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**

MOTION TO TERMINATE PROCEEDING

COMES NOW PRAXAIR, INC. ("Praxair") and moves that this workshop proceeding be terminated immediately and in support thereof states:

I. INTRODUCTION.

This matter began on May 6, 2004 as Case No. EO-2004-0577. It was inititiated on Kansas City Power & Light's ("KCPL") request purportedly to

> open an ***investigatory*** docket, to provide notice and to establish a workshop process . . . to ***discuss***, and hopefully gain consensus on, constructive regulatory responses to emerging issues that will affect the supply, delivery and pricing of the electric service provided by KCP&L.[1/]

A lengthy series of meetings have been held on various dates, primarily in Jefferson City, and a number of entities have participated in these meetings. The focus of these meetings, apparently, has been to explore the plans of KCPL to site new generation in Missouri and elsewhere to meet the demands of its

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[1/] Order Establishing Case, EW-2004-0596, June 3, 2004, p. 1 (emphasis added).

projected load as well as rate treatment to recover the associated costs. Roughly 14 group meetings have been held including "phone-in" conferences. The count may actually be higher because of the meetings were divided into subgroups.

II. ARGUMENT.

A. This Proceeding Has Reached a Natural Point of Termination and, While Useful, Its Value Has Been Exhausted.

Praxair does not suggest that this proceeding has been of no value. Although unstructured and without a firm procedural schedule, it has developed a base of data and understanding by all participants of KCPL's needs and plans. However, even good things come to an end. The case has now reached the point that there is little or no more value to draw and the process needs to move into a more traditional approach.

The Commission has employed workshops in the past. Two major ones come to mind. In response to the national debate on electric restructuring, the Commission established a workshop and invited numerous stakeholders to participate in the workshop process. An end date was established. The Commission directed that a report or whitepaper be prepared and filed reflecting the respective positions of the stakeholders, any consensus positions that had developed, any conclusions that could be drawn from the workshop process and any recommendations that the participates

could make on a collective basis. Such a report was prepared and the workshop ended.

More recently, a Commission workshop or "task force" was convened to with the impact of high natural gas prices on utility customers. Again, stakeholders from all interested groups were invited to participate, and again a schedule was developed and the preparation of a report or whitepaper was directed. This workshop also involved what some called a "road show," namely a series of meetings in various locations throughout Missouri both to inform the public regarding that problem and to gather public reactions and preferences. Following those meetings a group report was prepared and submitted to the Commission and the process ended.

This proceeding did not have a specific procedural schedule, nor was it directed to end in a report. However, that is essentially all that a workshop such as this could do. There has been adequate time for a report to have been prepared, but no such report has been prepared.

Now what seems to be proposed, but only by KCPL, is the preparation of a settlement document. However, there is nothing in this workshop docket to "settle," for this is not a contested case. If efficacious, this settlement document must reach beyond this uncontested case workshop to matters that must be resolved through a contested case proceeding.

B. A "Workshop" and a Contested Case Are Not Equivalent Proceedings; There Are Serious Due Process Issues Involved In Attempting to Bridge These Two Disparate Processes.

In the June 20, 2004 prehearing conference held in this matter, RLJ Mills stated:

> JUDGE MILLS: If we get to a point in this case in which there are disputed issues that need to be resolved by the Commission, ***those will have to be brought up in a different case, and any decision by the Commission would be based on a record in that case completely independent of any discussions in this case.*** So this case by the -- by definition, a W case ***can't result in a Commission order*** because it's -- there are no ex parte rules, there are no parties, there are no contested issues. It's designed as information
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> gathering, information exchange, rather than a dispute resolution or a contested issue resolution case.

Prehearing Conference, T. 7-8, June 30, 2004 (emphasis added). We are now at the point Judge Mills referenced.

A workshop proceeding is not a contested case. There is no entitlement to a hearing, nor are there even "parties" in the traditional sense. The stakeholders are termed "participants." They have no intervenor status (even though some such as Praxair sought intervenor status). There are limited or virtually no established due process protections for such "participants" who are not parties in a contested case proceeding. There are no clear *ex-parte* protections.

This workshop proceeding has abounded with due process problems. *First,* there has been almost universal participation in this process with representatives that have at various times even indicated that they did not have the authorization from

their respective stakeholder to even attend the particular meeting. The status of such "participants" is simply uncertain.

Second, it is not even clear in some instances who is the "participant." Is the "participant" the individual or the entity that they claim to represent? Both? While permissible for information gathering and collection, such uncertainties are untenable when contested issues are involved.

