

**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. |) | |

APPLICATION FOR REHEARING

COME NOW, Praxair, Inc. ("Praxair") and Explorer Pipeline, Inc. ("Explorer"),
and in support of their Application for Rehearing respectfully state as follows:

1. On August 18, 2006, Staff and the Empire District Electric Company ("Empire") filed their Stipulation And Agreement As To Certain Issues ("Stipulation"). Commission Rule 4 CSR 240-2.115(2)(A) provides that "[a] nonunanimous stipulation and agreement is any stipulation and agreement which is entered into by fewer than all the parties." Recognizing that the Stipulation was not signed by Praxair / Explorer as well as several other parties, the Stipulation is by definition a nonunanimous Stipulation.

2. Commission Rule 4 CSR 240-2.115(2)(B) provides that "[e]ach party shall have seven (7) days from the filing of a nonunanimous stipulation and agreement to file an objection to the nonunanimous stipulation and agreement. The Commission Rule continues on to note that "[i]f no party timely objects to a nonunanimous stipulation and agreement, the commission may treat the nonunanimous stipulation and agreement as a unanimous stipulation and agreement."

3. In the filed Stipulation, Empire and Staff provided that:

The Staff also shall have the right to provide, at any agenda meeting at which this Stipulation and Agreement **is noticed to be considered** by the Commission, whatever oral explanation the Commission requests; provided, that the Staff shall, to the extent reasonable practicable, provide

the other Parties with advance notice of when the Staff shall respond to the Commission's request for such explanation once such explanation is requested from Staff.¹

4. Furthermore, the Stipulation provided:

In the event the Commission **unconditionally** accepts the specific terms of this Stipulation and Agreement **without modification**, the signatories waive their respective rights to present oral argument and written briefs pursuant to §536.080.1 RSMo 2000; their respective rights to the reading of the transcript by the Commission pursuant to RSMo §536.080.2 RSMo 2000; their respective rights to seek rehearing; pursuant to §536.500 RSMo 2000; and their respective rights to judicial review pursuant to §386.510 RSMo 2000.²

5. Finally, the Stipulation notes that:

If the Commission does not unconditionally approve this Stipulation and Agreement without modification, and notwithstanding the provision herein that it shall become void; neither this Stipulation and Agreement nor any matters associated with its consideration by the Commission shall be considered or argued to be a waiver of the rights that any Party has for a decision in accordance with §536.080 RSMo 2000 or Article V, Section 18 of the Missouri Constitution, and the Parties shall retain all procedural and due process rights as fully as though this Stipulation and Agreement had not been presented for approval, and any suggestions, memoranda, testimony, or exhibits that have been offered or received in support of this Stipulation and Agreement shall become privileged as reflecting the substantive content of settlement discussions and shall be stricken from and not be considered as part of the administrative or evidentiary record before the Commission for any purpose whatsoever.³

6. Recognizing that the Stipulation provided for a strict procedure to be followed prior to any Commission communication with Staff regarding the Stipulation, and further provided that any Commission attempt to modify this procedure would necessarily result in the Stipulation being void, Praxair / Explorer did not object to the Stipulation.

¹ Stipulation at page 8, ¶13. (emphasis added).

² Id. at page 7, ¶11 (emphasis added).

³ Id. at page 6-7, ¶10.

7. On August 29, 2006, the Commission held its regularly scheduled agenda session. During that agenda session, the Commission called upon the Staff to provide a verbal explanation of the Stipulation and the issues contained in that Stipulation. Contrary to the terms of the Stipulation, neither the Commission nor Staff provided other parties with notice of the Commission's intent to communicate with the Staff regarding the Stipulation. As such, by its very terms, the Stipulation was void.⁴

8. On August 31, 2006, the Commission issued its Order Approving Stipulation and Agreement as to Certain Issues ("Order"). In its Order, the Commission purports to approve the nonunanimous Stipulation reached between Staff and Empire. As explained in this Application, the Commission's Order: (1) is unlawful in that it denies non-signatory parties of their constitutional right to due process; (2) is in direct violation of the prohibition against *ex parte* communications as contained in 4 CSR 240-4.020; (3) violates the parties right to a fair and impartial decisionmaker in that it provided Staff an opportunity "to attempt to sway the judgment of the commission by undertaking, directly or indirectly, outside the hearing process to bring pressure or influence to bear upon the commission"; and (4) is unreasonable in that it is not based on competent and substantial evidence.

I. DENIAL OF DUE PROCESS

9. Missouri Courts have found that, while it has flexibility in its proceedings, the Commission does not have "unlimited discretion to conduct its hearings in any possible manner."⁵ In fact the Court has noted that Section 386.420 RSMo "sets forth

⁴ During the evidentiary hearing held on September 5, 2006, Applicants became aware that Staff as well as the court reporter had been provided approximately one week's notice (August 24, 2006) of the Commission's intent to communicate with the Staff regarding the Stipulation.

⁵ State ex rel. Fischer v. Public Service Commission, 645 S.W.2d 39, 42 (Mo.App. 1982).

minimal procedural requirements for Commission hearings.”⁶ Among other things, Section 386.420 guarantees that all parties “have the right to be heard and to introduce evidence.”⁷ Furthermore, Section 536.070 guarantees parties a right to cross examine opposing witnesses. Other statutory provisions provide the parties a right to closing statements or written briefs as well as a right to require the Commissioners to read the transcript.⁸

10. The Missouri Supreme Court has had several opportunities to discuss the procedural requirements and safeguards that must be employed by the Public Service Commission. Each time, that Court has found that “expediency” is not a proper consideration of this Commission.

