BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of the Future Supply, Delivery and Pricing of the Electric Service Provided by Kansas City Power & Light Company.	))))	**EW-2004-0596**

REPLY TO KCPL RESPONSE TO MOTION TO TERMINATE PROCEEDING

COMES NOW PRAXAIR, INC. ("Praxair") and replies to the Response of KCPL to Praxair's Motion to Terminate Proceeding as follows:

1. On January 18, 2005, Praxair filed its Motion to Terminate Proceeding ("Motion") requesting that this case be terminated immediately. Praxair's Motion was supported by two St. Louis-based industrial groups. The Office of the Public Counsel provided equivocal support for the Motion, expressing concern as to what proceeding would replace the EW proceeding.

2. On January 28, 2005, the participants Department of Natural Resources and the Sierra Club filed in support of Praxair's Motion. Commission Staff also filed in general support of the Motion, stating that it did not oppose Praxair's Motion. Staff also confirmed several of Praxair's points regarding the methods of making new rates under Missouri law and added some historic context and background.

3. Kansas City Power & Light Company ("KCPL") also responded to Praxair's Motion. KCPL did not appear to oppose Praxair's Motion, and in fact stated that it "did not oppose"

termination but wanted to wait for a report that it had "discussed" with Staff counsel, of course thereby confirming one of the assertions in Praxair's Motion regarding separate meetings.[1/]

4. Instead KCPL appears to suggest that the Commission reopen Case No. EO-2004-0577 "to provide an appropriate forum for the consideration and approval of any potential Stipulation and Agreement." KCPL then goes on to suggest that it and others "would expect to provide testimony to support any Stipulation and Agreement that might be reached" suggesting that the provisions of 4 CSR 240-2.115 could then be used if a non-unanimous stipulation were filed.[2/]

5. Once again, KCPL has it wrong. Changing case numbers does not make a non-contested case into a contested case. Section 536.010(4) RSMo defines what constitutes a contested case as "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing." An "agency" is certainly defined to include the Commission: "'Agency' means any administrative officer or body existing under the constitution or by law and authorized by law or the constitution to make rules or to adjudicate contested cases." As long as the procedure or case remains

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[1/] Praxair Motion to Terminate, p. 6.

[2/] KCPL Response, p. 5.

"investigatory," or is not an "adjudication," it is not a contested case.[3/]

6. As stated in our original motion (which KCPL does not dispute or challenge and which Commission Staff confirmed), there are two ways to make rates under Missouri law: file and suspend or complaint.[4/] Both are contested case proceedings in which Commission decisions will have to meet Constitutional tests and potential judicial scrutiny. Even if a filed rate is allowed to go into effect without a hearing, all relevant factors must be considered.[5/]

7. KCPL's approach does not satisfy Praxair's concerns. It is, again, nothing more than an attempted bootstrap around a full rate case procedure. It could conceivably even make the circumstances more confusing or "awkward" as they were termed by the Department of Natural Resources. KCPL seems to assume that the newly-reactivated "EO" docket would be nothing more than a receptacle for its unanimous or non-unanimous stipulation. If not all parties were agreeable to a "regulatory plan," which certainly seems more likely than not, KCPL asserts

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[3/] *Vacca v. Administrative Law Judge Review Commission*, 945 S.W.2d 50 (Mo. App., E.D. 1997).

[4/] *State ex rel. Utility Consumers Council, Inc. v. Public Service Com.*, 585 S.W.2d 41, 56 (Mo. *en banc* 1979); *State ex rel. Jackson County v. Public Service Com.*, 532 S.W.2d 20, 28 (Mo. 1975).

[5/] *State ex rel. Utility Consumers Council, Inc. v. Public Service Com.*, 585 S.W.2d 41, 56 (Mo. *en banc* 1979).

that the non-unanimous stipulation rules of 4 CSR 240-2.115 would apply. Pursuing that theory a bit further, a dissenting party could then have a "hearing." A hearing as to what issues? Whether the stipulation is acceptable? That seems to be KCPL's approach since it expects parties to submit evidence "in support" of its stipulation (whether unanimous or non-unanimous) and the hearing thus would be directed to the stipulation.

8. But a settlement is a settlement of ***something***. It is not a piece of *tabula rasa* legislation for the Commission to approve or not approve. ***Issues*** in a full rate case are often settled, and frequently by a non-unanimous stipulation. The hearing that a dissenting party would obtain would be a hearing regarding resolution of the ***underlying issues*** -- not whether the stipulation was in some manner to be "approved." That was the very error of the *Fischer*[6/] case and the identification of and development of these underlying issues are what would be "resolved" in a settlement stipulation. Were such unopposed, the Commission could simply approve or reject. But if a hearing is to be held, the hearing is on the underlying issues -- not on whether the stipulation represents some acceptable settlement of them. Testimony offered to support a stipulation is not evidence concerning the underlying issues.

[6/] See footnote 7, *infra*.

9. In *Fischer*, parties excluding the Public Counsel had settled an important issue -- rate design and class cost allocation -- in the underlying case. They filed their non-unanimous stipulation and sought Commission approval. The Commission took the stipulation and held a hearing, but the hearing held was whether the stipulation should be approved, which, not surprisingly, it was.