Third, members of the Commission have attended various portions of the workshop, filtering in and out as they chose. While not necessarily inappropriate for a workshop proceeding, any attempt to transfer this process through a settlement would thrust those Commissioners into the very settlement process itself. Indeed, if the entire purpose of this proceeding has been, in KCPL's view, a *de facto* settlement conference, attendance by Commissioners is entirely inappropriate and prejudicial. Yet KCPL counsel encouraged their participation, since this was identified as a "workshop" docket and the RLJ agreed. Transcript, Prehearing Conference, p. 6, ll. 8-9, 22-25 (June 30, 2004). There should be no surprise here. This issue was pointed out by Public Counsel Coffman in the intitial prehearing conference, and by Counsel for Praxair and Counsel for the Missouri Industrial Energy Group at the initial status presentation on Octoer 13, 2004.

Fourth, there is no clear list of parties with their respective statements of interest through the notice and inter-

vention process. To the extent that KCPL now seems intent on transforming this workshop process into a vehicle to support a rate increase, there has been no public notice of such a proposed increase, no intervention schedule, and as a result, no defined list of parties. While this is not inappropriate for an informal workshop proceeding, it is ***entirely*** inappropriate for a contested case proceeding.

Fifth, the absence of defined parties and a contested case structure, itself, denies due process to even the interested participants. Unannounced meetings have been held with selective parties at the instigation of KCPL. KCPL's view of the results of these meetings are then communicated to the other participants as though agreements have been reached or concessions have been made which reports prove significantly inaccurate when the other participants in the meeting are contacted. Since no rate changes should come from a workshop, this activity may be tolerated, but it is not acceptable when the purpose of the informal workshop proceeding is intended to be transformed, transferred or substituted for a formal contested case proceeding where parties procedural due process rights are respected. The process is not a level playing field for the resolution of contested issues. Moreover, an attempt to introduce a "settlement stipulation" into a case where there are no contested issues reveals the extent to which KCPL is seeking to stretch this "working group" case.

Sixth, when dealing with contested cases, the Commission has a well-developed and understood process for dealing with settlement documents. Unanimous settlements are dealt with in one manner, non-unanimous settlements through another.[2/] In both cases, any dissenting parties are assured of protection for their due process rights. As stated by Judge Mills, a "W" case is not a contested case. So there is nothing in it to "settle." Moreover, how would the Commission even begin to deal with a "non-unanimous settlement" in a "W" docket? For that matter, how would the Commission begin to consider who is entitled to notice of such settlement and who would have standing, as a party (since there are none) to seek a hearing that wouldn't have occurred in the first place since there would be no disputed issues? There is no mechanism in place to assure dissenting parties from a settlement of their due process rights and such a procedure will not be uphheld.

The absence of such a mechanism is critical. Ironically, when one of KCPL's own counsel was Public Counsel, he brought a seminal case to the courts dealing directly with the rights of parties that dissented from a "joint reccommendation."[3/]

[2/] 4 CSR 240-2.115.

[3/] The court ruled:

> Due process requires that administrative hearings be fair and consistent with rudimentary elements of fair play. Tonkin v. Jackson County Merit System Commission,

(continued...)

We are at the point that this matter -- as a "W" case -- should be concluded. Evidence of this is found in KCPL's recent effort to circulate a draft of a settlement document. This is completely inappropriate in a case where there are, by definition, no disputed issues to "settle," no ex-parte protections and no identified parties. It is not even clear at this point to whom the draft (supposedly confidential) was circulated. Consider, for example, since this is nominally a "W" workshop case, could the Commissioners see the draft of the "confidential" settlement document that has been circulated? To whom is is "confidential?" Would such disclosure be appropriate? Could it result in a Commissioner having to recuse from further activity in the case? Moreover, what "disputed" issues are there to be resolved by "settlement." Since there are (supposedly) no issues to be resolved -- or that can be in this "W" docket -- there is nothing to "settle." This attempt is revealed as nothing more than an attempt to reach beyond this case and settle what would otherwise be disputed issues in a contested case from

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[3/] (...continued)
599 S.W. 2d 25, 32-33[7] (Mo. App. 1980) and Jones v. State Department of Public Health and Welfare, 354 S.W. 2d 37, 39-40[2] (Mo. App. 1962). One component of this due process requirement is that parties be afforded a full and fair hearing at a meaningful time and in a meaningful manner. Merry Heart Nursing and Convalescent Home, Inc. v. Dougherty, 131 N.J. Super. 412, 330 A. 2d 370, 373-374[7] (Ct. App. Div. 1974).

