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

EMPIRE'S RESPONSE TO MOTION
AND APPLICATION FOR REHEARING

Comes now The Empire District Electric Company ("Empire" or the "Company"), and, in response to the Motion for Rehearing filed by Praxair, Inc. ("Praxair") and Explorer Pipeline, Inc. ("Explorer"), and the Application for Rehearing filed by the Office of the Public Counsel ("Public Counsel"), respectfully states as follows to the Missouri Public Service Commission ("Commission"):

SUMMARY

The Commission should deny the Praxair/Explorer Motion and the Public Counsel Application. The fundamental and overriding fact with respect to this controversy is that the Stipulation and Agreement from Empire's last rate case, Case No. ER-2004-0570 ("Stipulation and Agreement"), does not contain a rate moratorium. Consequently, Empire is not prohibited seeking rate relief in this case. Furthermore, in a rate case, the Commission is required to consider all relevant factors in establishing rates that are just, reasonable and not confiscatory. These circumstances, in and of themselves, are dispositive of the issues before the Commission.

BACKGROUND

1. On June 15, 2006, effective June 25, 2006, the Commission issued its Order Rejecting Tariffs and Striking Testimony ("Order Rejecting Tariffs") through which it implemented an earlier decision in its May 2, 2006, Order Clarifying Continued Applicability of the Interim Energy Charge ("Clarifying Order").

2. The Clarifying Order recognized that in the pending electric rate case, Empire seeks to terminate the use of its existing interim energy charge ("IEC") and has requested authority to implement an energy cost recovery rider ("ECR") (Clarifying Order, p. 1). 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" (Clarifying Order, p. 3) and second, that "Empire may have the option of requesting that the IEC be terminated" in this case (Clarifying Order, p. 3). This latter finding indicates that: 1) Empire may propose termination of the IEC (which it has done); and, 2) The Commission may terminate the IEC prior to March 28, 2008.

3. The Order Rejecting Tariffs sought to implement these findings by rejecting Empire's proposed tariff sheets containing its ECR mechanism and striking those portions of Empire's testimony that discussed the ECR proposal.

4. Praxair/Explorer and the Public Counsel both seek a rehearing of the Order Rejecting Tariffs. Praxair/Explorer's Motion essentially reargues findings contained in the Commission's Clarifying Order. Public Counsel's Application challenges the remedy chosen by the Commission through its Order Rejecting Tariffs. Empire will address these two pleadings separately.

PRAXAIR/EXPLORER MOTION

5. Praxair/Explorer's dispute appears not to be with the Order Rejecting Tariffs, but rather with the earlier Clarifying Order. While the Motion complains that the Order Rejecting Tariffs "did not reject Empire's tariff sheet which purports to eliminate the IEC agreed to and approved by the Commission in Case No. ER-2004-0570" (Motion, para. 1), in reality it was the Commission's Clarifying Order that found Empire may seek to terminate the existing IEC. Thus, Praxair/Explorer's complaint, if any, is with that prior order and should not now be considered.

6. More importantly in examining Praxair/Explorer's arguments, the Commission should keep in mind that the Stipulation and Agreement from the last rate case contains no moratorium or any other restriction on Empire's ability to seek recovery of reasonable fuel costs in any rate case it files, including the present case.

7. In the past, when parties desired a rate case moratorium, they have included language in the appropriate agreements that described their intent clearly and unambiguously. The Stipulation and Agreement from Empire's last rate case, however, contains no such language. In fact, the language of that document reveals the opposite intent, i.e. an understanding that a rate case filing <u>is</u> permitted in that Empire retained the ability to propose tariff modifications at any time – a right guaranteed by law to any utility. In this regard, Sections 393.140(11) and 393.150, RSMo, form the basis for what has been called the "file and suspend" method of rate making. The Missouri Supreme Court has held that "these provisions mean that a public utility may, by filing schedules, suggest to the commission rates and classifications which it believes are just and reasonable, and, if the commission accepts them, they are authorized rates, but the

commission alone can determine that question and make them a lawful charge." *Jackson County, et al. v. Public Service Commission*, 532 S.W.2d 20, 28 (Mo. 1975), *citing May Department Stores Co. v. Union Electric Company*, 107 S.W.2d 41(Mo. 1937).

8. Where parties intend to impair a public utility's right to utilize this statutory rate making process, the parties must expressly state that intent. Without an express moratorium, a public utility can propose that any tariff be replaced at any time – even the day after that tariff becomes effective. Clearly no limitation on Empire's ability to exercise these rights is found in the Stipulation and Agreement or in the Commission's order approving that agreement.

