

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

In the Matter of Kansas City Power & Light)
Company's Request for Authority to Implement) **Case No. ER-2012-0174**
a General Rate Increase for Electric Service.) Tracking No. YE-2012-0404

and

In the Matter of KCP&L Greater Missouri)
Operations Company's Request for Authority) **Case No. ER-2012-0175**
To Implement a General Rate Increase for) Tracking No. YE-2012-0405
Electric Service.)

**REPLY TO "STAFF RESPONSE TO MOTION FOR FULL COMMISSION
RECONSIDERATION OF SEPTEMBER 28, 2012 ORDER DENYING MOTION"**

Kansas City Power & Light Company ("KCP&L") and KCP&L Greater Missouri Operation Company ("GMO") (sometimes referred to as "the companies") provide this short reply to Staff's Response concerning an attempt to obtain privileged documents under a claim that failure to timely object waives privileges.

STAFF'S POSITION

Staff's position is very clear: The companies' failure to serve an objection on counsel is a waiver of privilege in all circumstances and for all purposes. It matters not to staff that the privilege was asserted in response to the DR and that counsel did so in good faith based on a previous order of the Commission allowing privilege to be asserted at that time. It matters not to staff that the companies have never turned over the documents (*i.e.*, inadvertent disclosure) and that the companies have consistently objected to production of the documents. It matters not to staff that the issue before the Commission is a subpoena and there is no dispute that the companies objected to the subpoena and even served the correct part of the staff with those objections. Staff's argument is "we got you" on the subpoena because objections to DRs were

sent to the staff rather than to staff counsel and because the objections to the DRs were 10 days later than the time for objections. Staff asks the Commission to hold that failure to serve objections to DRs waives any objection to a *new* subpoena for the same documents. Staff asks for a dangerous precedent.

Staff's position is not the law. The companies' previous response discusses the Missouri "knowing waiver" standards and those argument will not be re-presented here. Neither staff nor the original order on this issue points the Commission to case law concerning whether failure to serve objections pursuant to a regulation is a waiver of privilege and undersigned counsel finds no Missouri case law directly on point. Instead, as previously discussed, waiver of privilege occurs when there is *no* objection and the information *is provided*. Even then, the waiver must have been knowing and voluntarily.

ADDITIONAL LEGAL SUPPORT FOR LACK OF WAIVER

With more time to consider the issues, the companies also point the Commission to *EEOC v. Lutheran Social Services*, 186 F.3d 959 (D.C. Cir. 1999)¹, with facts eerily similar to the current situation. In *Lutheran*, a subpoena was issued by the regulatory agency. Lutheran failed to object within the five days specified by EEOC rule. The Court summarized its own opinion as follows: "the EEOC argues that Lutheran waived its claim that the report is protected by the attorney-client and work product privileges by failing to comply with a regulation requiring recipients to present any objections to the [EEOC] within five days. We conclude that under the circumstances of this case Lutheran's failure to present its objections pursuant to regulation cannot be viewed as a waiver [of the privileges]." *Id.* at 960. The D.C. Circuit pointed out that privileges are a matter of common law and cannot be a matter of regulations. *Id.*

¹ The companies acknowledge that neither this case nor the Federal Rules cited in this section are binding on the Commission, but they both provide important framework for considering the issues presented here.

at 965. The Court also discusses cases where waiver is found as a result of "an utter abandonment of normal procedures," which had not occurred in the *Lutheran* case. *Id.* at 967. Further research shows that waiver of privilege for failure to object almost always occurs after the privileged information has been produced. In this case, as in *Lutheran*, the information was not produced and the companies' have taken appropriate steps to protect the privileges.

The situation presented in this case is quite similar to *Lutheran*. Staff argues that a failure to comply with a technical service rule is abandonment of privilege. But staff does not deny that the Commission had previously allowed the very practice followed by counsel in this case – preserve the privilege at the time of answer. The circumstances here are not of an abandonment of the Commission's process, indeed the companies' counsel was faithful to the process in making the objections in the way that he did.

A discussion of Federal Law is also helpful for another reason. Federal Rules of Civil Procedure specifically address waiver of objections. FED. R. CIV. P. 33(a)(4) specifies that "any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure." Of course, neither PSC regulations nor the procedural order in this case specifies that failure to timely object is a waiver. *See* 4 CSR 240-2.090. More important, the Federal Law recognizes that objections should be allowed to be made out of time for good cause. In this case, the companies clearly had good cause for not serving staff counsel – the practice followed here had been followed in previous cases without objection. To the extent the Commission considers staff's "gotcha" argument, the Commission should allow an exception from the technical requirements of service on counsel for good cause as well.

**IN THESE CIRCUMSTANCES, THE COMMISSION SHOULD
WAIVE ITS OWN RULES OR EXTEND THE OBJECTION TIME**

4 CSR 240-2.015 allows the Commission to waive any rule for good cause with or without motion by the parties. 4 CSR 240.2.090(2) governing objections to data requests, also allows the commission to extend the 10 days for objections. To the extent the Commission believes the companies have did not comply with Commission rules by not serving staff counsel with an objection, there is good cause for a waiver of the rules or an extension of the time to object in this case. When considering "good cause" the Commission should consider whether the companies were engaged in a practice of defiance or "a strategy of noncompliance" as opposed to "inadvertence and acting in good faith." The Commission should also consider the lack of prejudice to staff. *Drexel Heritage Furnishings, Inc. v. Furniture USA, Inc.* 200 F.R.D. 255, 259 (M.D. N.C. 2001). Here, there is no bad faith on the part of the companies in the way they handled the objections, and there is no prejudice to staff. Staff admits they received the objections, they just complain they went to the wrong department within the staff.

**PRIVILEGE LOGS ARE NOT AT ISSUE YET –
NO OPPOSITION TO A SPECIAL MASTER**

Finally, paragraph 7 of Staff's Response to the Motion to Reconsider complains about the privilege logs provided in response to the original DRs and incorporated into the objections to the new subpoena at issue here. At this stage, the privilege logs are not at issue. The Commission should address whether there has been a waiver of the privilege. Staff has not previously asked the companies to provide additional information in the privilege logs, but the companies would be happy to do so. Finally, the companies have no objection to the staff's suggestion that a special master be appointed to review these documents.

The companies respectfully request the Commission reverse the previous order finding a waiver of privilege and either: 1) Find that staff should have handled this entire matter through the discovery conferences established by the procedural order of April 26, 2012 rather than by issuing a subpoena. Although the procedural does not specify that the companies waive objections if not served on counsel, the procedural order *did* specify that staff waived discovery disputes not presented at discovery conferences. 2) Appoint a special master to review and make recommendation to the Commission concerning the companies' objections to the subpoena.

Respectfully submitted,

/s/ Charles W. Hatfield

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this 3rd day of October, 2012, on the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

/s/ Charles W. Hatfield
Attorney