

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

<b>In the Matter of a Proposed Experimental</b>	)	
<b>Regulatory Plan of Kansas City Power &amp;</b>	)	<b>Case No. EO-2005-0329</b>
<b>Light Company</b>	)	

**KCPL AND STAFF'S SUPPLEMENT TO  
SIGNATORY PARTIES'SUGGESTED REPORT AND ORDER (PROPOSED  
FINDINGS OF FACT AND CONCLUSIONS OF LAW) FILED ON JULY 19, 2005**

**Procedural History**

On May 31, 2005, the Staff, on behalf of the parties to the proceeding, filed a List of Issues And Witnesses and Order of Cross-Examination. On June 2, 2005, the various parties filed their respective Position Statements. On June 15, 2005, Prehearing Briefs were filed by the various parties.

At the request of SC/CCPC, the evidentiary hearings were postponed until June 23-24, 2005. Additional evidentiary hearings were held on June 27 and July 12, 2005.

Suggested findings of fact and conclusions of law and Post-Hearing Briefs were filed by the various parties on July 19, and July 21, 2005, respectively.

On July 25, 2005, the Commission issued an Order Directing Filing. On July 26, 2005, certain Signatory Parties filed a Signatory Parties' Response To Order Directing Filing. On July 27, 2005, the Staff filed Staff's Additional Response To Order Directing Filing.

On July 25, 2005, Praxair filed a Limited Response To Sierra Club And Concerned Citizens' Posthearing Brief. SC/CCPC filed on July 26, 2005, a Motion For Leave To File A Reply Brief Or, In The Alternative, To Strike The Limited Response To

Sierra Club And Concerned Citizens' Posthearing Brief. On July 27, 2005, KCPL and the Staff filed a Supplement To Signatory Parties' Suggested Report And Order (Proposed Findings Of Fact And Conclusions Of Law) Filed On July 19, 2005 and Motion For Leave To File Supplement To Signatory Parties' Suggested Report And Order (Proposed Findings Of Fact And Conclusions Of Law) Filed On July 19, 2005.

## **Discussion**

SC/CCPC raised for the first time in their Proposed Findings Of Fact And Conclusions Of Law and Posthearing Brief a Chapter 610 issue, a Section 393.170.3 certificate of convenience and necessity issue and an issue that the Stipulation<sup>1</sup> is not ripe for determination by the Commission because it is not final. The Commission will address these three issues in the "Findings Of Fact" and the "Conclusions Of Law" sections of this Report And Order.

## **FINDINGS OF FACT**

### **CHAPTER 610**

The heading of section IV of SC/CCPC's Posthearing Brief states in part "The Stipulation Is Unlawful In That It Calls For The Creation Of A Customer Programs Advisory Group ('CPAG') In Violation Of Chapter 610 Of Missouri's Revised Statutes, The 'Sunshine Law'. . . " The Commission's May 6, 2005 Order Establishing Procedural Schedule clearly states at page 2, in part, "The parties shall agree upon and the Staff shall file a list of the issues to be heard, the witnesses to appear on each day of the

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<sup>1</sup> The Commission will continue to refer to the document pending before it as the Stipulation. The Commission has noted elsewhere in this Report And Order that pursuant to 4 CSR 240-2.115 it will consider the provisions of the Stipulation filed on March 28, 2005, to be joint recommendations of the Signatory Parties. The Commission will therefore review the competent and substantial evidence in the case to determine whether the joint recommendations are in the public interest and should be approved, or whether the alternative recommendations of SC/CCPC should be approved.

hearing and the order in which they shall be called and the order of cross-examination for each witness. Any issue not contained in this list of issues will be viewed as uncontested and not requiring resolution by the Commission.”

There is no indication that SC/CCPC was denied an opportunity to list this matter as an issue in the List Of Issues filed on May 31, 2005. It appears that no party was denied the opportunity to have identified in the List Of Issues items of concern to each party. For example, the List Of Issues filed by the Staff shows as “Issue No. 22” an item raised by Trigen-Kansas City Energy Corp., respecting which the Staff responded, in its Statement Of Positions filed on June 2, 2005, that this item is not a relevant issue.

The language in the Stipulation is clear that non-Signatory Parties are not members of the CPAG and do not have a role respecting the CPAG. Among the non-governmental Signatory Parties to the Stipulation are Praxair, Inc., Ford Motor Co., Missouri Industrial Energy Consumers, The Empire District Electric Company, and Aquila, Inc. The Stipulation clearly states as follows regarding the CPAG: “The Staff, Public Counsel, MDNR and any other interested Signatory Party will serve as an advisory group (‘Customer Programs Advisory Group’ or ‘CPAG’) to KCPL in the development, implementation, monitoring and evaluation of the Demand Response, Efficiency and Affordability Programs.”