9. Empire knows of no situation where a rate moratorium was found to have been "implied" by the language of an agreement. In addition, it is clear that the Commission cannot impose a rate moratorium *sua sponte*. In *Jackson County, et al. v. Public Service Commission*, 532 S.W.2d 20, 28 (Mo. 1975), the Missouri Supreme Court stated that the "'[Commission's] supervision of the public utilities of this state is a continuing one and its orders and directives with regard to any phase of the operation of any utility are always subject to change to meet changing conditions, as the commission, in its discretion, may deem to be in the public interest.' To rule otherwise would make [Section] 393.270(3) of questionable constitutionality as it potentially could prevent alteration of rates confiscatory to the company or unreasonable to the consumers." This obligation to assess rates as conditions change includes the requirement that the Commission examine all relevant factors, including fuel and purchased power costs – two major components of any electric utility's cost of service.

10. In addition, the subject Stipulation and Agreement expressly provides for the possibility of early termination of the IEC. The document clearly states that the IEC will "expire no later than . . . three (3) years after the original effective date . . . unless earlier terminated by order of the Commission." (Stipulation and Agreement, para. 1c, p. 4). An IEC required or bargained to guarantee rate stability to last three full years would be described as expiring *no earlier than* three years.

11. Praxair/Explorer have stated that maintaining the IEC in effect for the full three-year period was extremely important to them; yet there is no provision in the Stipulation and Agreement imposing that requirement. If rate stability was important to those parties, the duration of the IEC would have been described in terms of a minimum length of time. But the Stipulation and Agreement actually describes the three year period as a maximum length of time. The Stipulation and Agreement states that the IEC will "expire no later than . . . three (3) years after the original effective date." (Stipulation and Agreement, para. 1c, p. 4) (emphasis added). The three-year period described in the Stipulation and Agreement clearly was not designed to be a minimum length of time. Rather, it is the maximum possible duration of the IEC.

12. The facts concerning Empire's previous IEC show how this matter was handled in a falling fuel cost market. As described in Staff's Response, Empire was authorized an IEC in Case No. ER-2001-299. That IEC became effective on October 1, 2001, and was a two year IEC. Report and Order, Case No. ER-2001-299 (September 20, 2001).

13. After implementing that IEC, a period of falling natural gas and purchased power prices ensued. As a result, Empire entered into two agreements that were

presented to the Commission. First, the Commission approved an immediate reduction of the IEC. Later, the IEC itself was terminated when the Commission approved a stipulation effective December 1, 2002, only fourteen months after the IEC's implementation. Order Approving Tariffs Filed in Compliance with Commission Order, Case No. ER-2002-424 (November 22, 2002); Staff Response, p. 7, para. 13.

14. Staff has previously stated that, with respect to the prior Empire case, Staff did "not recall a question arising as to whether terminating the IEC was permissible." Staff Response, p. 8, para 14. Empire likewise remembers no such dispute arising. In fact, the parties to the stipulation that terminated the prior IEC were more than happy to cooperate with an immediate (prior to the end of the term stated in the IEC tariff sheet) reduction in rates to reflect that termination. Empire's approach to the IEC issue in the current case is consistent with the approach it previously took: it seeks elimination of the IEC in response to natural gas markets that have both fallen and risen outside predictable bounds.

15. In addition to the general principles stated above, the Commission should deny the Motion filed by Praxair and Explorer for the following reasons.

16. Order Not Unlawful Under Section 386.266.8, RSMo. Praxair/Explorer argues that it would be unlawful for the Commission to allow Empire to terminate its existing IEC because such action is prohibited by Section 386.266.8, RSMo, a provision of SB 179. Section 386.266.8 states:

> In the event the commission lawfully approves an incentive- or performance-based plan, such plan shall be binding on the commission for

the entire term of the plan. This subsection shall not be construed to authorize or prohibit any incentive- or performance-based plan.

17. This provision is not applicable to the existing IEC. The existing IEC became effective on March 27, 2005. SB 179 (and Section 386.266) became effective by its own terms on January 1, 2006 (Section 386.266.12, RSMo).

18. In addition, Section 386.266(10) states "[n]othing contained in this section shall be construed as affecting any existing adjustment mechanism, rate schedule, tariff, incentive plan, or other ratemaking mechanism currently approved and in effect." Empire's current IEC was an existing ratemaking mechanism in effect at the time SB 179 was enacted and, therefore, is unaffected by the terms of SB 179.

19. Order is Not Contrary to Empire's Tariff. As discussed above, Missouri statutes afford Empire the opportunity to propose changes to its tariffs at any time, through the file and suspend method of rate case filing. Nothing in the IEC tariff or in the Stipulation and Agreement changes or restricts this right. Further, the Commission may not impose a rate moratorium by tariff or otherwise. *See Jackson County, et al. v. Public Service Commission*, 532 S.W.2d 20, 28 (Mo. 1975) Empire's current tariff, therefore, does not restrict the Company's ability to propose in the pending rate case that the IEC be eliminated.

