BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Kansas City Power & Light Company for Approval to Make Certain Changes in its Charges for Electric Service to Begin the Implementation of Its Regulatory Plan	))))))	**ER-2006-0314**

APPLICATION BY PRAXAIR, INC.
FOR REHEARING, RECONSIDERATION OR MODIFICATION

COMES NOW Praxair, Inc. ("Praxair") and through its attorney seeks reconsideration or rehearing of the Commission's Order Setting Procedural Schedule ("Order") dated March 29, 2006 in the following particulars:

A. Timeliness of This Application.

1. The subject Order was issued on March 29, 2006 and stated to be effective that same date. Missouri law requires that any such order[1/] be issued with a reasonable time within which to seek rehearing or reconsideration. Failure to provide such a reasonable period, which Missouri courts have construed as not less than 10 days, results in such a period being imposed by law. Else parties are denied the opportunity to seek rehearing of a substantive order before they even see it. This Application, filed within 10 days of the March 29, 2006 date, is, accordingly, timely. Indeed, Judge Brown of the Cole County

[1/] It cannot seriously be questioned that an Order that establishes a procedural schedule, requires prefiling of testimony, shortens time for specified data request responses has substantive effect.

Circuit Court has previously chastened the Commission for attempting to make its orders impervious to review by declaring them effective simultaneously with their issuance.

B. Advance Rulings on "Continuances for Negotiation" is Arbitrary, Capricious, Unreasonable, Violates Commission Rules and Violates Governing Missouri Law and Public Policy.

1. Paragraph M of the March 29, 2006 Order states:

> No continuance for negotiation will be granted without the submission of a Stipulation and Agreement covering those matters on which testimony was scheduled for the period of the requested continuance. No motions for continuance will be granted without a hearing unless the parties submit a unanimous Stipulation and Agreement.

2. This paragraph rules in advance on what are termed "continuances for negotiation" and further appears to require unanimity in stipulations. This is not only arbitrary and capricious but violates the Commission's rules, governing law and public policy favoring negotiation and settlement of controverted issues. It appears to result from inexperience regarding the settlement process and the often controversial, complex and contentious negotiations surrounding settlement of all or part of a rate case.

3. The clause in Paragraph M is arbitrary and capricious because the Commission has not been presented with any motions for continuance in this proceeding, whether for "negotiation" or otherwise and has no factual or legal circumstances upon which to base such an order of advance denial. Denying such a motion in advance, without knowledge of either the facts or

circumstances that might underlie such a motion, is the very essence of arbitrariness and capriciousness. While Praxair appreciates the sometimes frustrating process of case handling and resolution, public policy encourages settlement. The number of cases that settle on the "courthouse steps" is legion. Rather than constructing arbitrary and edict-driven obstacles to an already contentious settlement process, the Commission should be seeking counsel from the representatives of the respective parties regarding encouragement of the process.

4. A requirement that continuance applications will not be granted unless a unanimous stipulation is submitted violates the Commission's own rule. 4 C.S.R. 240-2.115 clearly recognizes nonunanimous stipulations in Commission practice and the Commission has frequently been presented with nonunanimous stipulations.[2/] That rule provides a mechanism for a party that, while unwilling for many reasons to ***sign*** a settlement, still has no desire to ***contest or oppose*** that settlement. There may well be good and sufficient reasons that the party cannot disclose without breaching ethical constraints why in a particular set of facts they cannot sign a settlement. In other instances their inability to do so may be obvious to all involved. Nevertheless, for different reasons, such a party may not wish to contest the settlement. Paragraph M of the Commission's March

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[2/] We have searched in vain for a notice of proposed rulemaking that would seek to alter this well-established rule.

29, 2006 Order would force these parties either to go to hearing or sign.

5. A settlement is a contract between the signatory parties. The Commission has an opportunity to consider that contract and approve or reject it pursuant to its rule. If a party does not sign, but does not request a hearing within 7 days,[3/] the Commission is empowered by its rule to treat that settlement as unanimous for purposes of its processes. But the Commission cannot force an unwilling party into a contract that party does not wish to accept but does not wish to oppose or contest. An arbitrary advance ruling that requires unanimity forces hearings upon parties who might not be sufficiently opposed to request them under the rule. Moreover, under the guise of trying to "save" Commission time, it actually would force the Commission into a potentially lengthy hearing which certainly the signing parties do not wish and which the non-signatories have not requested. To force that result is absurd and unreasonable and again bespeaks inexperience as to the nature of the settlement process.

6. Indeed, such a rule might well distort the otherwise favored and reasonably balanced settlement process by imposing upon it a requirement of unanimity when none is required by Commission rule. It violates the governing Missouri law on

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[3/] Given this 7-day time limit, the implications of requiring unanimity, even if "unanimity" is defined to be "constructive" through a non-signatory's determination not to sign but not to oppose, may have unanticipated effects on the Commission's procedural schedule.

the subject that, including the Commission's own rule, is embodied in *Fischer v. P.S.C.*[4/] The Commission's rule was promulgated following the *Fischer* decision and has proved adequate to deal with hundreds of Commission cases filed in the more than two decades following. It has well served the public and the functioning of the Commission. This settlement process, though often frustrating, is neither broken nor misunderstood by the Commission bar.

