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 Continue the Implementation of Its Regulatory Plan.	))))))	Case No. ER-2009-0089

SUGGESTIONS IN SUPPORT OF STAFF'S MOTION TO COMPEL PRODUCTIONS OF DOCUMENTS

COMES NOW Staff (Staff) of the Missouri Public Service Commission (Commission), by and through counsel, and in support of Staff's Motion to Compel Production of Documents suggests as follows:

1. The subjects of Staff's *Motion to Compel Production of Documents* are documents Staff requested of Kansas City Power & Light Company by Staff Data Request (DR) 0631.

Background

2. On November 20, 2008, the Commission issued its *Order Setting Procedural Schedules* in this case in which it, among other things, established a shortened time for responding to data requests as follows:

> Answers to data requests submitted on or after the date established for rebuttal testimony shall be made within ten (10) business days of the request: however, objections and responses that additional time will be required to provide an answer shall be made within five (5) business days of the request.

The Commission established two dates for rebuttal testimony, one for revenue requirement testimony – March 11, 2009 – and other for rate design rebuttal testimony – March 17, 2009.

3. Staff submitted DR 0631 on June 17, 2009 requesting the following:

1. Please provide a copy of the document titled 'Iatan Projects - Accounting for Certain Activities.'
2. Please provide a copy of the meeting minutes and other documents provided at or discussed in the 12/14/06 Iatan Joint Owners meeting.
3. Please provide copies of computer disks of all invoices given to the Kansas Corporate Commission (KCC) regarding their investigation into Iatan 1 and Common Facilities.

4. On July 28, 2009, Staff's attorney, Jaime Ott sent Kansas City Power & Light's (KCPL) attorney Victoria Schatz a letter stating that KCPL had not answered DR 0631 or requested an extension. At this point in time the DR was over a month overdue.

5. On July 30, 2009, Ms. Ott and Ms. Schatz had a telephone conversation about the status of DR 0631, in which Ms. Schatz stated that KCPL was in the process of replacing the disks provided to the KCC and would shortly provide Staff with the copies of the "new" disks it provided to the KCC.

6. On August 4, 2009, KCPL responded to Staff's DR 0631, by providing Staff with thirteen (13) compact disks containing copies of redacted invoices. KCPL did not serve Staff with a formal objection to DR 0631 on or before August 4, 2009 and has only made an objection during the September 6, 2009 conference call with Judge Stearley.

7. On August 14, 2009, Staff's attorney Nathan Williams sent KCPL's attorney Ms. Schatz a letter containing Staff's position on DR 0631 and expressing Staff's position KCPL had waived its attorney-client privilege and/or work-product doctrine by providing the KCC with invoices in their unredacted form.

8. After many unsuccessful attempts to resolve the dispute, on September 3, 2009, Staff's Ms. Ott sent KCPL's Ms. Schatz an email to schedule a telephone conference call with the presiding officer, Regulatory Law Judge (RLJ) Stearley, as provided by Commission Rule 4 CSR 240-2.090(8)(B).

9. On September 6 and 8, 2009, RLJ Stearley, KCPL's Ms. Schatz, and Staff's Ms. Ott convened via telephone in accordance to Commission Rule 4 CSR 240-2.090(8) (B). During this discovery conference, RLJ Stearley stated that he believed that KCPL had not waived its attorney-client privilege and/or its work-product doctrine protections by providing the KCC with unredacted copies of the invoices requested by Staff. Further, RLJ Stearley went through each redaction and determined what he would recommend to the Commission regarding whether the material blacked-out was privileged. RLJ Stearley opined, and KCPL agreed that a few redactions were not privileged and could be provided to Staff. Shortly thereafter, KCPL provided Staff with another set of redacted invoices in response to this conference call. Staff notes that this is the only time KCPL has provided any portions it originally redacted from the copies of the invoices it provided to Staff in response to DR 0631.

10. Since the beginning of September 2009, Ms. Schatz and Ms. Ott engage in weekly telephone conferences in which they discuss discovery issues in the above referenced matter. It is possible that DR 0631 has been a topic of conversation during those meetings, but at no point has KCPL changed its position to DR 0631 or provided Staff with any additional language to the invoices.

11. On October 30, 2009, Staff filed *Staff's Motion to Compel Production of Documents* seeking unredacted copies of the invoices KCPL provided to the KCC as requested in DR 0631.