20. Order Does Not Deny Praxair/Explorer Property Rights. Praxair/Explorer argues that the Order Rejecting Tariffs is unlawful because it denies property rights without due process of law. At best this argument is premature because the event that purportedly gives rise to the denial of property rights – the expiration of Empire's IEC – has not yet been authorized. But ripeness issues aside, no one can seriously contend

that the procedural steps and safeguards that are part of this or any other rate case, and that will precede any decision by the Commission regarding the termination of Empire's IEC, fail to satisfy the requirements of due process. Praxair/Explorer has access to the full panoply of due process rights to contest the termination of Empire's IEC, including prefiled testimony, live evidentiary hearings that will include the right to cross examine the Company's witnesses, and post-hearing briefs. In addition, if Praxair/Explorer's argument is based, in part, on the belief that the Stipulation and Agreement prohibits Empire from proposing that the IEC be terminated, that belief is not supported by the terms of that document. A customer cannot have a property right in a provision not found in the subject Stipulation. Further, the courts have found that a customer has no property right to a utility's existing rates and charges. Even if such a property right did exist, in this case the question of whether to approve Empire's proposal to terminate the existing IEC will not be made until after the Commission has conducted evidentiary hearings and given all parties the procedural due process normally found in a rate case.

21. Order is Reasonable. Praxair/Explorer alleges that the Commission's Order Rejecting Tariff constitutes an interpretation of the Stipulation and Agreement without consideration of competent and substantial evidence.

22. In response, it should first be emphasized that the case citation relied on by Praxair/Explorer is not a holding of the Supreme Court in *State ex rel. Riverside Pipeline Company, L.P. v. Public Service Commission*, 165 S.W.3d 152 (Mo. 2005), but is merely a recitation of the procedural history of the case. Although the procedural history is not controlling as precedent, the court's recitation of that history is informative

as to the rule of law that does apply. If the Commission finds that a stipulation is ambiguous, then it is required to hold hearings and take evidence to assist it in determining the intent of the parties. Conversely, where there is no finding of ambiguity, no such hearings are required. Because the Commission did not find the Stipulation and Agreement to be ambiguous, no hearings were needed and the Clarifying Order was not required to be supported by competent and substantial evidence.

23. Second, Praxair/Explorer's assessment of its own pleadings seems a bit strong. They indicate that:

> Praxair/Explorer clearly proved that the intent of the parties to the Stipulation and Agreement was for the IEC to last for three years. Despite its clear demonstration of proof, Praxair/Explorer recognized the possibility that the Commission may declare the Stipulation ambiguous and seek to interpret the Stipulation.

24. As stated above, the Commission has not found the Stipulation and Agreement to be ambiguous. The Commission has found that the terms of the Stipulation and Agreement do not prohibit (a) the filing of a rate case, (b) a proposal that the IEC be terminated, or (c) the Commission's termination of the IEC. The Commission appears to have considered the information presented to it in regard to the Order Rejecting Tariffs and needs no further hearing to make this determination.

25. Order is Not Arbitrary and Capricious. Praxair/Explorer plays games with the language of the Clarifying Order to allege that the Commission "reversed field . . . by allowing Empire to seek recovery of fuel and purchased power in base rates" (Motion, para. 22). No such reversal of understanding can be found. The second sentence of

the Clarifying Order states in relevant part "Empire, in the present case, seeks to terminate the use of the interim energy charge ("IEC") . . ." This proposed termination of the existing IEC was a part of Empire's initial filing that created this case. There is nothing new associated with the Commission's recognition of this fact in the Order Rejecting Tariffs.

PUBLIC COUNSEL APPLICATION

26. The Public Counsel's Application should also be denied. The Public Counsel argues that the Commission cannot reject individual tariff sheets but, instead, must reject a tariff filing in its entirety. There is no legal support for this position, as the Public Counsel's Application freely acknowledges. Implicit in the "file and suspend" method of ratemaking prescribed by Sections 393.140 and 393150 is the ability of the Commission to accept some tariff changes while rejecting others. The actions ordered by the Commission in the Order Rejecting Tariffs were simply an exercise of these statutory prerogatives. As stated previously, nothing in the Stipulation and Agreement prohibits Empire from filing a general rate case while its IEC is in effect. By ordering that all references to the ECR be excised from the Company's filing, the Commission accomplished two things: (1) it enforced the Commission's interpretation of the terms of the Stipulation and Agreement that restricted Empire from seeking an ECR while the IEC is in effect; and (2) it allowed the Company to exercise its legal right to seek an increase in rates, a right that was not restricted or limited by the terms of the Stipulation and Agreement.

WHEREFORE, Empire urges the Commission to deny the Praxair/Explorer Motion and the Public Counsel Application.

Respectfully submitted,

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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 3RD day of July, 2006, to:

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