Thus, while these statutes are remedial in nature, and should be liberally construed in order to effectuate the purpose for which they were enacted, "neither convenience, expediency or necessity are proper matters for consideration in the determination of" whether or not an act of the commission is authorized by the statute⁹

In still another case the Supreme Court found:

In *State ex rel. Missouri Water Co. v. Public Service Commission*, supra, the court, in considering the problem the PSC has in arriving at a rate base, said, 308 S.W.2d at 720, ". . . neither impulse nor expediency can be substituted for the requirement that such rates be 'authorized by law' and 'supported by competent and substantial evidence upon the whole record.' Article V, sec. 22, Constitution of Missouri, V.A.M.S. For the reasons stated, we are forced to the conclusion that the order of the Commission is neither authorized by law nor supported by competent and substantial evidence upon the whole record."¹⁰

⁶ Id.

⁷ Id.

⁸ Section 536.080.2 RSMo.

⁹ State ex rel. Utility Consumers Council, Inc. v. Public Service Commission, 585 S.W.2d 41, 49 (Mo. Banc 1979) (citing to State ex rel. Kansas City v. Public Service Commission, 301 Mo. 179, 257 S.W. 462 (Mo. Banc 1923).

¹⁰ State ex rel. Martigney Creek Sewer Co. v. Public Service Commission, 537 S.W.2d 388, 394 (Mo. 1976).

11. By failing to follow the strict procedure called for in the Stipulation, the Commission denied parties the right to notice, the right to be heard, the right to introduce evidence, the right to cross examine witnesses, the right to closing statements / written briefs and the right to require a reading of the transcript by the Commission. As such, the procedure utilized by the Commission violated the parties of their fundamental rights to due process.

II. VIOLATION OF *EX PARTE* RULES

12. 4 CSR 240-4.020(6) provides that:

No member of the commission, presiding officer or employee of the commission shall invite or knowingly entertain any prohibited *ex parte* communication, or make any such communication to any party or counsel or agent of a party, or any other person who s/he has reason to know may transmit that communication to a party or party's agent. (emphasis added).

13. By communicating with Staff without following the strict procedure outlined in the Stipulation, the Commission violated 4 CSR 240-4.020(6). In fact, during the agenda session in which the Commission communicated with the Staff, an objection was raised to the fact that the communication, while transcribed by a court reporter, would not constitute competent and substantial evidence upon which the Commission could base its decision. In response to said objection, the Chairman specifically asked whether the transcribed conversation would constitute evidence of an *ex parte* communication.

14. Despite the Commission's apparent recognition that its communication with the Staff constituted an *ex parte* communication, to date none of the Commissioners have made a written report of the *ex parte* communication as required by 4 CSR 240-4.020(8).

III. FAIR AND IMPARTIAL DECISIONMAKER

15. Missouri Courts have found that “one of the most cherished attributes of our system of justice” is the right to have one’s cause “determined by a fair and impartial official.”¹¹ In fact, this right “is woven into the very fabric of our system of justice.”¹²

16. By inviting an *ex parte* communication, the Commission provided Staff an opportunity “to attempt to sway the judgment of the commission by undertaking, directly or indirectly, outside the hearing process to bring pressure or influence to bear upon the commission”. Such an attempt to “sway the judgment of the commission” is in direct violation of 4 CSR 240-4.020(4) and undermines the parties right to a “fair and impartial official.”

IV. COMPETENT AND SUBSTANTIAL EVIDENCE

17. Section 386.510 provides that all Commission Orders must be lawful and reasonable. Missouri Courts have repeatedly found that “[a]n order’s reasonableness depends on whether it is supported by substantial and competent evidence on the whole record.”¹³

18. In its Order the Commission noted that “[a]fter reviewing the Stipulation and Agreement, the Commission finds the Agreement to be reasonable. The Commission determines that the Agreement shall be approved.”

19. Recognizing that, at the time the Order was issued, the Commission had not yet held an evidentiary hearing, been presented evidence by any parties or accepted any evidence into the record, it is indisputable that the Commission’s finding that the

¹¹ Union Electric Company v. Slavin, 591 S.W.2d 134, 139 (Mo.App. 1979).

¹² Id.

¹³ State ex rel. AG Processing Inc. v. Public Service Commission, 120 S.W.3d 732, 734-735 (Mo. 2003) (citing to State ex rel. Alma Telephone Co. v. Public Service Commission, 40 S.W.3d 381, 387 (Mo.App. 2001)).

Stipulation is “reasonable” was not based on competent and substantial evidence.¹⁴ As such, the Order is patently unreasonable and in violation of Section 386.510 RSMo and Article V, Section 18 of the Missouri Constitution.

WHEREFORE, Praxair / Explorer respectfully request that the Commission issue its Order granting rehearing of the Commission’s August 31, 2006 Order Approving Stipulation And Agreement As To Certain Issues.

Respectfully submitted,

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

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

¹⁴ In fact, at the Commission’s September 5, 2006 evidentiary hearing, the Regulatory Law Judge in compliance with the approved Stipulation accepted several pieces of prefiled testimony into the record without the opportunity for cross-examination. Such “evidence” was accepted over the objection of counsel for Praxair / Explorer that it violated the parties’ right to cross-examination such witnesses.

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 positioned above a horizontal line. A vertical red line is located to the right of the signature.

Dated: September 8, 2006