

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

In the Matter of the Application of Kansas City Power)
and Light Company for Approval to Make Certain)
Changes in its Charges for Electric Service to) Case No. ER-2009-0089
Continue the Implementation of Its Regulatory Plan)

**KANSAS CITY POWER & LIGHT COMPANY'S RESPONSE
TO STAFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

Pursuant to the Missouri Public Service Commission's ("Commission") Order Directing Filing issued on November 2, 2009, Kansas City Power & Light Company ("KCP&L") respectfully submits its Response and hereby requests that the Commission deny Staff's Motion To Compel Production Of Documents ("Staff Motion") which was filed on October 30, 2009.

In support hereof, KCP&L states as follows:

1. On October 30, 2009, the Staff of the Commission filed a Motion To Compel Production Of Documents requesting that the Commission order KCP&L to provide Staff with unredacted copies of certain invoices from the Schiff Hardin LLP law firm which were inadvertently included in computer disks provided to the parties to the KCC Staff and CURB in the 2008 KCP&L rate case in Kansas. The unredacted version of the invoices from the Schiff Hardin LLP law firm included privileged, attorney-client communications or attorney-work product doctrine materials which was inadvertently included in the documents produced in the Kansas rate case. As explained below, when the inadvertent disclosure of the unredacted invoices was discovered in Kansas, KCP&L initiated contacts with the parties to the Kansas rate case which resulted in the return of the inadvertently disclosed unredacted invoices without objection by the Kansas parties. The unredacted versions of the Schiff invoices were replaced

with properly redacted versions of the invoices which redacted the privileged, attorney-client communications and other privileged, attorney- work product documents.

2. As noted in the Staff's Motion, this matter has already been reviewed by Regulatory Law Judge Harold Stearley. Judge Stearley has informally ruled that KCP&L was not required to provide Staff with the unredacted Schiff Hardin invoices which were inadvertently disclosed in Kansas, and subsequently retrieved from the Kansas parties. (Staff Motion, p. 3) KCP&L respectfully requests that Judge Stearley's ruling on this matter be affirmed in all respects by the Commission.

3. First, Staff erroneously argues that KCP&L failed to timely object to Staff DR No. 0631, and "For this reason alone the Commission should compel KCPL to provide unredacted copies of all the invoices it initially gave the KCC. . ." (Staff Motion, p. 3) This argument is based upon the fact that KCP&L did not object to Staff DR No. 0631 within ten days of receipt of the data request. However, the Commission has already reviewed this issue in other cases and has consistently ruled that claims of attorney-client privilege need not be raised within the ten-day objection period specified by Commission Rule 4 CSR 240-2.090(2). *See Opinion: Order Denying Motion To Compel Data Requests 554 And 555, Staff v. Union Electric Company*, Case No. EC-2002-1 (January 24, 2002); and *Order On Reconsideration Concerning Discovery, Re Union Electric Company*, Case No. EO-2004-0108 (February 26, 2004). In the 2004 Union Electric Company Order, the Commission stated:

This issue does not require extended discussion. As Union Electric points out, the Commission has previously resolved this question in a dispute between these same parties. . . On that occasion, the Commission held that claims of attorney-client privilege need not be raised within the ten-day objection period specified by Commission Rule 4 CSR 240-2.090(2). The Commission specifically determined that failure to raise a claim of attorney-client privilege within the ten-day period did not amount to waiver of that privilege. The Commission will follow that ruling in this case. (*footnotes omitted*)

4. Second, Staff argued that “KCPL waived its attorney-client privilege and/or work product doctrine privilege as to the invoices it produced to the KCC when it gave them to the KCC without redaction. . . .” (Staff Motion, p. 5) This Staff argument is also erroneous.

5. Various courts have held that an inadvertent disclosure of privileged, attorney-client communications and attorney-work product doctrine materials does not necessarily amount to a waiver of the attorney-client communications and/or attorney work product protections. *See Zapata v. IBP, Inc.* 175 F.R.D. 574 (D.Kansas 1997); *Monarch Cement Co. v. Lone Star Industries, Inc.*, 132 F.R.D. 558, 559 (D.Kans.1990); *Kansas City Power & Light Co. v. Pittsburg & Midway Coal Mining Co.*, 133 F.R.D. 171, 172 (D.Kan. 1989). These courts have employed a five-factor test to determine if inadvertent disclosure of documents effects a waiver of the attorney-client privilege or attorney-work product protections. The factors typically applied are as follows: 1) The reasonableness of the precautions taken to prevent inadvertent disclosure; 2) The time taken to rectify the error; 3) The scope of the discovery; 4) The extent of the disclosure; and 5) The overriding issue of fairness. *Zapata* at 4.

6. In *State ex rel. Tracy v Dandurand*, 30 S.W. 3d. 831 (Mo. banc 2000) the Missouri Supreme Court indicated that Missouri provides strong protection for attorney-client communications and that a trial court has the discretion to order the return of inadvertently disclosed attorney-client communications. *See also Gray v. Bicknell*, 86 F.3d. 1472 (8th Cir. 1996)(endorsing a middle ground balancing test).

