

**FINNEGAN, CONRAD & PETERSON, L.C.**

**ATTORNEYS AND COUNSELORS AT LAW**

**1209 PENNTOWER OFFICE CENTER  
3100 BROADWAY  
KANSAS CITY, MISSOURI 64111**

**(816) 753-1122  
TELECOPIER (816) 756-0373**

Internet: [stucon@fcplaw.com](mailto:stucon@fcplaw.com)

**JEREMIAH FINNEGAN, P.C.  
STUART W. CONRAD  
C. EDWARD PETERSON\***

**\*ALSO ADMITTED IN  
KANSAS AND MASSACHUSETTS**

Writer's 24-Hour Number:  
(800)821-5073 PIN:247-4501

March 1, 2001

FEDERAL EXPRESS

Mr. Dale H. Roberts  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
200 Madison Street, Suite 100  
Jefferson City, Missouri 65101

**FILED<sup>3</sup>**

**MAR 01 2001**

**Missouri Public  
Service Commission**

Re: **Empire District Electric Company  
Case No. ER-2001-452**

Dear Mr. Roberts:

Enclosed are the original and eight (8) conformed copies of a pleading, which please file in the above matter and call to the attention of the Commission.

An additional copy of the **INITIAL PAGE** of the material to be filed is enclosed, which kindly mark as received and return to me in the enclosed envelope as proof of filing.

Thank you for your attention to this important matter. If you have any questions, please call.

Sincerely yours,

FINNEGAN, CONRAD & PETERSON, L.C.

By: 

Stuart W. Conrad

SWC:s  
Enclosures  
cc: All Parties

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

FILED<sup>3</sup>

MAR 01 2001

Missouri Public  
Service Commission

In the Matter of the Tariff Revi- )  
sions of The Empire District Elec- )  
tric Company Designed to Increase )  
Rates on an Interim Basis for Elec- )  
tric Service to Customers in its )  
Missouri Service Area )

Case No. ER-2001-452

INTERVENOR PRAXAIR'S RESPONSE IN OPPOSITION  
TO MOTION FOR EXPEDITED TREATMENT  
AND TO IMPLEMENT TARIFF SHEETS IN LESS THAN THIRTY DAYS

COMES NOW Intervenor Praxair Inc (Praxair) and responds to the Motion for Expedited Treatment and to Implement Tariff Sheets in Less than Thirty Days that was filed herein on February 16, 2001 by Empire District Electric Company (Empire):

1. Praxair is believed to be Empire's largest retail customer. In its February 16, 2001 filing, Empire has proposed rate increases that would have a dramatic effect upon Praxair's operations in Empire's service territory.

2. Despite that effect, Praxair received insignificant notice of the filing and was not consulted in any manner with respect to the filing. As a welcome professional courtesy, Empire counsel telephoned Praxair counsel with respect to the filing late in the forenoon of the day the filing was made.

3. Praxair forthwith applied to intervene. There is no basis for opposition to the application, but as of yet, the Commission has not acted to grant this motion. However, the proposed effective date for the rate change would be less than

the time period provided under Commission rules for responding to Praxair's Application to Intervene. On its face, such expedited treatment is not only unwarranted, but would be an outright denial of due process to Praxair. Empire justifies its delay in filing by referencing loss of "talented and long-term employees, many . . . in the regulatory and planning area." Those employees did not somehow transfer their employment to Praxair making us able to respond in less than ten days.

4. Empire has failed to provide Praxair counsel with a complete copy of the filing. Empire counsel has stated that a "protective order" is necessary for Praxair counsel to review the "highly confidential" aspects of the filing and that such material will not be provided until Praxair has been "made a party." Regardless of the circularity of this reasoning, Praxair has not had access to what are apparently critical parts of the filing. This response is, accordingly, without prejudice to Praxair's right to provide a further response at a later time when information asserted to be "confidential" is provided to counsel.

5. Praxair has already tendered data requests to Empire seeking supporting documentation with respect to this filing. Under Commission rules, twenty days are allowed for a response and even though a more prompt response was requested, counsel has received, at this point, nothing. Even if Praxair had tendered such data requests instantly upon the filing, responses thereto technically would not be due until four days

after the effectiveness of the rates as proposed by Empire. As above, this time discrepancy shows on its face that permitting the rate increase to take effect as proposed would be an outright denial of procedural due process to Praxair.

