit 151, pages 2-3.
[17] Exhibit 151, Schedule 1, line 8.
[18] Id. at Schedule 2.

IV. GAIN FROM UNWINDING FORWARD NATURAL GAS CONTRACT

See Initial Posthearing Brief filed on October 16, 2006.

V. RETURN ON COMMON EQUITY

A. APPROPRIATE METHODOLOGY

See Initial Posthearing Brief filed on October 16, 2006.

B. WITNESS CALCULATIONS

See Initial Posthearing Brief filed on October 16, 2006.

C. NATIONAL AVERAGE / OTHER RECENT STATE DECISIONS

In its Initial Posthearing Brief, Praxair / Explorer assert that the Commission should authorize Empire a return on equity of 10.0%. In support of its position, Praxair / Explorer pointed out in that brief that "the national average return on equity decision has dropped dramatically since the time of the last Commission decision approximately 18 months ago."[19] In fact, looking at the return on equity decisions for 2006, Praxair / Explorer noticed that "Empire is seeking a return on equity higher than that authorized to any other electric utility for the entirety of 2006."[20]

At the true-up hearing, Praxair / Explorer offered evidence which provides updated information on the return on equity authorizations of other state utility commissions. That evidence indicates that return on equity authorization continue to drop dramatically. In fact, for the 3rd quarter of 2006, return on equity authorizations averaged 10.06%.[21] For the all of 2006, the average return on equity is now 10.34%.[22] Finally, the evidence provided at the true-up hearing also indicates that the return on

[19] Praxair / Explorer Initial Posthearing Brief at page 77.
[20] *Id.*
[21] Exhibit 147.
[22] *Id.*

equity sought by Empire ***is approximately 120 basis points over the highest return on equity granted by any state utility commission for the 3rd quarter of 2006***.[23]

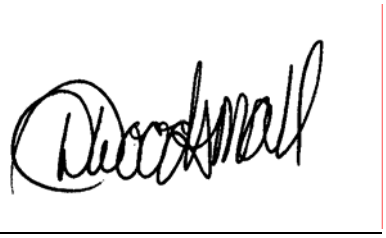
D. CONCLUSION

At an agenda session held October 24, 2006, the Commission deliberated the issue of return on equity. At that hearing, certain Commissioners made statements regarding the lack of credibility of Empire's witness. Some of the comments made included: "I can't believe that this was the same witness from the last case" and "He looked like a deer in the headlights." Praxair / Explorer agree that Empire's return on equity witness is completely lacking in credibility. It is readily apparent that Empire's witness is not interested in providing the Commission with an objective recommendation on a return on equity, but is only interested in supporting the highest return on equity possible. Consistent with that focus, Empire's witness recommends a return on equity (11.7%) that is approximately ***170 basis points higher than the national average return on equity for the 3rd quarter of 2006***.

In contrast, expert analysis provided by Staff and OPC are supported by the evidence provided at the true-up hearing. Those experts recommend that Empire be granted a return on equity of approximately 9.6%. Praxair / Explorer continue to assert that its recommended 10.0% ROE is supported by objective expert analysis, is consistent with return on equity decisions throughout the industry, and is consistent with the standards expressed in the *Hope* and *Bluefield* decisions.

[23] *Id.*

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: November 27, 2006