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**

REPLY TO EMPIRE'S RESPONSE TO MOTION TO REJECT SPECIFIED TARIFF SHEETS AND STRIKE TESTIMONY

COMES NOW, Praxair, Inc. ("Praxair") and Explorer Pipeline, Inc. ("Explorer"), and in support of their Reply to Empire's Response to Motion to Reject Specified Tariff Sheets and Strike Testimony ("Reply") respectfully states as follows:

1. On May 2, 2006, the Commission issued an Order Clarifying Continued Applicability of the Interim Energy Charge ("Clarifying Order"). This Clarifying Order clearly provides for a single finding of fact, "Empire is precluded from requesting the use of another fuel adjustment mechanism during the period in which the IEC is in effect." In dicta attached to the Clarifying Order the Commission notes the following:

> However, Empire **may** have the option of requesting that the IEC be terminated. If the Commission grants that request, once the IEC is terminated, Empire would be able to request an alternative fuel adjustment mechanism.[1]

Importantly, the Commission continues on to point out that "[t]he Stipulation and Agreement was freely negotiated. Consideration was given and received. The Commission approved it and it is binding."[2]

---

[1] Clarifying Order at page 3 (emphasis added).
[2] *Id.*

2. The language that the Commission used in discussing Empire's ability to terminate the IEC is determinative. The Commission used forward-looking language that reflected Empire's future ability ***to*** exercise its option, specifically the use of the phrase "***may*** have the option of requesting". This contrasts with language that would have been appropriate had the action already occurred, for example: "Empire has exercised its option of requesting". Necessarily by its language in the Clarifying Order, the Commission has recognized that Empire has not yet properly exercised its option, if such an option exists, to terminate the IEC.

3. Contrary to the Commission's previous dicta that Empire "may have the option of requesting" termination of the IEC, a review of Section 386.266 provides an ***outright ban***, against the Commission terminating the IEC prior to the completion of the entire three year term of the IEC. Although not originally approved under the auspices of SB179, the subsequently enacted provisions of SB179 is now law and would undoubtedly apply to any fuel adjustment mechanisms in effect at the time it became law. Section 386.266.8 provides, "[i]n 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***." Recognizing that the IEC in question constitutes an incentive plan for the recovery of fuel expenses and has been lawfully approved by the Commission, Section 386.266.8 is an outright bar to the Commission terminating the IEC prior to the "entire term of the plan."

Given the existence of its IEC at the time of the 2005 legislative session and recognizing that Empire was deeply involved in the utility effort to pass SB179, Empire was doubtless aware of the content of SB179 as it was taking its legislative path and, indeed, the very inclusion of IECs in SB179 is obviously purposed at retaining or

buttressing Empire's existing arrangement. As noted in Praxair / Explorer' earlier pleadings on this issue,[3] Empire was then touting the values of its IEC to the financial community. While Empire's IEC was agreed to by the parties to the ER-2004-0570 Stipulation and approved by the Commission, there still existed a risk that another entity could show up and challenge the legality of Empire's IEC. In light of this risk, the wording of what became Section 386.266.8 was undoubtedly specifically urged and chosen to remove any doubt regarding the ongoing viability of Empire's then-cherished IEC. Clearly given the explicit recognition of an interim energy charge within the provisions of SB179, as well as the outright ban on the Commission terminating such plans prior to the "entire term of the plan", it would appear to be unlawful for the Commission to take any action to disturb Empire's IEC.

Undoubtedly, Empire will argue that the ban contained in Section 386.266.8 does not apply to its IEC because this IEC was not approved under the provisions of SB179. Section 386.266 contains no such exculpatory language. Recognizing that the Empire and Aquila IECs were in effect at the time of the enactment of SB179, the General Assembly differentiated between adjustment mechanisms that may come into existence under the provisions of SB179 and those that may already be in existence through some other process. For instance, Section 386.266.5 provides, "[o]nce such an adjustment mechanism is approved by the commission ***under this section***, it shall remain in effect until such time as the commission authorized the modification, extension or discontinuance of the mechanism in a general rate case or complaint proceeding." The methodology for discontinuing adjustment mechanisms "approved by the commission

[3] See Response of Praxair, Inc. and Explorer Pipeline Company To Motion for Clarification or, in the alternative, Request for Extension To Conduct Further Discovery and Motion for Hearing, filed April 24, 2006, at pages 24-26.

under this section" contrasts with the absolute bar contained in Section 386.266.8 to discontinuance any plan that is already in existence. Specifically, Section 386.266.8 does not contain the previously referenced language that the adjustment mechanism must be approved "under this section". Rather, this absolute bar is intended to be targeted at any ***currently existing mechanisms***.