12. There are approximately 6,227 batches of invoices contained in KCPL's response to DR 0631. Of those, 40 batches of the invoices contain pages that were initially provided to the KCC without redactions. Of those 40 batches of invoices 164 pages contain redactions.

Staff believes KCPL should provide to Staff those 164 invoices in the same format in which KCPL originally provided them to the KCC.

13. It is Staff's position that KCPL voluntarily and not inadvertently provided the KCC with unredacted invoices before Staff issued DR 0631 on June 16, 2009. Therefore, for these invoices, KCPL waived both its attorney-client privilege and its work-product doctrine protections.

14. In support of Staff's position that KCPL did not inadvertently provide the KCC with unredacted invoices Staff notes that on January 14, 2009 Staff requested with DR 0415 copies of all Schiff Hardin invoices to KCPL. Many of the invoices at issue here with regard to DR 0631 are Schiff Hardin invoices that were also within the scope of DR 0415. On January 23, 2009, KCPL objected to DR 0415 based on attorney-client privilege and/or work-product doctrine and redacted portions of the invoices it claimed were privileged. When the Commission was processing this rate case, KCPL was concurrently in the middle of a rate case in Kansas. The KCC had requested invoices from a sampling of months, and KCPL provided the KCC the invoices for those months without making any redactions or objections. It was not until after Staff submitted DR 0631 on June 16, 2009 that KCPL claimed that it had inadvertently provided the invoices to in their entirety to the KCC. It took KCPL almost two months to switch out invoices with the KCC. Staff does not see how KCPL can show diligence in retrieving the unredacted invoices it produced to the KCC if it truly inadvertently produced them to the KCC.

Argument

I. Attorney-Client Privilege

15. No privilege attaches to communications simply because they are made with an attorney. 22 Mo. Prac. 502.1. In order for the attorney-client privilege to attach to a communication, there must be an actual relationship of attorney and client in existence at the time of the communication and that relationship must exist with respect to the subject matter of the communication. In addition, the communication must have been made with the attorney in his or her professional capacity, by reason of the relationship of the attorney and client for the purpose of securing legal services. No privilege exists as to communications between a lawyer and a non-lawyer concerning non-legal matters.

16. The documents in question are invoices between KCPL and attorney's, consultants, vendors, etc. that provide services to KCPL. KCPL's relationship with its attorney's, consultants, vendors, etc. is not always in the scope of attorney-client relationship. For instance, Schiff Hardin provides both for legal services and business consulting services. Not every service Schiff Hardin invoiced to KCPL is within the scope of their attorney-client relationship. Additionally, an invoice is not within the scope of attorney-client privilege. Invoices are a communication between KCPL and the service provider as to what services were render, and not the actual service provided.

17. It is well settled that the rationale behind the attorney-client privilege is to encourage an open and honest flow of communication between the client and the attorney. *See Upjohn Co. v. U.S.*, 449 U.S. 383, 389-90 (1991). Here the purpose behind the attorney-client privilege is not hindered by disclosure of invoices. Disclosure is not affecting the attorney's or client's conduct in the course of representation.

18. In *Lipton v. St. Louis Housing Authority,* the Missouri Appellate Court for the Eastern District stated:

> Confidentiality of communications between attorney and client is essential for an effective attorney-client relationship because confidentiality fosters candor on the part of a client who is seeking advice and guidance from his chosen representative. . . . Generally all of what the client says to the lawyer *and* what the lawyer says to the client is protected by the attorney-client privilege.
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> 705 S.W.2d 565, 570 (Mo. App. 1986) (internal citations omitted).

However, the Court went on to state that the attorney-client privilege is waived where the client voluntarily shares the communication with a third party, with an exception if the client and third party share a common interest in the outcome of the litigation and the communication by the client to the third party was made in confidence. *Id*. In *Lipton* the Court held that the disclosure of the attorney-client communication to a third party fell within the foregoing exception.

19. There is case authority both that disclosure to another agency waives the attorney-client privilege and that it does not. In *United States v. Massachusetts Institute of Technology*, the First Circuit, after lengthy discussion of the countervailing considerations and citation to the weight of authority supporting its holding, held, among other things, that by disclosing legal bills to the Defense Contract Audit Agency, the auditing arm of the Department of Defense, MIT waived attorney-client privilege as to those billings. 129 F.3d 681, 684-686 (1st Cir. 1997). Rather than reproducing that well-reasoned discussion here, attached is a copy of that opinion. Discussed in *MIT* is opposing authority—Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977). There, on rehearing *en banc*, the Court reached a holding contrary to the original panel which held a law firm's report was not privileged because the law firm was hired to make an investigation of facts and give business recommendations for future conduct not to give legal advice or represent the company in any pending or potential litigation. On rehearing *en banc* the Court held that employee interviews were attorney-client communications and

therefore the law firm's report was privileged and, further, prior disclosure of that report to the SEC in litigation involving the same matters was a limited waiver of the privilege.