A few questions which Counsel for SC/CCPC asked Susan K. Nathan, KCPL’s witness on the Demand Response, Energy Efficiency and Affordability Programs, and Ms. Nathan’s responses are the only record that SC/CCPC established regarding this item. (Tr. 648-49). Counsel for KCPL asked several questions in follow-up on re-direct. (Tr. 679-81). It was established that five (5) meetings had been scheduled by KCPL for

the CPAG: the first was scheduled for later that week on June 30, 2005 and then there was to be a meeting on every Wednesday in July 2005. (Tr. 680).

SC/CCPC asserts in its Posthearing Brief that the CPAG is a “public governmental body” within the meaning of Section 610.010 and its meetings “include officials of the PSC, OPC and MDNR and are ‘public meetings’ within the meaning of ‘ [sic] 610.010.’” It is not indicated anywhere that there is any intention that the Commissioners or the Director of MDNR will participate in the CPAG. It is intended that employees of the Commission, Public Counsel and MDNR will participate in the CPAG. Contrary to SC/CCPC’s contention, “officials” of the Commission will not attend the meetings of the CPAG. There also will be non-governmental Signatory Parties that will participate in the work of the CPAG. The CPAG is not a “public governmental body.”

Among other things that the CPAG is not, the CPAG is not an administrative entity created by the Missouri Constitution or statutes; the CPAG is not an advisory committee appointed by the Governor or by executive order; the CPAG is not a department or division of the state; the CPAG is not an administrative governmental deliberative body under the direction of three (3) or more appointed members; the CPAG is not a committee appointed by or at the direction of the Commission, Public Counsel or MDNR, which is authorized to report to the Commission, Public Counsel or MDNR; and the CPAG is not an advisory committee appointed by or at the direction of the Commission, Public Counsel or MDNR for the specific purpose of the CPAG recommending directly to the Commission, Public Counsel or MDNR policy or expenditures of public funds; and the CPAG is not a “quasi-public governmental body.” Thus, the terms “public business” and “public meeting” do not apply to the CPAG.

The Demand Response, Energy Efficiency and Affordability Programs will be tariffed (Tr. 665, 668), so after the process involving the CPAG, KCPL will file a tariff with the Commission to offer a particular program. Thus, the CPAG is solely advisory. It is the Commissioners who will decide whether a proposed Demand Response, Energy Efficiency or Affordability Program is implemented by KCPL. Also, since there will be a tariff filing by KCPL, SC/CCPC will have the opportunity to file with the Commission a request that the proposed program be changed before the tariff becomes effective or that the Commission not approve the tariff, not permit the tariff to go into effect without suspension or suspend the tariff for proceedings. Since KCPL will file a tariff for each Demand Response, Energy Efficiency and Affordability Program, SC/CCPC will have an opportunity to affect the implementation or denial of each program that is proposed to the Commission for implementation.

Unlike Praxair's July 25, 2005 Limited Response To Sierra Club And Concerned Citizens' Posthearing Brief, SC/CCPC provides no legal support for its allegations. In its Limited Response, Praxair states at pages 6-7 that the CPAG is not a "public governmental body," rather the CPAG:

. . . is nothing more than a continuation of the settlement process surrounding the Stipulation. Just as a settlement meeting is open only to 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 sounding board. If it "advises" anyone, it is not the Commission but, rather, the utility regarding its future tariff filings. [Footnote citing Tribune Pub. Co. v. Curators of University of Missouri, 661 S.W.2d 575, 587 (Mo.App. 1983) omitted.]

. . . . SC/CCPC make the absurd argument that subgroups of parties to the case cannot meet to explore settlement of issues of concern to them without opening their meeting to the "public." . . .

In violation of the Commission's May 6, 2005 Order Establishing Procedural Schedule, SC/CCPC raised in their Proposed Findings Of Fact And Conclusions Of Law filed on July 19, 2005 and their Posthearing Brief filed on July 21, 2005 the aforementioned three (3) "issues" for the first time. SC/CCPC also violated 4 CSR 240-2.110(8) Hearings. The Commission on July 6, 2005 scheduled an additional half-day of evidentiary hearings. Rather than producing the affiant as a witness on July 12, 2005, or requesting that the Commission reopen Case No. EO-2005-0329 for the taking of additional evidence for a date other than July 12, 2005, Counsel for SC/CCPC attached an affidavit to the SC/CCPC Posthearing Brief, thereby, among other things, denying other parties and the Commissioners the opportunity to question SC/CCPC's affiant. The Commission also notes that SC/CCPC has not requested that the affidavit attached to the SC/CCPC Posthearing Brief be admitted into evidence in this case. The mere filing of the affidavit does not constitute competent and substantial evidence in the record.

