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September 18, 2006

Ms. Colleen M. Dale
Secretary
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

FILED³

SEP 18 2006

Missouri Public
Service Commission

Re: Case No. ER-2006-0315

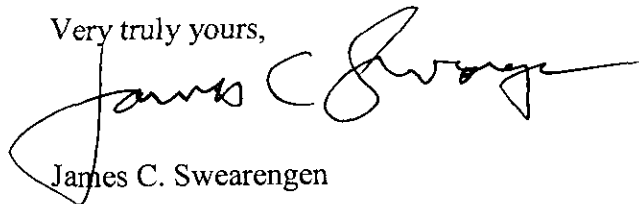
Dear Ms. Dale:

On behalf of The Empire District Electric Company enclosed please find an original and eight (8) copies of Empire's Response to Praxair and Explorer's Application for Rehearing for filing in the above-referenced case.

Would you please bring this filing to the attention of the appropriate Commission personnel.

Thank you very much for your assistance.

Very truly yours,



James C. Swearengen

JCS/lar
Enclosures
cc: All Parties of Record

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

SEP 18 2006

Missouri Public
Service Commission

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
PRAXAIR AND EXPLORER'S APPLICATION FOR REHEARING**

Comes now The Empire District Electric Company ("Empire" or the "Company"), by counsel, and for its Response to the Application for Rehearing filed herein by Praxair, Inc. ("Praxair") and Explorer Pipeline Company ("Explorer") on September 8, 2006, respectfully states as follows to the Missouri Public Service Commission (the "Commission"):

1. On August 18, 2006, the Staff of the Commission ("Staff") and the Company filed a Stipulation and Agreement as to Certain Issues (the "Stipulation"). Copies were provided to all parties to this proceeding. The Stipulation was not signed by several parties to this proceeding, and, as such, it was filed as a non-unanimous stipulation pursuant to Commission Rule 4 CSR 240-2.115(2)(A). Ultimately, however, the Commission was allowed to treat the Stipulation as unanimous pursuant to Commission Rule 4 CSR 240-2.115(2)(C), in that no non-signatory filed a timely objection to the Stipulation or any portion thereof.

2. Additionally, pursuant to 4 CSR 240-2.115(2)(B), each non-signatory ultimately waived its right to a hearing on the issues addressed by the Stipulation by failing to file an objection within seven days from the filing of the Stipulation. The Rule reads, in pertinent part (emphasis added), as follows:

(B) Each party shall have seven (7) days from the filing of a nonunanimous stipulation and agreement to file an objection to the nonunanimous stipulation and agreement. **Failure to file a timely objection shall constitute a full waiver of that party's right to a hearing.**

(C) If no party timely objects to a nonunanimous stipulation and agreement, the commission may treat the nonunanimous stipulation and agreement as a unanimous stipulation and agreement.

Paragraph 13 of the Stipulation reads, in relevant part, as follows:

The Staff also shall have the right to provide, at an agenda meeting at which this Stipulation and Agreement is noticed to be considered by the Commission, whatever oral explanation the Commission requests; provided, that the Staff shall, to the extent reasonably practicable, provide the other Parties with advanced notice of when the Staff shall respond to the Commission's request for such explanation once such explanation is requested from the Staff.

3. The Stipulation was posted on the Commission's August 22, 2006 Agenda as an item under "Case Discussion" and was again posted on the Commission's August 29, 2006 Agenda – thereby evidencing the Commission's intent to consider the Stipulation. These Agendas were posted and became publicly available at least 24 hours prior to each scheduled agenda meeting.

4. On August 29, 2006, the Commission, at the regularly scheduled public agenda meeting, asked for Staff to provide information on the Stipulation. A court reporter was present.

5. Before the Commissioners asked questions of Staff at the August 29 agenda meeting, Steve Dottheim, counsel for Staff, stated that he had just visited with Stu Conrad, counsel for Praxair/Explorer. (Transcript Volume 6, page 2) Mr. Dottheim then noted that David Woodsmall was present in the agenda room. (*Id.*) Mr. Woodsmall, on behalf of Praxair/Explorer then stated as follows: ". . . I have no problems with you asking questions, but it would not constitute competent and substantial evidence

because it was never noticed." (*Id.*) Mr. Woodsmall also stated, "We are not objecting to the stipulation." (*Id.* at 3.) Shortly thereafter, Mr. Conrad joined the discussion, as did Lewis Mills of the Office of the Public Counsel.

6. Chairman Davis asked for legal counsel to make their entries of appearance. Mr. Dottheim noted his appearance for Staff, Mr. Mills noted his appearance for the Office of the Public Counsel, and Mr. Conrad noted his appearance for Praxair and Explorer. (*Id.* at 3-4.) Commissioner Clayton asked if any party had filed a timely objection to the Stipulation, and Judge Dale stated that no objections had been filed within the time permitted by the Rule. (*Id.* at 5-6.) Judge Dale then suggested that the Commissioners direct any questions they may have to Mr. Dottheim and Mr. Mark Oligschlaeger of the Staff. (*Id.* at 6.)