6. Even cursory examination of the materials supplied indicates that the requested expedited treatment would neither be warranted or justified. That examination shows:

a. Empire has completely failed to show (or even to assert) that it meets any of the three recognized conditions that would justify emergency interim rate relief under established Missouri law. Empire has not shown

- that additional funds are needed immediately,
- that the need for such funds cannot be postponed, and
- that no other alternatives exist to meet the funding need other than rate relief.

*In Re Missouri Public Service Company*, 20 Mo.P.S.C. (N.S.) 244 (Missouri P.S.C. Case No. 18,502, 1975).

b. Empire has wholly failed to offset actual cost reductions in personnel against projected gas cost increases.

(1) During the recent merger hearings involving Empire and UtiliCorp, Empire witnesses testified that about one-third of Empire's personnel had been laid off as a result of preparation for the merger. Case No. EM-2000-369, Transcript, Vol 2, p. 136, l. 24.

(2) Even in this filing Empire witness Gipson acknowledges that 62 jobs have been lost "[e]xcluding retirements, terminations, long-term disability and deaths." Gipson Prefiled Direct, p. 6. The direct and indirect expenses associated with those personnel losses are, nonetheless, currently included in Empire's rates and are, currently, being recovered from its customers.

(3) Although the exact amount of these cost reductions is not known, it may reasonably be assumed that they are an average of \$50,000 each, which would represent actual cost reductions of \$3.1 million.<sup>1/</sup> This rough calculation would not take into account the actual reductions in other benefits that might represent as much as \$1.5 million for a total of \$4.6 million.

(4) These are **actual** costs, not projected costs, and they would be essentially contemporaneous with the claimed natural gas cost increases. Depending upon what full investigation might reveal, they certainly would partially offset and might even **fully offset** appropriate gas cost increases.

c. Empire has wholly failed to make any allowance, adjustment or recognition of growth that has occurred in

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<sup>1/</sup>Witness Gipson characterizes these lost personnel as "many talented and long-term employees," a "base of talent," (Gipson Prefiled Direct, p. 4, 5) and identifies the areas impacted as "skilled crafts, planning, regulatory, information technology, engineering, accounting and finance." Gipson Prefiled Direct, p. 6

its customer base since its last rate case. In the recent merger case, Case No. EM-2000-369, Empire President McKinney testified that Empire was continuing to experience growth in the Branson service area (Case No. EM-2000-369, Transcript Vol. 2, p. 131) and that growth was becoming "more profitable with time." *Id.*, p. 132. Indeed, we would not be surprised to find, upon review of the currently withheld "confidential" information, that Empire's rate of return had actually increased during the very period of time that it was facing gas cost increases.

d. Empire asserts that, to aid its finances, "[t]ravel and seminars or conferences have been curtailed and require senior officer approval." Apparently such approval is granted if the reason for the trip is to lobby the General Assembly or testify at legislative hearings.

e. In the last few months, Empire management has certainly been "occupied" if not altogether distracted by its pursuit of the now-defunct merger with UtiliCorp. At the same time, the potential for gas cost increases was well known perhaps as much as nine months to more than a year ago. Given the imminence of a new gas-fired plant coming on line, it is presently uncertain, and certainly unproved, that Empire management was not "diverted" from attention to simple risk management and hedging devices that would have insulated it from significant portions of the gas cost increases that the market has experienced. A good

portion of Empire's "problem," if problem it be, may be of Empire's own making.

f. Empire admits that it has ability to continue to finance its operations.<sup>2/</sup> Empire's preparations for a now-collapsed merger such as repurchasing its preferred stock and adjusting its debt/equity ratios are indisputably the results of Empire management decisions.

(1) Empire's commitment not to issue additional capital stock was clearly merger driven. It is uncertain what financing opportunities might have been missed while Empire was preoccupied by its merger travails. Given the present ability of Empire to finance, Empire's attempt to obtain compulsory financing from its ratepayers should be rejected. Empire should not be shielded from the effects of its own management decisions. Moreover, if and to the extent that financing is now more costly as a result of decisions related to the ill-fated merger, Empire's customers should be shielded from those decisions. We believe that the Commission is obliged not only to protect customers from adverse effects of a merger but also to protect them from adverse effects of a collapsed merger.

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<sup>2/</sup>Witness Gipson asserts that rating agencies will take a "dim view" of any "material financial deterioration" which "in turn **will** raise the cost of debt plus have **a compounding effect** on our ability to raise equity capital." Gipson Prefiled Direct, p. 8-9. Witness Gipson stops well short of asserting that Empire is presently unable to borrow or raise equity capital or even is facing such a potential.