#### **CERTIFICATE OF CONVENIENCE AND NECESSITY**

The Commission is not aware of anything that prevented SC/CCPC from raising as an issue to be included in the List Of Issues filed on May 31, 2005 whether, under Section 393.170.3 RSMo 2000, the time between the granting of the certificates of convenience and necessity and the construction of a second unit at the Iatan Station has rendered the certificates of convenience and necessity held by KCPL, Aquila and Empire null and void.

## **STIPULATION IS RIPE FOR COMMISSION DETERMINATION**

The Commission is not aware of anything that prevented SC/CCPC from raising as an issue to be listed in the List Of Issues, filed on May 31, 2005, its claim that the entire matter of the Stipulation is not ripe for determination due to the fact that the Stipulation is subject to modification based on the provisions and terms agreed to by KCPL in Kansas or directed by the KCC.

## **CONCLUSIONS OF LAW**

8. There has been no violation of Chapter 610 by a June 30, 2005 meeting of some of the Signatory Parties to the Stipulation, and there will be no violation of Chapter 610 in the future by meetings being held limited to Signatory Parties of the Stipulation

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The Commission finds and concludes that the meeting on June 30, 2005 of representatives of the Staff, Public Counsel, MDNR and Praxair was not a meeting of the CPAG and the meeting that occurred did not violate Chapter 610. There can be no actual meeting of the CPAG until the Commission has approved the formation of the CPAG. Commission Staff, not Commissioners, attended the meeting. Even if a Commissioner did attend a meeting of the CPAG, a quorum of Commissioners would be required before the provisions of Chapter 610 would clearly apply. The employees of the Commission are not authorized to set public policy for the Commission. The Commissioners through their actions as Commissioners set public policy for the Commission.

The CPAG will serve as an advisory group to KCPL and for any Demand Response, Energy Efficiency or Affordability Program that KCPL seeks to effectuate, the Commission will expect KCPL to file tariff sheets with the Commission for the Commission's approval. Any entity, including SC/CCPC may file a recommendation

with the Commission respecting said tariff sheets or request that the tariff sheets be suspended.

9. SC/CCPC has violated the Commission's May 6, 2005 Order Establishing Procedural Schedule and 4 CSR 240-2.110(8)

The Commission finds and concludes that SC/CCPC has violated the Commission's May 6, 2005 Order Establishing Procedural Schedule by not raising as issues in the List Of Issues filed on May 31, 2005 its Chapter 610 argument regarding the CPAG, its contention that there is now no valid or effective certificates of convenience and necessity for the construction of Iatan 2, and its argument that the instant case is not ripe for Commission determination because the Stipulation may change due to the provision that KCPL agrees that it will offer to the Signatory Parties in Missouri comparable terms to those terms agreed upon in Kansas that are adopted or directed by the KCC respecting the Kansas KCPL Experimental Regulatory Plan. The purpose of Commission procedures, such as the filing of a List Of Issues, which SC/CCPC have not followed, is to identify and fully develop the issues to be presented to the Commission at an appropriate stage of the proceedings.

Even if SC/CCPC's raising of its Chapter 610 allegation were not a violation of the Commission's May 6, 2005 Order Establishing Procedural Schedule, SC/CCPC's merely attaching an affidavit to its Posthearing Brief would still be a violation of 4 CSR 240-2.110(8). Rather than merely attaching an affidavit to its Posthearing Brief, SC/CCPC should have sought to raise the matter addressed in the Affidavit (a) at the evidentiary hearing reconvened on July 12, 2005 and thereafter (b) in a pleading requesting that the Commission reopen the record for the taking of additional evidence.



10. Certificates of convenience and necessity issued in Case No. 17,895 and Case No. EM-78-277 are valid and operative, and no further authority is necessary from the Commission for the siting of a second generating unit at the latan Station site

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The certificates of convenience and necessity issued in Case No. 17,895 on November 14, 1973 and in Case No. EM-78-277, 22 Mo.P.S.C.(N.S.) 249, 255-56 on July 28, 1978 are for four generating units to be constructed and operated by KCPL at the latan Station site. The certificates of convenience and necessity clearly contemplate that the four (4) units will not be built at the same time and that there is no further requirement from the Commission that KCPL seek any further authority from the Commission for the construction of latan 2, latan 3 or latan 4. The Commission's Report And Order in Case No. 17,895 clearly contemplates that latan 2 will commence construction over two (2) years after the granting of the certificates of convenience and necessity. The Commission finds and concludes that the SC/CCPC's argument that the certificates of convenience and necessity issued for the four-unit generating station at the latan Station site have lapsed, is incorrect and is hereby rejected. KCPL exercised its certificate of convenience and necessity when it commenced construction of the first unit at the latan Station site, and the Commission concludes that KCPL has sufficient lawful authority from the Commission to proceed with the construction of the second unit at the latan Station site.

