

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

**In the Matter of a Proposed Experi- )  
mental Regulatory Plan of Kansas )  
City Power & Light Company. )**

**EO-2005-0329**

**LIMITED RESPONSE TO SIERRA CLUB  
AND CONCERNED CITIZENS' POSTHEARING BRIEF  
BY PRAXAIR, INC.**

Praxair, Inc. is a Signatory Party to the Stipulation and Agreement under consideration by the Commission in this matter. Certain statements in the Post Hearing Brief submitted by Sierra Club and Concerned Citizens of Platte County (SC/CCPC) substantially misstate provisions of the Stipulation and deserve a brief response as follows:

**A. SC/CCPC Excluded Themselves From Participa-  
tion In the Citizen's Program Advisory Group  
In Which Participation Is Limited to Parties  
Signing the Stipulation.**

SC/CCPC have attached to their brief an affidavit of a disappointed attendee at the announced initial but aborted meeting of the Customer Programs Advisory Group (CPAG). SC/CCPC appear to complain about "exclusion" from this aspect of the process that would be initiated by Commission approval of the Stipulation. We take exception to these claims. Setting aside the question of SC/CCPC's untimely, desperate, irrelevant and blunderbuss-like attempt to inject new issues into this proceeding, Praxair will respond on a limited basis to these particular complaints.

Undersigned counsel also attended what had been indicated earlier as the first-in-a-series meeting of the CPAG.<sup>1/</sup> At that meeting undersigned counsel objected to the "going forward" of the meeting as a CPAG meeting, given that the CPAG was a creature of the Stipulation and did not yet exist absent Commission approval of the Stipulation. Counsel also objected to the involvement of the SC/CCPC in such meetings given that SC/CCPC was challenging the Stipulation and in any event was not a signatory party to the document that, if approved, would establish the CPAG.

Assuming Commission approval of the Stipulation, the CPAG may come into being as a group among the signatory parties. That group does not include SC/CCPC or other non-signatory parties.

SC/CCPC's wails of exclusion demonstrate only that it wants to have its cake and eat it too. SC/CCPC claim in their post-hearing brief that "[the Stipulation] excludes the Sierra Club and Concerned Citizens of Platte County . . . ." <sup>2/</sup> Wrong. SC/and CCPC excluded themselves by choosing not to sign the Stipulation. Choices have consequences.

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<sup>1/</sup> While we understand DNR's enthusiasm to "get moving" with a portion of the settlement package it likes, like Praxair, DNR has no unilateral ability to modify the Stipulation and likewise its witness has no unilateral authority to change the membership criteria for the group that is established by the Stipulation. DNR is welcome internally to plan its activities as it sees fit, but seeking to move forward with formal meetings of a group that has not been authorized or created seems to us, at the least, premature.

<sup>2/</sup> SC/CCPC Post-Hearing Brief, p. 8.

The Stipulation represents a compromise among a number of diverse interests. Entering into any stipulation requires analysis and evaluation of various issues including trade-offs and willingness to accept certain distasteful provisions in the settlement and other risks in order to gain the benefit of other provisions. SC/CCPC have spurned the Stipulation and are engaged in challenging it, contesting even the Commission's jurisdiction to consider it. While that is their right, it is not their right to reject the Stipulation on one hand and on the other selectively "cherry pick" and try to gain the benefit of particular provisions of the package that they may like. If SC/CCPC find participation in the CPAG attractive, they are welcome to join the club by signing the Stipulation and withdrawing their objections and challenges to its approval. But if they choose not to sign, Praxair and perhaps others will object to their participation in a group that is reserved for those who have accepted and signed the compromise agreement and have agreed to be bound by its provisions.

**B. The Proposed Advisory Group is Not A Public Governmental Body.**

Without any citation of authority, SC/CCPC boldly assert that the proposed CPAG is a "Public Governmental Body" within Section 610.010 RSMo.<sup>3/</sup> Plainly it is not.<sup>4/</sup> The pro-

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<sup>3/</sup> In relevant part, the Section provides:

(4) "Public governmental body", any legislative, administrative or governmental entity created by the  
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3/ (...continued)

constitution or statutes of this state, by order or ordinance of any political subdivision or district, judicial entities when operating in an administrative capacity, or by executive order, including:

(a) Any body, agency, board, bureau, council, commission, committee, board of regents or board of curators or any other governing body of any institution of higher education, including a community college, which is supported in whole or in part from state funds, including but not limited to the administrative entity known as "The Curators of the University of Missouri" as established by section 172.020, RSMo;

(b) Any advisory committee or commission appointed by the governor by executive order;

(c) Any department or division of the state, of any political subdivision of the state, of any county or of any municipal government, school district or special purpose district including but not limited to sewer districts, water districts, and other subdistricts of any political subdivision;

(d) Any other legislative or administrative governmental deliberative body under the direction of three or more elected or appointed members having rulemaking or quasi-judicial power;

(e) Any committee appointed by or at the direction of any of the entities and which is authorized to report to any of the above-named entities, any advisory committee appointed by or at the direction of any of the named entities for the specific purpose of recommending, directly to the public governmental body's governing board or its chief administrative officer, policy or policy revisions or expenditures of public funds including, but not limited to, entities created to advise bi-state taxing districts regarding the expenditure of public funds, or any policy advisory body, policy advisory committee or policy advisory group appointed

