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

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

1. This case has been lingering before the Commission since February 1, 2006; a period of over 26 months. During its processing of this case, the Commission has shown itself capable of: (1) moving in an expedited manner in its consideration of ***utility*** pleadings and (2) refusing to undertake any action when considering the ***consumers'*** resulting applications for rehearing. Specifically, this Commission found it appropriate to rush to judgment in its approval of the Empire compliance tariffs. In fact, the Commission approved those tariffs, in a special agenda without any finding of good case, and without any evidence to support a finding that those tariffs complied with the Report and Order. Despite the demonstrated ability to act in such an expedited fashion, the Commission has also found it appropriate to linger over pending applications for rehearing for over 15 months.

During that time, at the urging of the Empire, the Commission has engaged in repeated legal gymnastics and machinations designed to deny parties due process and access to the courts while simultaneously trying to assure Empire its illegal and unsupported rate increase under the guise of state action. The Commission appears to

have become an advocate for the utility, a position that is not only unseemly, but may well be unlawful. The Commission has repeatedly acted to deny the parties due process of law, and has done so as state action. Even where the Missouri Supreme Court directs the Commission to vacate its previous decision, this Commission ignores the clear meaning of the Supreme Court's opinion and, instead, merely reaffirms its early decision.[1]

By its March 26, 2008 Report and Order Upon Reconsideration ("Order"), the Commission finally takes up numerous applications for rehearing of its December 21, 2006 Report and Order that have been pending for over 15 months. The Commission will note, as to these applications for rehearing of the Report and Order, they were not affected by the Supreme Court's mandamus opinion and could have been addressed at any time during the intervening period. That said, it is unclear what the Commission intended to accomplish by its March 26, 2008 Report and Order Upon Reconsideration. Noticeably, despite Section 386.500's proclamation that the Commission shall either "grant" or "deny" a rehearing, in this Order the Commission has done neither. Instead, the Commission has granted clarification of its previous order and found certain applications for rehearing to be moot. By its finding that such applications for rehearing are moot, did the Commission intend to "deny" those applications or merely continue to refrain from addressing those pleadings? Furthermore, in its continued effort to deny

[1] The fact that the Commission merely reaffirmed its previous order, despite a Supreme Court decision to "vacate" its previous decision, is supported by the Commission's 2d Ordered Paragraph in its Report and Order Upon Reconsideration. "That the tariff sheets previously filed by The Empire District Electric Company and approved by the Commission both in its December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs ***and*** its December 4, 2007 Order Vacating December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs, and Order Approving Tariffs, to be effective December 14, 2007, shall remain in effect; provided, however, that, as clarified in the Order of Clarification issued on January 15, 2008, tariff sheets which took effect on or after January 2, 2007, shall not be affected or otherwise displaced by this order." (emphasis added).

parties their constitutional right to judicial review, the Commission has continued to withhold any decision on all other applications for rehearing.

These legal gymnastics make it difficult for any party to determine the exact status of this case. Therefore, recognizing the requirement in Section 386.500.2 that precludes a party from arguing any matter on a writ of review that is not contained in its application for rehearing, Praxair / Explorer submit this application for rehearing that, in large part, merely revives its previous applications for rehearing, and in addition assert that the Commission acted arbitrarily, unlawfully, unreasonably and in violation of governing law and constitution provisions in entering the March 26, 2008 Order and said order may be a legal nullity. Any references to that order and any references to earlier orders are without prejudice to that position.

2. The Order is unlawful, unjust and unreasonable in that the Commission has once again 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 evidence and testimony 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 findings of fact.

4. The Order is unlawful, unjust, unreasonable and unconstitutional in that it is not supported by competent and substantial evidence upon the whole record and is contrary to the substantial and competent evidence of record.

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 failed to make any findings of the appropriate amounts of rate base, present revenue being received and additional revenue needed so that the parties and any reviewing court may evaluate the Commission's decision in view of the evidence on the whole record of this proceeding. Instead, the Commission appears to leave this matter to the utility to file compliance tariffs yet provides no mechanism that such compliance tariffs may be subject to review in a manner consistent with due process requirements and in a manner calculated to provide consideration of all relevant factors and a decision based on competent and substantial evidence on the whole record.

