

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

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 November 16, 2006, in response to a Motion to Quash Subpoenas filed by the Empire District Electric Company (“Empire”), the Commission issued its Order Quashing Subpoenas. In its Order, the Commission quashed subpoenas compelling the appearance of Empire’s President / Chief Executive Officer and Manager of Strategic Planning at the scheduled November 20, 2006 evidentiary hearing. Moreover, the Order denies parties the opportunity to cross-examine witnesses regarding positions taken in non-unanimous Stipulations and Agreements.

2. Praxair / Explorer seek rehearing of the Commission’s Order on the basis that it is unlawful and denies the parties certain constitutional rights. Chapter 536 provides for certain procedures that must be followed in any contested case. These procedures are in place to preserve the parties’ fundamental rights of due process.

Due process requires that administrative hearings be fair and consistent with rudimentary elements of fair play. One component of this due process requirement is that parties be afforded **a full and fair hearing** at a meaningful time and in a meaningful manner.¹

¹ *State ex rel. Fischer v. Public Service Commission*, 645 S.W.2d 39, 43 (Mo.App. 1982) (citing to *Tonkin v. Jackson County Merit System Commission*, 599 S.W.2d 25, 32-33 (Mo.App. 1980); *Jones v. State Department of Public Health and Welfare*, 354 S.W.2d 37, 39-40 (Mo.App. 1962); and *Merry Heart*

3. Missouri Courts have found that, while the Commission has flexibility in its proceedings, the Commission does not have “unlimited discretion to conduct its hearings in any possible manner.”² In fact the Court has noted that Section 386.420 RSMo “sets forth minimal procedural requirements for Commission hearings.”³ Among these minimal procedural requirements, Section 386.420 guarantees that all parties “have the right to be heard and to introduce evidence.”⁴ Furthermore, Section 536.070(2) provides that:

Each party *shall have the right* to call and examine witnesses, to introduce exhibits, to cross-examine opposition witnesses on any manner relevant to the issues even though that matter was not the subject of the direct examination, to impeach any witness regardless of which party first called him to testify, and to rebut the evidence against him. (emphasis added).

In addition, Section 536.070(3) provides that, “[a] party who does not testify in his own behalf may be called and examined as if under cross examination.” In order to effectuate these rights to be heard, to introduce evidence and to call witnesses, Chapters 386 and 536 provide parties with the ability to utilize subpoena powers.⁵

Commission Rules of Practice and Procedure specifically provide that “[i]n any hearing, these rules supplement section 536.070, RSMo.”⁶

4. The Missouri Supreme Court has found that the “existence of *unbridled* subpoenas rights” is an inherent part of the fairness of the Administrative Hearing

Nursing and Convalescent Home, Inc. v. Dougherty, 131 N.J. Super. 412, 330 A.2d 370, 373-374 (Ct.App.Div. 1974).

² *Id.* at 42. See also, *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)) (“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 statute”) and *State ex rel. Martigney Creek Sewer Co. v. Public Service Commission*, 537 S.W.2d 388, 394 (Mo. 1976).

³ *Id.*

⁴ *Id.*

⁵ Sections 386.440 and 536.077 RSMo.

⁶ 4 CSR 240-2.130(1).

Procedure.⁷ Similarly, the access to “unbridled” subpoenas is an essential part of a full and fair hearing under the Commission’s process and procedure.

5. As a result of Order Quashing Subpoenas and contrary to the dictates of *State ex rel. Fischer*, the Commission has implemented a “limited hearing procedure.” Specifically, in contravention of the full hearing rights provided by Section 386.420; Section 536.070 and 4 CSR 240-2.130(1), the Commission, by quashing the issued subpoenas, has denied Praxair / Explorer its **right**: (1) to be heard and to introduce evidence; (2) to call and examine witnesses; and (3) to impeach any witness.

6. In addition, the Commission’s Order not only improperly limited the procedure available to Praxair / Explorer, it also improperly limited the scope of the issues discussed at the hearing. The Order notes:

The filing of the non-unanimous Stipulation and Agreement does not require further testimony on the issues addressed. All that remains is whether the existing record is sufficient to support the position taken in the non-unanimous stipulation and agreement, or to establish that some other position is better. **No witnesses will be called on these “stipulated” issues.** Either the evidence presently exists in the record or it does not; **there is no opportunity or need to call additional witnesses or recall previous witnesses.** (emphasis added).

This position regarding the nature of the evidence to be presented and the cross-examination to be allowed represents a complete change in position for the Commission. As reflected in its November 7, 2006 Order Confirming Hearing, the Commission initially anticipated that evidence would be taken and cross-examination permitted on the non-unanimous Stipulation and Agreement. “Parties will be limited to cross-examination of witnesses who offered pre-filed testimony on the subjects of corporate allocations, regulatory plan amortizations and true-up testimony.”

⁷ *Stewart v. Director of Revenue*, 702 S.W.2d 472 (Mo. 1986) (emphasis added).

7. By limiting the scope of the issues to be heard at the November 20 hearing, the Commission's Order fails to recognize that the non-unanimous Stipulation and Agreement regarding regulatory amortizations constitutes a change in position for Empire since the initial evidentiary hearing in this matter. One of the witnesses subpoenaed by Praxair / Explorer provided the following discussion of Empire's position regarding regulatory amortizations:

Q. Are you requesting any amortization to meet financial ratio targets as provided for in Case No. EO-2005-0263?

A. Not in the initial rate filing.⁸

In fact, when presented with testimony from other parties suggesting a regulatory amortization was necessary, the same witness was adamant in his opposition.

Q. How do you think the financial community will react to an amortization in this case?

A. As I stated in my supplemental direct testimony, the amortization mechanism was designed to maintain certain S&P ratios during the construction of Iatan 2. It was not designed as a substitute for the timely recovery of prudently incurred fuel and purchased power expense or substitute for an adjustment to the Company's authorized return on equity in the absence of timely recovery of those costs. Therefore, I do not believe that the financial community will react favorably to an amortization as a substitute for prudently incurred expense.⁹

8. Understanding that the non-unanimous Stipulation and Agreement constitutes a change in position from Empire's prefiled testimony and that Praxair / Explorer was not informed of this change in position until after the evidentiary hearing, Praxair / Explorer was not given an opportunity at the initial hearing to cross-examine Empire witnesses on the position reflected in the non-unanimous Stipulation and Agreement. As such, to the extent the Commission's Order denies parties an opportunity

⁸ Exhibit 5, page 10.

⁹ Exhibit 7, page 2.

to cross-examine witnesses on the modified position, as reflected in the non-unanimous Stipulation and Agreement, it violates the full procedural rights guaranteed in Section 536.070 RSMo.

WHEREFORE, Praxair / Explorer respectfully request that the Commission issue its Order Granting Rehearing of the November 16, 2006 Order Quashing Subpoenas.

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.

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 written over a horizontal line. A vertical red line is positioned to the right of the signature.

Dated: November 22, 2006