11. The matters to be determined at this time by the Commission are sufficiently final for the Commission to issue a lawful Report And Order that will be ripe for judicial review, should judicial review be sought

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The Commission rejects SC/CCPC allegation that the Commission is unable to issue a Report And Order granting the request to approve the Stipulation because such a Report And Order would lack finality in that it would remain tentative, provisional,

contingent, subject to recall, revision or reconsideration by the Commission depending on changed terms of the Stipulation. Multijurisdictional utilities often face the situation where they have the same or similar requests pending before more than one jurisdictional authority. The situation thus arises of which jurisdiction will issue a decision first and whether the jurisdiction issuing the initial determination will amend or modify its determination based upon the subsequent determinations of other jurisdictions. The administrative law applicable in Missouri to the Commission as an administrative agency is not unique to Missouri: “[The Commission’s] supervision of the public utilities of this state is a continuing one and its orders and directives with regard to any phase of the operation of any utility are always subject to change to meet changing conditions, as the commission, in its discretion, may deem to be in the public interest.” *State ex rel. Chicago, Rock Island, & Pacific R.R. Co. v. P.S.C.*, 312 S.W.2d 791, 796 (Mo. banc 1958); *State ex rel. General Tel. & Tel. v. P.S.C.*, 537 S.W.2d 655, 661-62 ((Mo.App. 1976).

Contrary to the argument of SC/CCPC, the Commission is not prevented from approving the Stipulation due to it being subject to change on the basis that the Signatory Parties in Missouri may adopt terms set in Kansas by the Signatory Parties there, as ultimately approved by the KCC, or as directed by the KCC, should the KCC approve the Stipulation And Agreement that is before it. Since the principal reason for SC/CCPC's opposition to the Stipulation and the Experimental Regulatory Plan contained therein is that it includes the construction of a coal-fired plant at Iatan, it is extremely unlikely that the bases for SC/CCPC's opposition will change should the KCC approve the Stipulation And Agreement before it and the Signatory Parties in Missouri

seek to reflect in the Missouri KCPL Experimental Regulatory Plan any provisions or terms that are different in the Kansas KCPL Experimental Regulatory Plan. The opposition of SC/CCPC to this Commission approving the Stipulation will remain the same should the KCC authorize the Kansas KCPL Experimental Regulatory Plan, that being that SC/CCPC are opposed to the construction of any coal-fired generating unit.

The Commission can authorize the KCPL Experimental Regulatory Plan; accept for consideration Applications For Rehearing; wait for the KCC to issue its decision and then wait for the Signatory Parties to file with this Commission whether they seek that this Commission adopt any provisions accepted or directed by the KCC; issue an amended Report And Order, as a consequence, if necessary; rule on the Applications For Rehearing; and close Case No. EO-2005-0329 so that SC/CCPC can file in Circuit Court a Petition For Writ Of Review, if SC/CCPC so chooses. Again, it is extremely unlikely that the grounds for SC/CCPC's opposition to the Missouri KCPL Experimental Regulatory Plan will change because of any different terms approved or directed by the KCC that are then sought to be reflected in Missouri.

## **ORDERED SECTIONS**

### **IT IS THEREFORE ORDERED:**

1. That the joint recommendations comprising the Stipulation And Agreement of the Signatory Parties filed on March 28, 2005 (Attachment No. 1 hereto) and the amendments in the Signatory Parties' Response To Order Directing Filing filed on July 26, 2005 are approved, and the Signatory Parties shall carry out the terms and requirements therein.

2. That the recommendations sponsored by the Sierra Club and Concerned Citizens of Platte County are denied.

3. That this case shall remain open for the Signatory Parties to report to the Commission seven (7) days after the Kansas Corporation Commission issues its decision in KCC Docket No. 04-KCPE-1025-GIE respecting in what manner, if any, they propose to amend their joint recommendations comprising the Missouri KCPL Experimental Regulatory Plan to reflect the Kansas KCPL Experimental Regulatory Plan adopted or directed by the Kansas Corporation Commission.

4. That the Sierra Club And Concerned Citizens' Motion For Leave To File A Reply Brief Or, In The Alternative, To Strike The Limited Response To Sierra Club And Concerned Citizens' Posthearing Brief is denied.

5. That KCPL And Staff's Motion For Leave To Supplement The Signatory Parties' Suggested Report And Order (Proposed Findings Of Fact And Conclusions Of Law) Filed On July 19, 2005 is sustained.

6. Any pending motions not otherwise granted are hereby denied.

7. That this order shall become effective on August \_\_, 2005.

BY THE COMMISSION

**Colleen M. Dale**  
Secretary

(S E A L)

\_\_\_\_\_, CC., concur

and certify compliance with the provisions  
of Section 536.080 RSMo 2000.

Dated at Jefferson City, Missouri,  
on this \_\_\_\_ day of \_\_\_\_\_, 2005.

Ronald D. Pridgin, Regulatory Law Judge