I. RETURN ON EQUITY

6. The Order is unlawful, unjust and unreasonable in that the Commission fails to consider updated evidence regarding the industry national average return on equity. In its Order the Commission considered and relied upon evidence indicating a national average return on equity for electric utilities for the 1st Quarter 2006 of 10.57% and 10.55% for the year 2005.[2] In reaching its decision, the Commission failed to consider updated evidence which detailed a national average return on equity of 10.06% for the 3rd Quarter of 2006.[3] By failing to consider such evidence the Commission's Order runs afoul of the requirement in Bluefield Water Works that the Commission

[2] Order at pages 24 and 28.
[3] Exhibit 147.

authorize a return on equity "equal to that generally being made ***at the same time***."[4] In fact, in a recent Missouri Gas Energy decision, the Commission noted a criticism that certain recommendations were based on "***stale*** model inputs."[5] The use of such ***stale*** evidence is equally inappropriate here and is contrary to the dictates of Bluefield Water Works. Furthermore, in its updated decision on capital structure, the Commission expressly recognizes the need to use up to date information. "The use of updated figures is generally preferable, as they more nearly reflect the Company as it will exist on the day that the new rates will take effect."[6]

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 Commission, though citing to the Bluefield and Hope cases, fails to apply the standards of those cases properly by applying a national average instead of addressing the needs of comparable companies in the same region as Empire District.

8. 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 utilizes a "zone of reasonableness" defined as "100 basis points above or below the industry average."[7] As used and defined in the current case, the "zone of reasonableness" is a regulatory fiction created by the Commission in determining a return on equity in the last Empire rate proceeding.[8] In that case, the Commission first defined the "zone of reasonableness" as "100 basis points

[4] *Bluefield Water Works v. State of West Virginia*, 262 U.S. 679, 690 (1923).
[5] *In re: Missouri Gas Energy*, Case No. GR-2004-0209, Report and Order at page 18.
[6] Order at page 31.
[7] *Id.* at pages 27-28.
[8] *Empire District Electric Company*, Case No. ER-2004-0570, at page 71.

above or below the industry average."[9] The "zone of reasonableness", employed by this Commission in calculating an appropriate return on equity, is not provided for in any statute or case law.

9. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the Commission made an apparent finding of what is referred to as a "zone of reasonableness" but did so without any competent and substantial evidence or hearing and appeared to do so on the basis of an indiscriminate citation to a prior Commission decision. Such a finding is not based on competent and substantial evidence in this proceeding or any Commission rule, Missouri statute or any relevant case law.

10. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the Commission failed to consider evidence regarding the national average return on equity for gas utilities. As the Commission noted in its Report and Order, "Empire recently acquired Aquila, Inc.'s natural gas distribution operations in Missouri."[10] As such, Empire now operates as a combined electric and gas utility. Despite Empire's existence as both an electric and gas utility and the availability of national average return on equity figures for ***gas utilities***, the Commission ignored evidence which reveals a national average return on equity for gas utilities for the 3rd quarter of 2006 of 9.60%.[11]

11. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the Commission inexplicably ignored the DCF calculation conducted by Empire Witness

[9] *Id.*
[10] Order at page 17.
[11] Exhibit 147.

Vander Weide for gas utilities (9.6%).[12] Instead, the Commission relied solely on Vander Weide's DCF calculation for electric utilities. This failure to consider the DCF calculation for gas utilities is rendered all the more problematic when one recognizes that the inclusion of gas utilities in the total number of comparable companies was specifically cited by the Commission as the reason why Empire's comparable company group was preferable to that utilized by OPC.[13]

12. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the Commission authorizes Empire a return on equity amount (10.90%) which is unsupported by competent and substantial evidence on the whole of the record. In reaching this figure, the Commission cites to the Rebuttal Testimony (Exhibit 3, page 43) of Empire Witness Vander Weide.[14] A review of the record evidence provided at that citation fails to provide any support for the referenced 10.9% return on equity.

Nevertheless, assuming that the Commission merely provided an incorrect cite to Vander Weide's testimony, such testimony has been rendered unusable. In its purported findings of fact, the Commission found "none of the experts' final results appear to be reasonable."[15] Once found to be unreasonable, such evidence is no longer deemed competent and substantial and, accordingly, cannot thereafter be relied upon as support for a decision. It certainly is not competent and substantial evidence as required by law.

13. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the

[12] Exhibit 2, Schedule JVW-2.
[13] Based upon this total of 26 comparable companies, OPC recommends a return on equity of 10.09%. Noticeably, this is virtually identical to the national average return on equity of 10.06% found at Exhibit 147.
[14] Order at page 25, footnote 68.
[15] *Id.* at page 28.

Commission compares Empire's relative risk currently as compared to that which existed when Empire's last rate case was decided. There is no competent and substantial evidence to support any Commission finding regarding the relative risk across time or the effect of that risk on an appropriate return on equity. In fact, the Commission inappropriately attempts to buttress its 10.9% return on equity by relying upon extra-record evidence regarding the risk underlying the return on equity authorization from the last proceeding.

14. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the Commission fails to consider the effect that its termination of the Interim Energy Charge has on the overall risk of the Company. While the Commission attempts to compare the relative risk from this case to Empire's last proceeding, the Commission fails to account for the significant decrease in risk that comes from the termination of the IEC. Allowing Empire to recover fuel and purchased power expense above and beyond the level capped by the IEC represents a significant reduction in risk. In addition, by allowing Empire to terminate the IEC, the Commission inevitably permits Empire to seek implementation of a fuel adjustment clause in its next rate proceeding. Absent the termination of the IEC, Empire would not have been permitted to seek such a fuel adjustment clause.[16] The General Assembly explicitly recognized that the method for recovery of fuel and purchased power expense has a direct effect on risk and the appropriate return on equity.[17]

16. The Order is unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the Commission fails

[16] Order at pages 9-10.
[17] Section 386.266.7 RSMo.

to provide any substantive basis for the arbitrary and capricious changes in the method for calculating return on equity in its last four return on equity decisions. In 2004, the Commission issued its Report and Order in Case No. GR-2004-0209. In that decision, the Commission found that a 10.5% return on equity was appropriate. The Commission reached this decision by relying upon the national average return on equity authorization and an ***annual*** DCF method (using Value Line comparable company growth rates) calculated by Company's witness.[18]

Less than 6 months later, the Commission issued its Report and Order in Case No. ER-2004-0570. Contrary to the previously cited decision, the Commission chose a different approach to reaching its authorized return on equity. In this case, the Commission reached its authorized return on equity by relying upon the Company witness' recommendation which relied upon a ***quarterly*** DCF method inflated by the application of two risk premium methods.[19]

In a Report and Order issued simultaneous with that in the immediate docket, the Commission authorized a return on equity of 11.25%. Again, contrary to the methodologies adopted by the Commission in its two previous decisions, this authorized return on equity was based upon a ***multi-stage*** (quarterly) DCF method which used a growth rate based on long-term forecasted growth in gross domestic product.[20] In the present case, the Commission authorized a return on equity based upon the national average return on equity for electric utilities as well the Company's ***quarterly*** DCF analysis – using a proxy company growth rate.

[18] *In re: Missouri Gas Energy*, Case No. GR-2004-0209, issued September 21, 2004, at pages 16-23.
[19] *In re: Empire District Electric Company*, Case No. ER-2004-0570, issued March 10, 2005, at pages 39-46.
[20] *In re: Kansas City Power & Light Company*, Case No. ER-2006-0314, issued December 21, 2006, at pages 19-30.

The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the foregoing litany of decisions readily reveals that the Commission has applied four different methodologies in establishing four different authorized returns in four different proceedings. The essence of an arbitrary administration decision is that there is no discernable standard applicable from case to case across a reasonable period of time. Here the Commission vacillates between various tests with the only apparent harmonization being to select that which gives the utility more revenue. The questions remain: What is the Commission's methodology for establishing an appropriate return on equity? Does the Commission utilize a quarterly or annual DCF methodology? Does the Commission utilize a proxy company Value Line or GDP growth rate? Does the Commission utilize other methodologies besides the DCF method? What role does the national average return on equity have in determining the appropriate return on equity? To date, the Commission has failed to provide a substantive basis for parties to determine what methodology is appropriate in what circumstances which is the very essence of an arbitrary and capricious approach to decision-making and certainly far wide of the mark of reasoned decision-making as required by law.

