

**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) Case No. ER-2007-0291
Certain Changes in its Charges for Electric)
Service to Implement its Regulatory Plan)**

APPLICATION FOR REHEARING

COMES NOW, Praxair, Inc., pursuant to Section 386.500 RSMo., and applies for rehearing of the Commission's December 21, 2007 Order Approving Tariffs in Compliance with Commission Report and Order ("Order") on the following grounds:

1. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is on record, is arbitrary and capricious and is an abuse of discretion in that the Commission appears to believe that this docket is no longer a "contested case." Specifically, the Commission claims that "[n]o hearing is required for the Commission to approve the tariffs." Therefore, the Commission appears to believe that the due process protections guaranteed in Section 536.070 are not applicable.¹

While not initiated by the filing of the December 13 and 18 tariff sheets, a contested case was initiated by the suspension of the original tariff sheets.² Although those tariff sheets were subsequently rejected by the December 6 Report and Order, this

¹ Such due process protections include the right to a hearing, the right to present evidence, and the right to cross-examine witnesses. Other procedural requirements that may be avoided by suddenly characterizing this docket as "non-contested" include the requirement to provide findings of fact and conclusions of law that are based upon competent and substantial evidence on the record. Another procedural safeguard of contested cases is the prohibition against *ex-parte* communications. One necessarily wonders whether the Commission really suggests that *ex-parte* communications regarding the compliance tariffs would have been appropriate.

² See, Section 393.150.

case nonetheless remains contested. While KCPL could arguably have initiated a new rate case by the filing of new tariffs in a new proceeding, it chose to submit those tariff sheets in the *current* proceeding asserting that they were tendered as in “compliance” with an earlier order in that proceeding. Were that not enough, by submitting “compliance” tariffs in the ongoing *contested* rate proceeding, KCPL inextricably linked this filing with its “compliance” to the December 6 Report and Order.³ Given there is no legal basis by which a contested case can be magically transformed from a contested to a non-contested proceeding, such tariff sheets must be treated pursuant to the due process requirements of Chapter 536.

2. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is on record, is arbitrary and capricious and is an abuse of discretion in that Order *fails to provide a single finding of fact* on which a court may review how the Commission conclude[d] that the proposed tariff sheets with the Commission’s Report and Order. Rather, the Commission simply concludes that such tariffs are in compliance with its earlier order and should be approved.

3. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is on record, is arbitrary and capricious and is an abuse of discretion in that *the record is devoid of any evidence* upon which the Commission could base a finding that the tariffs are in compliance with the December 6, 2007 Report and Order.

³ One might otherwise reasonably inquire as to what KCPL contends the proposed tariffs “comply” with.

4. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is on record, is arbitrary and capricious and is an abuse of discretion in that the Commission unlawfully denied Praxair the ability to cross-examine James Watkins on the contents of his affidavit in contravention of Section 536.070(12)..

5. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is on record, is arbitrary and capricious and is an abuse of discretion in that the Order references the Commission's decision in the Report and Order which it claims shows that "KCPL needs to earn an additional \$35,308,914 per year to serve its customers and to pay a reasonable rate of return." Contrary to the Commission's reference, there is not a single reference in the Commission's Report and Order to support the Commission's suggestion that KCPL needs to earn an additional \$35,308,914. In fact, the Report and Order is silent on the overall amount of the necessary increase. Moreover, the record is completely devoid of any evidence to support a finding that the Report and Order authorizes a particular level of rate increase. Not only that, the record is completely devoid of any evidence to support a finding that the proposed tariffs actually deliver the increase that would be suggested by the Report and Order. There is no evidence by which the Commission can know whether it authorized a \$35 million rate increase or whether it authorized a \$100 million rate increase. It is this very reason that Praxair suggested that the Commission

should utilize the thirty days provided by statute to properly review the compliance tariffs.

6. In its Order, the Commission suggests a new standard by which it would judge “good cause” for allowing rates to go into effect on less than thirty-day’s notice. The Order is unlawful, unjust and unreasonable, is based on inadequate findings of fact, is not supported by competent and substantial evidence on the whole record and is contrary to the competent and substantial evidence that is on record, is arbitrary and capricious and is an abuse of discretion in that the Order suggests a standard in the context of a contested case rather than through a rulemaking. To the extent that the Commission is creating a standard by which it would judge tariff filings, such a standard should be developed using the procedures for promulgating a rule.

Nevertheless, as one portion of its proposed standard, the Commission suggests that the “good cause” must be “reasonable not whimsical.” Despite this new standard, the Commission then proceeds to violate its own rule. Missouri case law suggests that “reasonableness” is judged based upon the existence of competent and substantial evidence on the record. As detailed throughout this pleading, the Commission ignored pleas to conduct a hearing and accept evidence by which it could make a determination that the tariffs are in compliance with the Report and Order. Without such evidence, the Commission’s Order is, by definition, not reasonable. Therefore, given the Commission’s standard, the Order is necessarily “whimsical.” In legal parlance, the order is arbitrary and capricious.

WHEREFORE, Praxair respectfully requests that the Commission grant its application for rehearing and make changes consistent with this application.

Respectfully submitted,



Stuart W. Conrad, MBE #23966
David L. Woodsmall, MBE #40747
3100 Broadway, Suite 1209
Kansas City, Missouri 64111
(816) 753-1122 Ext. 211
Facsimile: (816) 756-0373
Internet: stucon@fcplaw.com

ATTORNEYS FOR PRAXAIR, INC.

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.



David L. Woodsmall

Dated: December 31, 2007