4. In its Reply to Praxair / Explorer's Motion, Empire readily admits that the Commission should "reject the three tariff sheets containing Empire's ECR proposal". That said, Empire opposes the additional relief sought in Praxair / Explorer's Motion on the basis that it should be allowed "to recover its current level of fuel and purchased power costs through base rates." Recognizing that the currently effective Interim Energy Charge ("IEC") would act as a bar to its attempt to recover fuel and purchased power costs through base rates, Empire suggests that its current case filed on February 1, 2006 implicitly provides a request to terminate the IEC. Empire's suggestion is in obvious conflict with Section 386.266.8 as well as the Commission's Clarifying Order, issued three months later, which indicates that while Empire "may have the option" to terminate, as of May 2, 2006, it had not yet properly sought to exercise this option.

5. Indeed, even if such an option did exist, exercise would certainly involve more than merely filing tariff sheets. Instead, the request to be relieved of the obligations of a contract that the Commission has previously approved and found to be binding would require nothing less than a formal application. In fact, in the event that another party to the Stipulation had wished to terminate the IEC, it could not seek such termination through the filing of tariff sheets. Rather, such relief would be initiated through the filing of a formal complaint. It therefore only makes sense that Empire's purported termination could not be commenced by merely filing tariff sheets, but would

instead require a filing with formalities commensurate with those of a complaint. The February 1, 2006 tariff sheets are not sufficient in this regard. Rather, Empire should be required to file a formal application. Such a requirement would be consistent with the Commission's determination that, as of May 2, 2006, Empire had yet to properly request termination of the IEC.

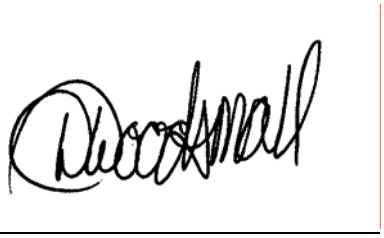
6. In substance, Empire's reply represents a collateral attack on the findings of the Clarifying Order. While Empire had the ability to seek rehearing or clarification of the Clarifying Order, it did not exercise this ability. Now, a month later, Empire seeks a clarification that Empire has already exercised any option that it may have to terminate the IEC. Such collateral attack on a final Commission Order is expressly precluded by Section 386.550 RSMo.

7. Praxair / Explorer continue to point out, as the Commission properly recognized in its Clarifying Order, that the "Stipulation and Agreement was freely negotiated. Consideration was given and received. The Commission approved it and it is binding." As such, any action contrary to the Stipulation and Agreement would effectively place the Commission in the position of vetoing decisions "freely negotiated" by Empire's management. As Praxair / Explorer has previously noted, while the Commission has a duty to ensure safe and adequate service at just and reasonable, case law clearly indicates that the Commission should not place itself in the position of managing the utility and that the utility's management must be given the freedom to make decisions and ultimately be held responsible for such decisions. The IEC package which the Commission found "binding" was for three years and involved a potential refund obligation for the benefit of the customers.

8. Finally, consistent with the Commission's finding that "[c]onsideration was given and received, Praxair / Explorer would point out that, in the event that the Commission released Empire from its obligations under the IEC, such consideration could never be returned to the ratepayers. Certainly while the Commission could order a return of all IEC revenues collected on an interim basis subject to refund, it can never reestablish the rights surrendered by Praxair / Explorer in the context of that approved Stipulation and Agreement. Specifically, as consideration for the three-year term of an IEC, Praxair / Explorer not only gave Empire the ability to collect costs over and above those reflected in base rates, Praxair / Explorer also surrendered any right it had to litigate the issue and seek rehearing / appeal of any Commission decision resulting from that case. No action by the Commission can return to Praxair / Explorer the consideration recognized by the Commission to have been "given" by Praxair / Explorer and already "received" by Empire.

WHEREFORE, Praxair / Explorer respectfully renew its request that the Commission: (1) reject the tariffs specified in Praxair / Explorer's previous Motion; (2) strike the testimony referenced in that Motion and (3) order Empire to revise certain schedules that are inconsistent with the Commission's previous order.

Respectfully submitted,



Stuart W. Conrad, MBE #23966
David L. Woodsmall, MBE #40747
3100 Broadway, Suite 1209
Kansas City, Missouri 64111
(816) 751-1122 Ext. 211
Facsimile: (816) 756-0373
Internet: stucon@fcplaw.com

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.

David L. Woodsmall

Dated: June 14, 2006