17. 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 unlawfully and incorrectly confuses the question of adequate credit ratings, which are of concern to the utility's debtors, and its earnings, which are of concern to shareholders. In so doing, the Commission violates the Hope and Bluefield tests that it professes to rely upon and reaches a decision that is not

supported by competent and substantial evidence on the whole record and is unsupported by the competent and substantial evidence that is of record in this proceeding.

II. REGULATORY PLAN AMORTIZATIONS

18. The Order is unlawful, unjust and unreasonable in that it grants an increase in rates based on the costs of construction in progress of an electric plant before it is fully operational and used for service in contravention of Section 393.135 RSMo.

III. FUEL AND PURCHASED POWER EXPENSE

19. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the Commission summarily rejects the testimony of Maurice Brubaker on the issue of fuel and purchased power expense. The Commission appears to base its decision solely upon an "apples v. oranges" comparison of the positions proposed by Mr. Brubaker and that proposed by Staff, OPC and Empire. The fact that positions are different or that the magnitude of the differences are large is not basis, in and of itself, for the Commission to disregard testimony. Rather, the decision to disregard testimony must be based on competent and substantial evidence.

That said, however, the position advanced by Mr. Brubaker is not "so far afield from the positions taken by other parties." The Commission's trouble regarding the position advanced by the Industrials appears to be founded upon a lack of familiarity / understanding with the issues and positions taken by the parties in this proceeding. Specifically, the Commission appears to believe that the Industrials recommend a total company fuel and purchased power expense level of $133,240,000 ($109 million Missouri jurisdictional). This recitation fails to account for the fact that the Industrials also included $25,104,177 of purchase demand charges, natural gas firm transportation

charges and other on-system fuel-related charges. Recognizing these additional, uncontested expenses, the Industrials advocate a total company level of fuel and purchased power expense of approximately $158,400,000 ($131,500,000 Missouri jurisdictional). As can be seen, the Commission's finding that Mr. Brubaker's position is "so far afield" is not supported by competent and substantial evidence, but rather by an incorrect perception of the position of the parties.

Moreover, despite the Commission's finding, the record also indicates that Mr. Brubaker has **consistently** derived his price of natural gas from actual and futures prices. As the record demonstrates, Mr. Brubaker suggests that the Commission utilize actual costs for those months in 2006 where costs are known (January – September 2006) and only use the futures price for those months where actual natural gas prices are not known (October – December 2006).[21] By only using futures gas prices where actual prices are not known, the Commission may minimize the inflationary effects of "fear factor" in the futures market.

In contrast to the consistency reflected in the position of Mr. Brubaker, the Company's position does appear to suffer from the criticism set forth by the Commission – inconsistency. As Mr. Brubaker notes in his Surrebuttal Testimony, "[i]n his initial testimony, Mr. Tarter used forecasted prices for calendar year 2006 for pricing the unhedged portion of Empire's estimated gas needs. In his rebuttal testimony, ***he now switches to a forecast for calendar year 2007***."[22]

Ultimately, the Commission fails to provide adequate findings of fact for its summary rejection of Mr. Brubaker's testimony. For this reason, the Commission should rehear this issue.

[21] Exhibit 88 at page 7; Exhibit 151 at pages 2-3.
[22] Exhibit 88, page 7.

20. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the Commission either neglects to decide the issue of the appropriate price of natural gas to include in the calculation of fuel and purchased power expense or fails to provide adequate findings of fact upon which parties can derive the appropriate price of natural gas. In its Report and Order the Commission appears to recognize that the issue of fuel and purchased power expense involves both an issue regarding: (1) the price of natural gas;[23] and (2) the appropriate inputs to use in the fuel model.[24] Nevertheless, and despite deciding the issue of the appropriate inputs to use in the fuel model, the Commission fails to provide adequate findings of fact regarding the issue of the price of natural gas.

Specifically, the Commission finds "Empire's ***inputs*** to be more credible than the Staff's."[25] Nevertheless, the Commission fails to provide any findings regarding whether the ***natural gas price*** advanced by Empire or OPC is more appropriate. In fact, the Commission notes that OPC fuel and purchased power expense relies upon Empire's fuel model, but merely "substituted a different natural gas price."[26] The Commission's Report and Order lacks adequate findings of fact for a reviewing court to determine whether the Commission found Empire or OPC's natural gas price to be more appropriate.

21. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the Commission rejects Staff's position on fuel and purchased power expense based merely

[23] Order at page 41 ("However, the price of natural gas is the main factor in the differences in the projected fuel cost.").
[24] *Id.* ("There is another small reason for the different results of Empire and the Staff. Although they use the same model, they differed slightly on other inputs to the model than just the price of natural gas, such as transportation costs.").
[25] *Id.* at page 44.
[26] *Id.*

on a perceived "greater familiarity with the intricacies of its system and facilities."[27] Despite this finding the Commission fails to explain why Empire's greater familiarity results in a more appropriate number for certain fuel model inputs including transportation costs. There is no evidence to support the Commission decision in this regard nor do the purported findings of fact identify any evidence.

It has been stated that findings of fact must not be merely conclusory. In regards to the immediate issue, the Commission's decision amounts to nothing more than a conclusory statement. In essence, the Commission has found that "Empire has a greater familiarity with the intricacies of its system and facilities."[28] Such conclusory acceptance of Company's position amounts to an abdication of the Commission's regulatory oversight. If applied to every issue in this proceeding, the Company's alleged "greater familiarity" would preclude the need for any independent audit or Commission decision on issues.

IV. FUEL AND PURCHASED POWER EXPENSE RECOVERY METHOD

22. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the Commission prematurely terminates an incentive or performance based plan in direct contravention of Section 386.266.8.

23. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the Commission applies a new standard to the determination of whether to grant interim relief from the rates previously found to be just and reasonable.

[27] *Id.*
[28] *Id.*

24. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the Commission finds that the Interim Energy Charge "does not allow sufficient recovery of Empire's prudently incurred fuel and purchased power costs by $26.8 million annually."[29]

25. The Order is unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the Commission finds that it "is not a party" to the Interim Energy Charge.

26. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the Commission fails to note the legal significance of its own approval of the Interim Energy Charge Stipulation and Agreement in Case No. ER-2004-0570.

27. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the Commission prematurely terminates an approved agreement that it found to be enforceable and supported by consideration without attempting to evaluate or return to the other parties the value of their consideration.

28. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the Commission attempts to seek reformation or rescission of a valid, approved agreement as a judicial function when it completely lacks judicial powers.

29. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the

[29] *Id.* at page 46.

Commission appears to confuse the exercise of the police power with regulatory contracts that it approved in a prior case wherein it exercised the police power at that time and found the approved contract to be consistent with the public interest and purpose.

30. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the Commission fails to recognize that the Interim Energy Charge does not preclude the Commission from setting just and reasonable rates. Rather, the Interim Energy Charge, as approved by this Commission, merely requires the Commission to establish just and reasonable rates based upon a fuel and purchased power expense level found to be just and reasonable.

31. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that there is no evidence to support a Commission finding that continuation of the Interim Energy Charge "could place a utility in serious financial jeopardy."[30]

32. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the there is no evidence to support a Commission finding that the Interim Energy Charge will lead to inadequate revenues undermining the utility's ability to provide safe and adequate service to its customers.

33. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that there is no evidence to support a Commission finding that the volatility of natural gas prices were "unforeseen at the time the IEC agreement was reached." In fact, the evidence in the

[30] *Id.* at page 50.

record expressly indicates that IEC was entered into and approved by the Commission as a result of the volatility of natural gas prices. The IEC is generally "designed to address the potential volatility in natural gas and wholesale electricity prices."[31]

34. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the there is no evidence to support a Commission finding that the IEC "will continue to create a significant under-recovery of costs for Empire because of the volatility of natural gas prices that was unforeseen at the time the IEC agreement was reached." In fact, documents created by Empire and accepted into evidence readily indicate that for three of the past six months, Empire has collected rates, through the IEC, that exceeded its fuel and purchased power expense.[32] Such evidence appears to have been disregarded by the Commission.

V. GAIN FROM UNWINDING FORWARD NATURAL GAS CONTRACT

35. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the Commission permits Empire to keep gains associated with the unwinding of a forward natural gas contract as a method of compensating Empire for the past under-recovery of fuel costs. This violates the doctrine of retroactive ratemaking contained in *State ex rel. Utility Consumers Council, Inc. v. Public Service Commission*, 585 S.W.2d 41 (Mo. 1979).