7. At one point during the discussion, Commission Murray asked a question regarding the continuation of the IEC. (*Id.* at 12.) As Mr. Oligschlaeger began to answer, Mr. Woodsmall raised an objection regarding the question going outside the bounds of a question and answer session on the Stipulation. (*Id.* at 13.) Commissioner Murray promptly withdrew her question. (*Id.*) The discussion proceeded, and no other objections were made by counsel for Praxair/Explorer. Mr. Woodsmall did, however, state the following:

Your Honor, I guess to help out at this point, the industrials didn't file any testimony on any of the issues [resolved by the Stipulation]. We monitored what Staff had done, but we don't have an independent and unique number on these issues.

(*Id.* at 16.) At the conclusion of the discussion, Mr. Conrad said, "I'm just sitting watching. I just would like to be sure I get a copy of the transcript." (*Id.* at 23.)

8. Thereafter, an Order Approving Stipulation and Agreement as to Certain Issues was posted on the August 31, 2006 Agenda as an item under "Tariff and New Orders." This Agenda was posted and became publicly available at least 24 hours prior to the scheduled agenda meeting.

9. On August 31, 2006, the Commission issued its Order Approving Stipulation and Agreement as to Certain Issues ("Order"). In approving the Stipulation, **the Commission made no changes to the terms of the Stipulation.** The Commission noted that no party had filed a timely objection, cited to Rule 4 CSR 240-2.115, found the Stipulation to be reasonable and approved it.

10. Praxair and Explorer allege that the Order is unlawful because it denies non-signatory parties their constitutional right to due process, is in direct violation of the prohibition against *ex parte* communications, violates parties' rights to a fair and impartial decision maker, and is not based on competent and substantial evidence. Each of these arguments is without merit.

11. Praxair/Explorer failed to file a timely objection to the Stipulation. Pursuant to Rule 4 CSR-2.115(2) and the terms of the Stipulation, Praxair/Explorer thereby waived their right to a hearing on the issues addressed by the Stipulation. Because the Commission approved the Stipulation without modification, Praxair/Explorer are bound by its terms.

12. In paragraphs three, four, and five of their Application for Rehearing, Praxair and Explorer point to certain provisions of the Stipulation and then state, in paragraph six, that they did not object to the Stipulation because "any Commission attempt to modify **this procedure** would necessarily result in the Stipulation being void." (emphasis added) No authority is cited for this assertion by Praxair/Explorer, and

Empire is unaware of any such authority. If the Commission had changed **the terms of the Stipulation** and had not approved the Stipulation as proposed, then the Stipulation would have been void – but this did not happen.

13. In paragraph seven of their Application for Rehearing and pointing to the fact that “neither the Commission nor Staff provided other parties with notice of the Commission’s intent to communicate with the Staff,” Praxair/Explorer assert that, “by its very terms, the Stipulation was void.” Again, no citation to the Stipulation or other legal authority is provided to support this assertion by Praxair/Explorer, and Empire is unaware of any such provision in the Stipulation which would void the agreement under these circumstances. In fact, in this regard, the actions of the Commission and the Staff were consistent with the Rule 4 CSR 240-2.115 and the terms of the Stipulation, specifically paragraph 13.

14. Praxair/Explorer assert that an *ex parte* discussion took place between Staff and the Commission at the August 29 agenda meeting. In this regard, however, the discussion was specifically contemplated by paragraph 13 of the Stipulation. Moreover, two attorneys for Praxair/Explorer were present for this alleged *ex parte* communication. Additionally, as stated above, notice of the discussion was provided via the posted Agenda, and Mr. Dottheim used his best efforts to notify the parties of the discussion that morning.

15. In order to satisfy due process, a hearing is required before the Commission may approve a *nonunanimous* stipulation, but Empire is aware of no statute or principle of common law that requires a hearing before a unanimous stipulation may be approved by the Commission. As stated above, because no party

filed a timely objection, the Commission was entitled to treat this Stipulation as a unanimous stipulation and agreement.

16. Praxair and Explorer allege a violation of Rule 4 CSR 240-4.020 as a result of the agenda meeting discussion. As indicated, however, the discussion was contemplated by paragraph 13 of the Stipulation and was conducted in conformity therewith. Further, Praxair/Explorer were not harmed or prejudiced by the agenda meeting discussion in which the Stipulation was considered. Praxair and Explorer had not one, but two attorneys present for this Commission proceeding. Notice had been provided. The terms of the Stipulation to which Praxair/Explorer had not objected, were approved.

Wherefore, The Empire District Electric Company respectfully requests that the Commission issue its order denying Praxair and Explorer's Application for Rehearing. Alternatively, Empire would have no objection to the Commission setting a hearing to take up the issues covered by the Stipulation and the Stipulation itself – as if Praxair/Explorer had made a timely objection to the Stipulation and requested a hearing on the issues addressed therein.

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 electronically transmitted, sent by U.S. Mail, postage prepaid, or hand-delivered, on this 18TH day of September, 2006, to:

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gencounsel@psc.mo.gov

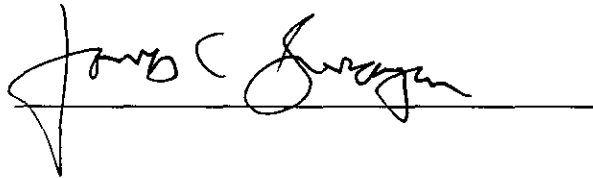
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A handwritten signature in dark ink, appearing to read "James C. Swearingen", is written over a horizontal line.