7. The recent settlement filed in Aquila's rate case, Case No. ER-2005-0436 examples the problem created. In that case the several signatories were able to bring forward a settlement that, while not signed by either Public Counsel or another party (AARP) was not opposed by either. In the following on-the-record presentation, both parties explained why they were not able to sign the settlement. It is uncertain whether a requirement of unanimity could have resulted in submission of a settlement in that case. We presume that the Commission would prefer that the parties settle, so it is difficult to understand why otherwise needless litigation should be forced upon the unwilling by the unwise.

8. In other cases, a party may be unable to enter into the contractual relationship of a settlement because of

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[4/] State ex rel. Fischer v. Public Service Commission, 645 S.W.2d 39, 43 (Mo.App. 1982), cert denied, 464 U.S. 819, 104 S.Ct. 81, 78 L.Ed.2d 91 (1983).

political reasons[5/] or overall client policy. Nevertheless they do not wish to impede either settlement of the particular case or Commission consideration of the settlement as in the public interest by contesting the settlement or forcing a hearing. It is intriguing that the Commission itself does not require unanimity to issue a report and order and allows its members to either abstain or dissent, even without opinion or thorough explanation, sometimes for the same reasons as may be faced by individual parties in the settlement process. Yet the Commission through this order appears to deny the parties the same rights it claims for itself.

9. Finally, it should require only limited discussion to note that public policy favors settlement of disputes. This does not in the least diminish the Commission's statutory responsibility to evaluate presented settlements from the perspective of the public interest -- a much different public policy test. The public policy favoring settlement is why settlement discussions are closed and privileged or protected from disclosure -- a protection that is often obviously frustrating to Commissioners who would like to explore the intricacies of a settlement and the processes by which it was reached but are precluded from so doing by the "public policy" that favors settlements.

10. Successful settlements are often careful but precarious balances of perceived interests that frequently turn

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[5/] This seems occasionally the case where other governmental bodies are the intervenors such as municipalities, county governments or the like.

on the precise words chosen. That is why parties often are able to advise the Commission that they have a "settlement in principle" but need time to bring this nascent settlement to full expression in a document before formal agreement can be indicated. Application of Paragraph M would frustrate that effort by forcing even agreeing parties into the hearing room when their time is needed (and would be more profitably spent) to work on the verbal embodiment of the settlement principles. Paragraph M also fails to recognize that a utility may have several different attorneys working on a case while intervenors may have only one who cannot be in a hearing room and simultaneously working on a settlement document. Witnesses or consultants are often required in both venues. Moreover, like the layers of an onion, developing that settlement document often reveals additional layers of issues that had not originally been addressed by the parties but must be resolved before the settlement can proceed. That process takes time. While unfortunate, it is a reality that often the imminence of a hearing encourages parties to evaluate and reevaluate their "litigation" positions and their evaluation of "litigation risk."[6/] Ironically, in the same order that it approves an extended procedural schedule to investigate and resolve the case, the Commission appears insouciant regarding the realities of the settlement process -- a process that, despite intense

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[6/] The legendary English lexicographer Samuel Johnson once penned that "Nothing concentrates one's mind like the imminence of hanging."

efforts by individual parties to move it forward, often does not begin, if at all, until the hearing is imminent.

11. While it is not the intent of the parties to keep the Commission "on hold" while that settlement process moves sometimes glacially forward, it is an unfortunate but unavoidable result of the process -- a process that is often as frustrating to the parties sitting on the inside of the "settlement room" as it is to the Commission sitting on the outside. But like King Canute's effort to command the tides, commanding the process to be otherwise is doomed to failure. That effort will result in unnecessary time expenditures, needless hearings and still thinner hair for the Commission bar.

12. Though neither feasible nor possible, it would be helpful for the Commissioners to sit through the development of a settlement -- perhaps "endure" that process would be more descriptive. Were that possible, the Commission would then understand the complexity of the process, the challenges involved in bringing constructive solutions forward, the difficulty of crafting language that accurately captures the intricate settlement balance by expressing only the areas of agreement and no more, and the unfortunate implications of an arbitrary advance ruling that would try to force "unanimity." It is understandable that Commissioners or others lacking in that experience see such an edict as a solution. It is not. It may even disrupt or destroy the process it seems intended to facilitate. This unwarranted and unwise edict should be rescinded. With respect,

one who attempts such a modification simply "doesn't know the territory."[7/]

WHEREFORE, reconsideration of the March 29, 2006 Order should be granted and the Order changed to delete Paragraph M.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.

Stuart W. Conrad MBE #23966
3100 Broadway, Suite 1209
Kansas City, Missouri 64111
(816) 753-1122
Facsimile (816)756-0373
Internet: stucon@fcplaw.com

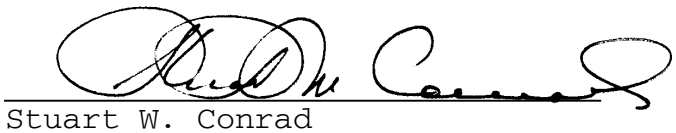
ATTORNEY FOR PRAXAIR, INC.

April 5, 2006

[7/] A description of Professor Harold Hill offered by a fellow travelling salesman in an early scene aboard a railroad car in Meredith Willson's American classic, *The Music Man*.

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.



Stuart W. Conrad

Dated: April 5, 2006