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<sup>3/</sup> (...continued)

by a president, chancellor or chief executive officer of any college or university system or individual institution at the direction of the governing body of such institution which is supported in whole or in part with state funds for the specific purpose of recommending directly to the public governmental body's governing board or the president, chancellor or chief executive officer policy, policy revisions or expenditures of public funds provided, however, the staff of the college or university president, chancellor or chief executive officer shall not constitute such a policy advisory committee. The custodian of the records of any public governmental body shall maintain a list of the policy advisory committees described in this subdivision;

(f) Any quasi-public governmental body. The term "quasi-public governmental body" means any person, corporation or partnership organized or authorized to do business in this state pursuant to the provisions of chapter 352, 353, or 355, RSMo, or unincorporated association which either:

a. Has as its primary purpose to enter into contracts with public governmental bodies, or to engage primarily in activities carried out pursuant to an agreement or agreements with public governmental bodies; or

b. Performs a public function as evidenced by a statutorily based capacity to confer or otherwise advance, through approval, recommendation or other means, the allocation or issuance of tax credits, tax abatement, public debt, tax-exempt debt, rights of eminent domain, or the contracting of leaseback agreements on structures whose annualized payments commit public tax revenues; or any association that directly accepts the

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posed group is nothing more than a continuation of the settlement process surrounding the Stipulation. Just as a settlement meeting is open only to the parties to the litigation, the CPAG is similarly limited. It has no authority, passes no legislation and does not "bind" the Commission. It certainly does not implement or approve tariff changes. It is no more than a

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<sup>3/</sup> (...continued)

appropriation of money from a public governmental body, but only to the extent that a meeting, record, or vote relates to such appropriation; and

(g) Any bi-state development agency established pursuant to section 70.370, RSMo  
. . . .

<sup>4/</sup> The definition of "public governmental body" refers to and includes constitutional and statutory **governmental** bodies or entities at all levels in the state; for example: the "state" itself, "any political subdivision of the state," the "county," the "municipal government," the "school district," the "special purpose district," etc. By including in the definition any "agency," "board," "bureau," "commission," "committee," "department" and "division," the General Assembly was recognizing some of today's forms of entities through which the several levels of governmental bodies function. It is these agencies, commissions and departments and their members which have "meetings" . . . .

*Cohen v. Poelker*, 520 S.W.2d 50, 52 (Mo., 1975) (Emphasis added).

sounding board. If it "advises" anyone, it is not the Commission but, rather, the utility regarding its future tariff filings.<sup>5/</sup>

Changes in rates cannot be effected without tariff filings which would be brought before the Commission in a public process open to SC/CCPC or other members of the public. Chapters 386 and 393 RSMo. SC/CCPC make the absurd argument that sub-groups of parties to the case cannot meet to explore settlement of issues of concern to them without opening their meeting to the "public." Confidentiality of settlement discussions could never be protected were such the case and the absurd result of SC/CCPC's logic would be that no cases could ever be settled.<sup>6/</sup>

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<sup>5/</sup> As significantly observed by the Supreme Court of Oklahoma in *Sanders v. Benton*, 579 P.2d 815, 819 (Okla. 1978), "although different courts must construe different statutory provisions, it appears that the majority of other jurisdictions have generally held that ad hoc committees or citizen advisory committees, empaneled for the purpose of furnishing information and recommendations to governing or decision-making entities, are not subject to the open meeting laws unless they have actual, or de facto decision-making authority."

*Tribune Pub. Co. v. Curators of University of Missouri*, 661 S.W.2d 575, 587 (Mo. Ct. App., 1983). Although the specific holding in *Tribune* pertained to the governance of the University of Missouri and the Board of Curators and was later overruled by a change in the basic law, the principle stated here remains pertinent.

<sup>6/</sup> See, e.g., *State ex rel. Board of Public Utilities v. Crow*, 592 S.W.2d 285, 291 (Mo. Ct. App. 1979):

The public interest does not require that the mechanisms of public sector collective bargaining be inhibited and eventually destroyed by requiring that the negotiations, or discussion about those negotiations, be conducted in public.

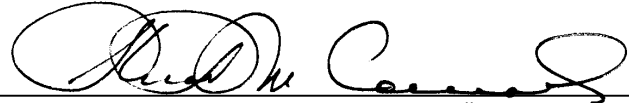
Just as there is no right for the "public" to participate in private settlement negotiations, there is no "public" right to attend or participate in the CPAG group -- it is purely a creation of the **signatory parties** and not of the Commission.

In making these arguments, SC/CCPC's continues to demonstrate its confusion of members of the Commission Staff and Public Counsel's office with the Commission and even confuses the effect of Commission approval of the Stipulation. SC/CCPC displays once more its lack of experience and insouciance regarding regulatory operations.

SC/CCPC's arguments should be rejected.

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 either by electronic means or by U.S. mail, postage prepaid, addressed to the legal representatives of all parties that have been identified as parties and petitioning intervenors through the Commission's Electronic Filing and Information System as of this date.



Stuart W. Conrad

Dated: July 25, 2005