20. It is the Staff's position that the redactions from the invoices are not protected attorney-client communications and, if they are, then by providing them to the KCC, KCPL waived the attorney-client privilege.

II. Work-Product Doctrine

21. The work product doctrine is a qualified immunity from the discovery of certain trial preparation materials because it permits a party to discover such materials if the party can establish: (1) substantial need for the materials in preparing its case; and (2) inability to obtain the substantial equivalent thereof by other means without undue hardships. Missouri Supreme Court Rule 56.01(b) (3). Substantial need can be found where the material for which discovery is sought has a material influence on the litigation. *Porter v. Gottschall*, 615 S.W.2d 63 (Mo. Banc. 1981). However, if the trial preparation materials sought to be discovered constitute "the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation, the work product doctrine affords an absolute immunity from discovery. *Id*.

22. The work product doctrine applies to material prepared in anticipation of litigation. *State ex rel. Day v. Patterson*, defined that, "to mean that documents prepared in anticipation of any related litigation, or trial are qualified immune and may be obtained only upon requisite showings." 773 S.W.2d 224, 229 (Mo. Ct. App. 1989). A document is prepared in "anticipation of litigation" or for trial, for work product purposes, when in light of nature of document and factual situation in a particular case, document can fairly be said to have been prepared or obtained in anticipation of litigation. *M.E.S. v. Daughters of Charity Services of St.*

Louis, 975 S.W.2d 477 (Mo. Ct. App. 1998). Work product immunity applies only to information and a material gathered by one's adversary in the litigation, or in preparation for the litigation, in which discovery is being sought; there must be possibility of litigation. *Brantley v. Sears Roebuck & Co*., 959 S.W.2d 927 (Mo. Ct. App. 1998). Protection of work product does not embrace materials prepared in anticipation of prior unrelated litigation. *Id.* In order to protect documents as work product, there must be more than bare allegations; counsel must have collected a document to prepare case for possible litigation. *State ex rel. Polytech, Inc. v. Voorhees*, 895 S.W.2d 13 (Mo. 1995).

23. Work product is distinguishable from attorney-client privilege; while the attorney-client privilege protects disclosures by the client to the attorney and is absolute in all but the most extraordinary situations, work product is designed to prevent a party from reaping the benefits of his opponent's labors for the same or related cause of action. If materials are produced in ordinary and regular course of opponent's business and not to prepare for litigation, they are outside the scope of work product doctrine; accordingly, even if litigation is imminent, there is no work product immunity for such documents.

24. In order for a party to invoke work product protection, the party opposing discovery, "must establish, via competent evidence, that the materials sought to be protected (1) are documents or tangible things, (2) were prepared in anticipation of litigation or for trial, and (3) were prepared by or for a party or a representative of that party. *State ex rel. Ford Motor Company v. Westbrooke*, 151 S.W.3d 364, 367 (Mo. Banc. 2005). A party challenging privilege must have sufficient information to assess whether the claimed privilege is applicable. *State ex rel. Atchison, Topeka and Santa Fe Ry. Co. v. O'Malley*, 898 S.W.2d 550, 554 (Mo. Banc. 1995).

25. In addition, the work-product doctrine is not absolute. A party can waive protection for work-product documents by sharing those documents with third parties. Disclosure of documents protected by the work product doctrine to third-parties does not necessarily waive the work product immunity. Disclosure to third persons only waives the work product immunity if it "substantially increases the opportunities for potential adversaries to obtain the information." *Navigators Management Company, Inc. v. St. Paul Fire and Marine Insurance Co.*, 2009 WL 465584 (Mo. Ct. App. 2009). The Court must determine whether sharing information increased the likelihood that the documents would be give to the adversary.