(2) Circumstances that result from what Praxair stated at the time was an ill-advised merger should not be turned back against Empire's ratepayers. Further, Praxair obtains its funding from lenders and from those who voluntarily invest in Praxair's enterprise. Praxair does not obtain capital from its shareholders or from its lenders so as to unwillingly loan it to Empire to finance Empire's enterprise.

g. Empire appears intent on causing its Missouri customers to support its enterprise with conscripted capital that it is fully able to obtain in the capital markets. Praxair competes from its Neosho, Missouri facility with Praxair competitors in surrounding states of Arkansas, Oklahoma and Kansas. We are unable to understand why Praxair's Missouri operation should support lower rates for Praxair's competitors in other states.

h. Empire's track record in past interim "emergency" cases is not good. Each interim case has been accompanied by claims of impending doom if relief was not instantly forthcoming. Upon investigation, however, none of Empire's interim requests since 1980 have been demonstrated to have been warranted. And yet, astonishingly, Empire has not only remained in business, but has, in fact, prospered despite its own dire predictions.<sup>3/</sup> Empire's track record, coupled with the clear admissions in this case of actual cost reductions from the merger

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<sup>3/</sup>To paraphrase Mark Twain: "The report of my financial exigency has been greatly exaggerated."



case and testimony regarding customer growth, inspire neither trust nor confidence in Empire's assertions. Empire cries "wolf" too easily and too often.

7. Praxair also has concerns regarding the method proposed for recovery. Although we have requested workpapers, none have yet been received. It appears that the approach appears to have been simple division which Witness Gipson characterizes as an "equal percentage basis utilizing the existing approved rate design using a kWh surcharge basis." An equal cents per kWh increase dramatically impacts rate of high load factor customers and completely overlooks the fact that Praxair, as a high load factor, fully interruptible customer, has load characteristics that do not align with the classes of customers necessitating the natural gas burn. Accordingly, Praxair's consumption may be a different times and at different periods so that to assume that all kWh it uses bear equal natural gas costs is incorrect. These differences may make little difference to a smaller customer, but make a dramatic difference to Praxair. The appropriateness of this methodology and its relationship to the costs it claims to recover are questionable.

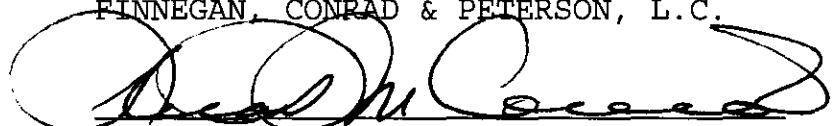
8. Bankruptcy of a public utility is, without doubt, serious business and is not in anyone's interest. However, based on this filing, Empire is miles from the courthouse door. If Empire is confident of its current financial exigency, it should clearly have an opportunity to demonstrate that case. Just as

clearly, those skeptical or even opposed should have the ability to challenge Empire's contentions and require that it prove that it is in an emergency situation. The time proposed by Empire is simply insufficient and suggests not Empire's confidence in the substance of its case, but rather fear that its case will collapse under even brief scrutiny.

WHEREFORE, for the foregoing reasons, Empire's Motion for Expedited Consideration should be denied as well as its included Motion to Implement Tariffs on less than Thirty Day's Notice. Instead, the proposed tariffs should be suspended for an appropriate period to permit investigation of Empire's claims of financial exigency and a procedural schedule established consistent therewith.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.

A large, stylized handwritten signature in black ink, appearing to read 'Stuart W. Conrad', is written over a horizontal line.

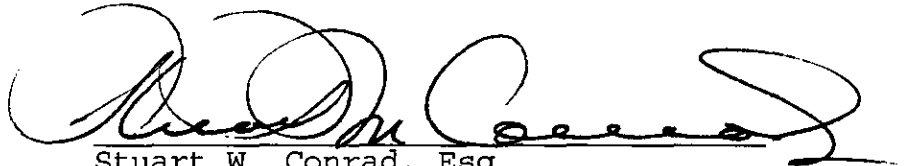
Stuart W. Conrad Mo. Bar #23966  
3100 Broadway, Suite 1209  
Kansas City, Missouri 64111  
(816) 753-1122  
Facsimile (816) 756-0373  
Internet: stucon@fcplaw.com

ATTORNEYS FOR PRAXAIR, INC.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated: March 1, 2001

A handwritten signature in black ink, appearing to read "Stuart W. Conrad", written over a horizontal line.

Stuart W. Conrad, Esq.  
An attorney for Praxair Inc.