> In accordance with the agreement, the Commission ruled prior to the hearing that the only issue it would consider was whether or not the stipulation and agreement would be accepted or rejected, and a full and contested hearing would be held only in the event that the Commission rejected the agreement. The Commission allowed the Public Counsel's witness to present the Public Counsel's rate design proposal, and allowed the Public Counsel to cross-examine the opposing witnesses regarding their prepared testimonies. A few days later the Commission heard oral arguments, and announced that it had voted to dispose of the matter under the terms proposed in the agreement.[7/]

10. From this disappointing result, Public Counsel Fischer appealed contending that due process had been denied by this procedure. The courts upheld Mr. Fischer's arguments, ruling among other things:

> The findings in this case, as quoted above, are completely conclusory, and provide no insights into if and how controlling issues were resolved. There are ***many factual issues which the Commission would necessarily have considered before entering an order adopting***

[7/] *State ex rel. Fischer v. Public Service Com.*, 645 S.W.2d 39, 41 (Mo. Ct. App. 1982).

> ***a rate design*** for Laclede, but which are absent from the findings of fact.[8/]

11. The death knell for KCPL's bootstrap procedure is sounded in the following language from the same decision:

> ***The hearing procedure followed in this case failed to satisfy the due process requirement.*** Although Public Counsel was allowed to present his rate design proposal and to cross-examine the opposing witnesses, the Commission had previously decided that the only issue it would consider was ***whether or not to approve the stipulation and agreement.*** In light of this decision, the hearing afforded Public Counsel was not meaningful, in that the Commission was precluded from approving anything but the stipulated rate design in the course of the hearing in question. The question properly before the Commission was what rate design to adopt, rather than whether or not to adopt one particular proposal. Thus, the hearing procedure adopted in this case was a violation of the due process which should be accorded to Public Counsel in his capacity as the representative of the public
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> . . . .
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> [T]he limited hearing procedure used in this case was unauthorized ***By adopting the stipulation agreement rather than conducting a full and contested hearing on the rate design issue, the Commission was able to avoid making proper findings of act.*** In addition, the hearing procedure in this case ***violated due process of law*** by denying Public Counsel an fair and meaningful opportunity to be heard.[9/]

[8/] *Id.*, at 42-43 (emphasis added)

[9/] *Id.*, at 43, 44 (emphasis added).

12. Ironically, from this very case came the Commission's present procedure for dealing with non-unanimous stipulations that makes the contested non-unanimous stipulation into nothing more than a "joint recommendation" of the signatory parties.[10/] As such, it would need to be a "joint recommendation" about the resolution of some issue or issues and there would be no evidentiary base for such a decision or, indeed, for a joint statement of position, provided by testimony that was filed "in support of the stipulation." In its single-minded attempt to avoid regulatory and public scrutiny, this inherently simple point eludes KCPL.

13. KCPL urges the Commission to create a docket into which it can then "insert" its yet-to-be-agreed-to-stipulation, file testimony to "support" that stipulation, and then hold a hearing for any dissenters from this stipulation -- all without ever broaching the dangerous territory of having to prove up its claims of increased revenue needs or without even having to demonstrate that its present revenues and tariffs are not excessive or discriminatory. As with the issues that were ruled unlawfully closed down in *Fischer*, KCPL would close down numerous issues here including the typical issues of class cost of service, cost of money, rate base, accounting, revenue and expense

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[10/] 4 CSR 240-2.115. In effect, the contested non-unanimous stipulation becomes no more than a joint statement of position of the signatory parties. Implicitly, that statement of position is on the ***underlying issues*** in the case.

issues. Apparently its "testimony in support" of the stipulation would supposedly suffice for this type of public hearing and investigation.

14. Praxair's concern is that KCPL's suggested procedure lures the Commission into a procedural trap. KCPL can initiate a rate case by simply proposing new rates. KCPL also does not need authority from this Commission to begin construction of a new coal facility on the Iatan site. But it seems unwilling to do that unless it has a fully mapped-out and agreed-to approach guaranteeing revenue increases in particular lumps and at particular times over a lengthy number of years, and all with compressed auditing and review procedures. Conspicuously, KCPL did not deny Praxair's point that KCPL was simply "gaming" the Commission so that it could go to the legislature and argue that it couldn't get the relief it wanted from the Commission when all the time the door is wide open in front of it.

15. Boil it down: KCPL doesn't want to take a risk. While maintaining itself as a public utility, it does not want to run the risk of public or regulatory scrutiny of its operations until its has everyone's "John Henry" on the dotted line. Given this approach, it seems that KCPL may be in the wrong business. Perhaps KCPL has grown comfortable with the *de facto* deregulated status it has enjoyed for over 20 years.

16. But KCPL is not free to choose the procedure, process or standards under which it is regulated. A public

utility is a public trustee, entrusted by the public with the responsibility to make appropriate and prudent decisions regarding supplying utility service to the public and subjected to regulatory scrutiny in exchange for the monopoly service position it occupies. Utilities frequently object to the Commission trying to "manage" their business operations; here it seems KCPL even wants to try to make a business partner out of the Commission and the participants to this proceeding. We cannot speak for anyone else but we decline the opportunity. If we wish to invest risk capital in KCPL we will purchase Great Plains stock.

Respectfully submitted,

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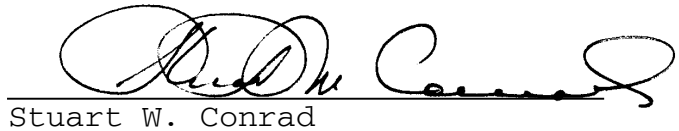
ATTORNEYS FOR PRAXAIR, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by electronic means or by U.S. mail, postage prepaid, addressed to the legal representatives of all parties and participants that have been identified as parties and petitioning intervenors through documents on the Commission's EFIS System as of this date.



Stuart W. Conrad

Dated: February 4, 2005