26. In *Bergonzi* Defendants sought production of document reports of an internal investigation made by McKeeson and shared with the Government in response for leniency. 216 F.R.D. 487 (N.D. Cal. 2003). Defendants argued the Company waived any claim of privilege by producing the material to the Government. *Id.* The U.S. District Court for the Northern District of California determined that once a party has disclosed work product to one adversary, it waives work product protection as to all other adversaries. *See McMorgan v. First Cal. Mortg. Co.*, 931 F.Supp. 703 (N.D. Cal. 1996). The Court found that disclosure of the Report and Back-up Materials to the Government constitutes a disclosure of the documents to an adversary. Therefore, any work product protection claimed against production to the Defendants was also waived

27. In a similar set of facts to those here, *U.S. v. MIT,* the Massachusetts Institute of Technology attempted to assert the attorney-client privilege and work-product doctrine in response to a document request by the Internal Revenue Service. 129 F.3d 681 (1st Cir. 1997). One issue presented was whether MIT's disclosure of certain of the documents to another government agency caused it to lose the privileges. In 1993, the IRS conducted an examination

of MIT's records to determine whether MIT still qualified for exempt status and to determine whether it was complying with provisions relating to employment taxes and the reporting of unrelated business income. In aid of this examination, the IRS requested from MIT copies of the billing statements of law firms that had represented MIT and minutes of the MIT Corporation and its executive and auditing committees. In response, MIT supplied the documents requested but redacted information it claimed to be covered by the attorney-client privilege or the work-product doctrine or both. In mid-1994 the IRS requested that the redacted information be supplied, and MIT declined. At this point the IRS sought to obtain the same documents in unredacted form from the Defense Contract Audit Agency ("the audit agency"), the auditing arm of the Department of Defense. It appears that the same billing statements and possibly some or all of the minutes sought by the IRS had earlier been provided to the audit agency pursuant to contracts between MIT and components of the Department of Defense. The audit agency advised the IRS that it would not turn over the documents MIT provided it without the latter's consent, which MIT declines to give. The audit agency had made no unconditional promise to keep the documents secret, but its regulations and practices offered MIT some reason to think that indiscriminate disclosure was unlikely.

28. The district court held that the disclosure of the legal bills to the audit agency forfeited the attorney-client privilege. As to the minutes, the district court said that the privilege remained available because the government had not proved that the minutes had been disclosed to the audit agency. After reviewing the minutes *in camera*, the court found that three contained privileged material and ordered MIT to turn over the others as unprivileged or because MIT had lost the privilege by disclosing the substance of the minutes in its now unprivileged legal bills. The district court followed a different path in resolving MIT's work product objection. The

court held that neither the legal bills nor the minutes were "prepared in anticipation of litigation or for trial." Fed.R.Civ.P. 26(b) (3). It ruled that they were therefore discoverable as ordinary business records affirmed the district courts decision. On review the First Circuit upheld the district court as to waiver of the attorney-client privilege for billing statements by their disclosure to the audit agency, but vacated the district court's ruling holding that the IRS was not entitled to the minutes with guidance that MIT had waived its attorney work product protection by its inability to meet its burden of proving it had not disclosed the minutes to the audit agency.

29. By disclosing them to the KCC, KCPL waived its attorney-client privilege and its work-product privilege regarding the documents it disclosed to the KCC. The work product doctrine protects from discovery materials prepared by an attorney in anticipation of litigation. *See generally, Hickman v. Taylor*, 329 U.S. 495, 511 (1947). The privilege is intended to allow an attorney to "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Id*. Materials that contain the impressions, conclusions or theories of counsel constitute work product. *Id.*

30. The documents in question were not prepared in the anticipation of litigation. The documents in question are all invoices. While a dispute might arise over the cost of services, the "possibility" of litigation is insufficient to protect the documents from the work-product doctrine privilege.

31. Additionally, in DR 0631 Staff was trying to obtain the disclosed documents from KCPL, in that the documents have already been disclosed to an adversary, the KCC. Although, KCPL did try to the cure the disclosure by requesting the documents back, and by supplementing the invoices with redacted versions eight months after their were in control of

the KCC. It is plausible that another adversary would have access to the information contained in the documents and thus the work product doctrine was waived.

Conclusion

32. KCPL waived both its attorney-client privilege and work-product doctrine protections by disclosing the documents to the KCC in an unredacted format. KCPL did not inadvertently disclose those documents. KCPL did not diligently recover the unredacted invoices from the KCC. Thus Staff is entitled to production of the invoices in their unredacted format.

WHEREFORE, Staff respectfully submits the foregoing suggestions to the Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 16th day of November, 2009.

/s/ Jaime N. Ott