State ex rel. Fischer v. Public Service Com., 645 S.W.2d 39, 43 (Mo. Ct. App., 1982).

within a "workshop" docket which has none of the procedural protections of the contested case structure. There are serious due process reasons why this should not be done.

In *In the matter of KANSAS CITY POWER & LIGHT COMPANY*, 1972 Mo. PSC LEXIS 6 (Mo. PSC, 1972), 17 Mo. P.S.C. (N.S.) 420 Case No. 17,419, the Commission rejected a change to the steam allocation because there had not been notice to the steam customers that would be affected by the change. Moreover, Missouri courts have repeatedly looked strictly at Commission procedures that "cut corners" and end up denying either hearing, notice or other procdural infirmity.[4/]

C. Issues of Confidentiality Continue to Plague the Participants.

Since this is not a contested case, there has been a protective order issued with modification for "signatory participants" and not "parties." However, there is been no clarification or, in some cases, even clear identification of who is a "signatory participant." "Participant" may refer to the individ-

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[4/] But however difficult may be the ascertainment of relevant and material factors in the establishment of just and reasonable rates, neither impulse nor expediency can be substituted for the requirement that such rates be "authorized by law" and "supported by competent and substantial evidence upon the whole record." Article V. § 22, Constitution of Missouri, V.A.M.S.

State ex rel. Missouri Water Co. v. Public Service Com., 308 S.W.2d 704, 720 (Mo. 1957). *State ex rel. Martigney Creek Sewer Co. v. Public Service Com.*, 537 S.W.2d 388, 394 (Mo. 1976).

ual who attends or refer to his or her principal -- this has not been clear and thus the scope of the protective order, even as issued, is ambiguous. While we understand that KCPL has reasonably sought to protect its data from public disclosure, this is supposed to be a public process and a "working group docket." The process should conclude with a public report similar to earlier workshop proceedings.

D. Seeking to Convert A Working Group Information Gathering Case Into A Contested Case To Establish Future Rates Is Inappropriate For A Utility That Has Not Been Subjected to a Full Rate Case For 20 Years.

KCPL has not been the subject of a rate case for roughly 20 years. In fact, the last KCPL rate case involved the addition of the Wolf Creek Nuclear Generating Station to KCPL rate base. Following the conclusion of that case, two rate reductions were accepted by KCPL through settlements but neither represented anything close to a full rate case.

Although pursuant to Missouri law, rates once approved by the Commission remain -- presumptively -- just and reasonable until changed by Commission order, we have seen no evidence in this proceeding (nor is it a proper proceeding to receive and examine such evidence) that there is any relationship between KCPL's present rates and its present cost of service. Since the Wolf Creek case, KCPL has lost the major high load factor load of the Armco/GST Steel manufacturing facility in Kansas City.

Moreover, there has been a substantial shift between KCPL's Kansas and Missouri jurisdictions of industries and new housing. These two changes alone suggest that the jurisdictional allocation that represented the customer mix between jurisdictions is no longer the same and that the predominant energy jurisdiction may have shifted west. Should Missourians pay more than appropriate for power while Kansans pay less?

There has also been no class cost of service review for this utility for over 20 years. It is unlikely that the existing class revenue shares bear any correlation to current class cost incurrence patterns and thus the rates may well be unduly discriminatory as between groups or classes of customers.

Finally, we have some indications that the aggregate revenue level currently being received by the utility is significantly in excess of cost of service. These matters, obviously, present disputed or contested issues that could only be resolved by a Commission order in a contested case.

We understand that KCPL already believes that it has siting authority to site another machine at the Iatan site. Given the multi-year plant construction cycle, such a decision may be appropriate now. It may well be that KCPL has made some sort of a "policy" determination that it does not wish to initiate a rate case. If so, that view is not reasonable, for there remain only two means to change rates under Missouri law: file

and suspend or complaint.[5] 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.[6] It is particularly unreasonable given that KCPL has not submitted to thorough regulatory scrutiny by the Missouri Commission for two decades.

E. Praxair Has Concerns That Continued Delay Through Continuance of This Proceeding Will Simply Buy KCPL Time For Potential Legislation To Be Implemented.

For the past two legislative sessions, "pre-approval" legislation has been sought by individual and combined groups of Missouri utilities. Various versions of these proposals would supplant the Commission's ability to review proposed plant additions and force ratemaking decisions substantially ahead in time so that the "risk" supposedly borne by the constructing utility is "reduced." Of course, the risk is not "reduced," but is just shifted from the utility shareholders and bondholders to the ratepayers.