VI. CORPORATE ALLOCATIONS

36. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the

[31] Exhibit 117, page 3, Section 1(b).
[32] Exhibit 146.

Commission made no findings of fact or conclusions whatsoever of law regarding the issue of corporate allocations. While the Commission properly found that "Empire's acquisition of Aquila, Inc.'s Missouri natural gas properties affects corporate allocations in that there should be a reduction in the percentage of administrative and general costs otherwise allocable to Empire's electric operations," the Commission failed to make any findings of fact or conclusions of law as to how the $500,000 adjustment contained in the non-unanimous stipulation and agreement is reasonable.

VII. UNLAWFUL PROCEDURE

37. The Order is unlawful, is arbitrary and capricious and is an abuse of discretion in that the Commission failed to allow Praxair / Explorer to subpoena witnesses for the presentation of evidence at a scheduled evidentiary hearing in contravention of Sections 386.420, 536.070, and 4 CSR 240-2.130.

38. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the Commission failed to make timely rulings upon numerous substantive motions submitted by the parties to the proceeding and dealt with those motions by attempting to overrule them without appropriate consideration thereof.

39. The Order is unlawful, is arbitrary and capricious and is an abuse of discretion in that the Commission denied Praxair / Explorer the right to adequately cross-examine witnesses in contravention of Section 386.420, 536.070 and 4 CSR 240-2.130.

40. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the Commission, in its August 31, 2006 Order Approving Stipulation and Agreement as to

Certain Issues, approved a Stipulation without having previously received any evidence into the record which could provide substantive basis for that Order.

41. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the Commission, in issuing its August 31, 2006 Order Approving Stipulation and Agreement as to Certain Issues relied solely upon *ex parte* communications with its Staff.

42. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the Commission, prior to issuing its August 31, 2006 Order Approving Stipulation and Agreement as to Certain Issues engaged in *ex parte* communications with its Staff, in violation of 4 CSR 240-4.020.

43. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the Commission, by approving the Stipulation and Agreement as to Certain Issues, denied Praxair / Explorer the right to cross-examine witnesses as to the issues contained in that Stipulation and Agreement.

44. The Order is unlawful and is an abuse of discretion in that the Commission permitted the Presiding Officer to conduct a hearing after granting a *de facto* and *de jure* Application for Rehearing.

45. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the Commission permitted its Presiding Officer to rule upon Applications for Rehearing without presenting them to the full Commission as is required by law.

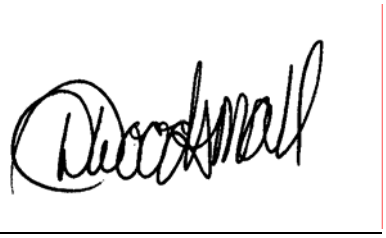
46. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the Commission permitted the Presiding Officer to rule upon her own competency to continue to preside in this case in violation of 4 CSR 240-2.120(2).

47. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is arbitrary and capricious and is an abuse of discretion in that the Commission failed to follow 4 CSR 240-2.120(2) in addressing the August 20, 2006 Motion to Disqualify.

48. Praxair / Explorer hereby incorporate by reference, as if fully set out herein, the points of rehearing contained in the Application for Rehearing filed by the Office of the Public Counsel on this date.

WHEREFORE Rehearing of the Order should be ordered and a new Order consistent with governing law, commission precedent and the evidence herein should be issued.

Respectfully submitted,

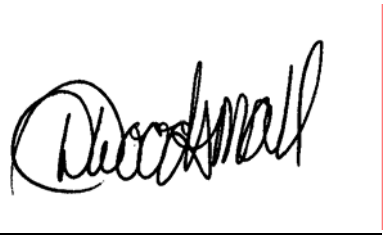


Stuart W. Conrad, MBE #23966
David L. Woodsmall, MBE #40747
3100 Broadway, Suite 1209
Kansas City, Missouri 64111
(816) 753-1122 Ext. 211
Facsimile: (816) 756-0373
Internet: stucon@fcplaw.com

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.



Dated: April 4, 2008