

**BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI**

| | | |
|-----------------------------------------------|---|-----------------------|
| In the matter of the tariff filing of The |) | |
| Empire District Electric Company |) | |
| to implement a general rate increase for |) | Case No. ER-2006-0315 |
| retail electric service provided to customers |) | |
| in its Missouri service area. |) | |

**EMPIRE’S RESPONSE TO THE APPLICATIONS FOR REHEARING
OF PUBLIC COUNSEL AND PRAXAIR/EXPLORER**

COMES NOW The Empire District Electric Company (“Empire” or the “Company”), by and through counsel, and for its Response to the Applications for Rehearing of the Office of the Public Counsel (“Public Counsel”) and Praxair, Inc. and Explorer Pipeline Company (“Praxair/Explorer”), filed herein on December 13, 2007, Empire respectfully states as follows to the Missouri Public Service Commission (the “Commission”):

1. Empire submits it would be prudent for the Commission to afford itself an opportunity to reconsider various orders issued by the Commission herein, to-wit: (a) the Order Vacating December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs, and Order Approving Tariffs issued December 4, 2007, to be effective December 14, 2007, as modified by the Notice of Correction issued on December 4, 2007; (b) the Report and Order issued December 21, 2006, to be effective December 31, 2006; and (c) the Order Supplementing and Clarifying Report and Order issued January 9, 2007, to be effective January 19, 2007 (collectively, the “Orders”).

2. Empire does not wish to cause undue administrative hardship or unnecessary delay in the processing of this case. This case has been before the Cole County Circuit Court and/or the Missouri Supreme Court for almost one year, however, and it is possible that the Commission will be dealing with this case, in one form or another, for the foreseeable future. As

such, Empire submits that the Commission should take this opportunity to put itself in the best possible position with regard to its duties and to possible challenges to the Orders.

3. With their various applications for rehearing, Public Counsel and Praxair/Explorer allege procedural deficiencies with respect to the Orders. Although Empire does not agree with the statements set forth in those applications for rehearing, without conceding any issues, or waiving any positions, Empire asserts that if the Commission determines that certain of the alleged procedural errors should be addressed and resolved, such could be accomplished upon reconsideration by the Commission and the possible issuance of a new report and order and order approving tariffs.

Comments Regarding the Application for Rehearing of Praxair/Explorer

4. With their Application for Rehearing filed herein on December 13, 2007, Praxair and Explorer primarily restate arguments which have been taken up and rejected by the Commission and the Courts. The Commission is not required to hold a hearing prior to issuing an order such as the Order Approving Tariffs issued herein on December 4, 2007. In fact, the Commission may permit new rates to take effect based on a mere tariff filing by a utility – without a hearing and without the issuance of an order. *See* RSMo. §393.140(11); *State ex rel. Laclede Gas Company v. Public Service Commission*, 535 S.W.2d 561, 566 (Mo.App. 1976); *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41 (Mo. banc 1979).

5. The holding of *State ex rel. Coffman v. Public Service Commission*, 121 S.W.3d 534 (Mo.App. W.D. 2003), is also applicable to the objections of Praxair/Explorer. The Western District held as follows:

Despite the lack of a statutory requirement for a hearing, Public Counsel argues that a hearing is required by law because there is a protected property interest at stake. This argument, however, is not supported by extant precedent. The Missouri Supreme Court has held that there is no protected property interest in a

particular utility rate. . . . To accept that argument would be to grant a right of hearing in all “file and suspend” cases, a result inconsistent with other cases which clearly hold that the decision of whether to suspend a tariff and hold a hearing is a matter for the sound discretion of the Commission.

Id. at 539 (internal citations omitted).

Comments Regarding Public Counsel’s Application for Rehearing

6. With regard to the Order Vacating December 29, 2006 Order Granting Expedited Treatment and Approving Tariffs, and Order Approving Tariffs issued December 4, 2007, to be effective December 14, 2007, Public Counsel, among other things, asserts that the issuance of said order has now displaced other tariffs of the Company filed during 2007. Empire disagrees with this assertion, but it may be prudent for the Commission to address this matter through a new order.

7. It is Empire’s position that the Public Counsel is correct that the Order Approving Tariffs issued on December 4, 2007, should, upon reconsideration, be amended to the extent necessary to clarify that said order does not purport to displace or otherwise impact tariffs which were approved or which otherwise took effect between the effective date of the original Report and Order and the effective date of the recent Order Approving Tariffs.

8. First, the recently issued Order Approving Tariffs did not address and should, therefore, have no impact on “original” sheets which took effect between January 2 and December 13, 2007. Those tariff sheets stand on their own and have no relationship to the subject order. It is also Empire’s position that the recent Order Approving Tariffs did not displace or otherwise impact subsequently filed, revised sheets. For example, the recently issued Order Approving Tariffs approves the No. 5, Section A, 21st Revised Sheet No. 1 for Empire’s service to its customers. On its face, this sheet simply replaces the 20th Revised Sheet. Issues concerning this tariff sheet became moot when the sheet was replaced by the 22nd Revised Sheet No. 1, replacing the 21st Revised Sheet, which became effective on March 7, 2007. The

22nd Revised Sheet No. 1 has not been found to be unjust or unreasonable, nor has any challenge to that tariff sheet been raised.

9. Empire would, however, encourage the Commission to amend or clarify its Order Approving Tariffs after reconsideration to the extent necessary to clarify that the tariffs that became effective between January 2 and December 13, 2007, remain in effect and are not impacted by the Commission's order issued in response to the Missouri Supreme Court's decision in SC88390.

Empire's Recommendation

10. In the event the Commission affords some opportunity for reconsideration or rehearing, Empire suggests that the parties be provided with the opportunity to submit proposed plans of action and/or proposed orders for consideration by the Commission and the Administrative Law Judge.

11. Empire believes it is important to note that certain pending applications for rehearing should not be addressed unless and until *all* applications for rehearing are addressed by the Commission – this applies to both pending applications and applications which may be filed with regard to any order issued upon reconsideration. Dealing with all rehearing/reconsideration applications simultaneously should avoid piecemeal appeals to the Circuit Court. If the Commission were to rule upon the tariff order rehearing applications with issues regarding the underlying Report and Order (or any order upon reconsideration) remaining before the Commission, then the Commission could once again prematurely lose jurisdiction of the case.

WHEREFORE, The Empire District Electric Company respectfully submits this response with regard to the Applications for Rehearing of Public Counsel and Praxair/Explorer and respectfully requests the opportunity to submit a proposed order for consideration by the Commission and the Administrative Law Judge.

BRYDON, SWEARENGEN & ENGLAND, P.C.

By: _____/s/ Diana C. Carter_____

James C. Swearengen MBE #21510

Dean L. Cooper MBE #36592

Diana C. Carter MBE #50527

312 East Capitol Avenue

P.O. Box 456

Jefferson City, MO 65102

(573) 635-7166

(573) 635-7431 (facsimile)

DCarter@BrydonLaw.com

ATTORNEYS FOR THE EMPIRE DISTRICT
ELECTRIC COMPANY

Certificate of Service

I hereby certify that the foregoing has been hand-delivered or transmitted by facsimile or electronic mail to all counsel of record on the 21st day of December, 2007.

_____/s/ Diana C. Carter_____