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[5] *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).

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

The inadvisability of such proposed legislation will doubtless be argued elsewhere. However, the Commission should not permit its processes to be "gamed" simply to buy time for a utility that believes it needs to add capacity. That utility is a public trustee, holding its property as a trustee under a certificate of public convenience and necessity for the benefit of the public. In exchange the utility owners are entitled to an opportunity to earn a reasonable rate of return on the value of that property. Those are decisions made by the Commission in a contested case; not in a collaborative "workshop" proceeding.

There is even concern that KCPL may seek to exploit this motion in that process, arguing that they were unable to bring "parties" to resolution. Such would both be inaccurate and disingenuous, to say the least, as most if not all the "participants" here have faithfully sought to follow KCPL's tortuous path.

F. At Base, the Error Is the Attempt To Turn A Non-contested, Non-adversarial Workshop Proceeding Into A Contested Case Through A "Settlement."

In its efforts to avoid the full audit of its operations that a rate case would involve, KCPL appears bent on attempting to transform this "W" case into a vehicle in which it can obtain significant future rate relief by the means of "settling" this "W" docket. As made clear by Judge Mills on June 30, 2004, there is nothing in a "W" docket that is contested; it is

an information gathering proceeding. No order can result from this case and certainly no rates can result from it either.

G. This Proceeding Places Commission Staff In An Ambiguous Position.

In a workshop docket, much of the organizational load is shifted to the Commission Staff. They serve as facilitators, organizers, scribes and data collectors for the various participants. In a rate case, the Staff assumes the responsibility of a party and an advocacy role. In fact, as the system is presently constituted, the Commission Staff is the only entity with the resources and personnel to conduct a full audit of the utility to confirm its revenue needs (or lack thereof) and the other parties to a rate case -- as indeed all ratepayers -- must depend on the efforts of Commission Staff for a thorough and aggressive job. For only through the clash of differing views can the Commission strike an appropriate balance that protects both the interests of the ratepayers and the interests of the utility.

In this case, however, Staff seems at times to be uncertain of its role. Is it pursuing the facilitator role of the "W" case, or is it preparing for a rate case filing by the utility or even an earnings complaint on its own. In a "W" proceeding, the facilitator role is quite appropriate, but as the "W" case turns the corner, as this one has, to identify issues

that are contested and that will be contested in the future, we sense that Staff is uncomfortable with the ambiguity of its role.

While that problem is to some extent endemic in the present system, continuing with that ambiguity diffuses Staff's focus and efforts and interferes with the usual advocacy function and role that the Staff performs. While to this point Staff representatives have served well as facilitators and enablers, the point in this case has now been reached where that conflict in positions is obviously uncomfortable not only to Staff members but to the participants who must depend on the efficacy of Staff's efforts as an investigator and advocate.

III. CONCLUSION.

Many years ago the large store window of Macy's department store in downtown Kansas City had a Christmas display of various animated figures, electric trains and other mechanical toys depicting (typically) Santa's workshop, his elves and other themes intended to catch the fancy of young children. A mother took her young son to that display fully expecting him to be entranced for many minutes. However, in only a very short time the youngster turned to his mom and stated: "But they're not going anywhere."

Similarly, this proceeding is not "going anywhere." It has already passed the point of continued usefulness. This is not to say that it was not a useful exercise, but like all

workshops, the information gathering and data exchange appear to have concluded. What has now been substituted is one of the "participants" seeking to transform this workshop docket into an entirely different type of proceeding where traditional rate case issues would be resolved, but without a hearing, without a filing of rates and without the procedural and due process protections that are essential elements in a contested case involving potentially hundreds of millions of dollars.

This case has run its course. Once useful, it is now an albatross around the necks of the participants who need to move on into a mode where disputes can be resolved or, if not resolved, litigated. This proceeding should be terminated as quickly as possible.

Respectfully submitted,

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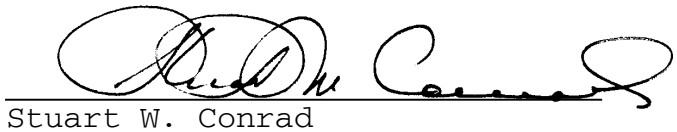
ATTORNEYS FOR PRAXAIR, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing Late-Filed Application for Leave to Intervene by electronic means and 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: January 18, 2005