7. In addition, the newly enacted Federal Rule of Evidence Rule 502 specifically addresses inadvertent disclosure of privileged attorney-client communications in federal court and administrative proceedings. The federal rule provides that inadvertent disclosure does not operate as a waiver if: 1) the disclosure was inadvertent; 2) the holder of the privilege or

protection took reasonable steps to prevent disclosure; and 3) the holder took reasonable steps to rectify the error. *See* FED. R.CIV. P. 502 (b) (effective September 19, 2008).

8. Applying the legal standards discussed above, the Commission should uphold Judge Stearley's ruling that the attorney-client privilege has not been waived by the inadvertent disclosure that occurred in Kansas that was subsequently rectified. As explained in the attached Affidavit of Tim Rush, KCP&L took reasonable precautions to prevent the inadvertent disclosure of the privileged documents. However, in the case of the inadvertent disclosure, there was an error in the KCP&L's process for handling legal invoices whereby the legal invoices in question were scanned into the Company's Voucher Imaging Payment System without submission to the Law Department for review and removal of supporting documentation first. In preparing responses to certain Kansas data requests a clerical error occurred and unredacted versions of the Schiff Hardin invoices, and supporting documentation, were mistakenly copied onto computer disks that contained other invoices from other law firms, that had been processed through the Law Department, and other vendors working for KCP&L. There were a total of 121 unredacted invoices included out of a total of 6,414 vendor invoices contained on 14 computer disks.

9. Once discovered, the inadvertent disclosure was brought to the attention of the Kansas Staff and CURB, and was rectified without objection with all invoices containing privileged information destroyed and replaced with redacted invoices. Legal counsel for the Kansas Staff was notified of the inadvertent disclosure on July 13, 2009 and the matter was fully concluded on August 18, 2009 with the agreement that Kansas Staff and CURB would destroy and/or erase the unredacted invoices from any computer upon which they were downloaded and KCP&L would provide a computer disk containing the redacted replacement invoices. Because

the invoices had been loaded onto Staff and CURB's computers, some level of coordination was required to identify and replace the invoices in question. *See* Affidavit of Tim Rush, pp. 8-10, which is attached and incorporated herein.

10. With regard to the scope of discovery in this case, it should be noted that KCP&L has worked diligently to provide Staff with the information it has requested, and has asserted the attorney-client privilege sparingly (with respect to roughly two percent of the data requests and many of those data requests have been subsequently answered.) KCP&L has provided over 103,000 documents (equivalent to approximately 4.0 million pages), including documents contained in CD and DVD computer disks and jump drives, or provided in hard copy. Of these, over 65,900 documents were provided to the MPSC audit and engineering Staff in the ER-2009-0089 case, with the remaining documents provided in the concurrent ER-2009-0090, HR-2009-0092 and 09-KCPE-246-RTS dockets. Additionally, KCP&L has responded to a total of 2,861 data requests during these cases, not including a large amount of data provided to the Commission's engineering staff. This total includes 1,457 data requests in this case (1,100 from the Commission's auditing staff) as well as an additional 878 data requests in the companion KCP&L Greater Missouri Operations Company rate cases (Case No. ER-2009-0090 and HR-2009-0092), and 526 data requests in Kansas Docket 09-KCPE-246-RTS. Given the massive amount of discovery that has occurred, it is understandable that a clerical error could result in an inadvertent disclosure of a limited number of documents that KCP&L had intended to be provided on a redacted basis, despite KCP&L's best efforts to protect the information from inadvertent disclosure. *See* Affidavit of Tim Rush, pp. 1-8.

11. The parties in the Kansas rate case recognized the overriding issue of fairness required the rectification of the mistake that occurred. KCP&L would respectfully request that

the Commission also recognize that the disclosure was inadvertent, and that fundamental fairness requires that this mistake in Kansas should not be used against KCP&L in this Missouri proceeding.

WHEREFORE, for the foregoing reasons, KCP&L respectfully requests that the Commission uphold the initial ruling of Regulatory Law Judge Harold Stearley, and deny the Staff's Motion To Compel Production Of Documents filed on October 30, 2009.

Respectfully submitted,

/s/ James M. Fischer

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CERTIFICATE OF SERVICE

A copy of the foregoing has been served this 19th day of November 2009 upon counsel of record in the above-captioned proceedings.

/s/ James M. Fischer

James M. Fischer

- Approximate total page count of those documents.
- Approximate number of meetings/conferences the parties had attempting to resolve the issues prior to the discovery conferences with the RLJ.
- In addition to legal arguments concerning objections/privileges, please specify if objections and privileges were raised during your informal meetings.
- If possible, the approximate number of times objections/privileges were waived after your informal meetings and thus additional information was provided.
- Were "Golden Rule" letters sent?

2. In response thereto, KCP&L initiated both electronic and manual analyses of the documents provided during its 2009 rate cases and associated construction audit. Based on the results of these analyses, KCP&L has provided over 103,000 documents (equivalent to approximately 4.0 million pages), including documents contained in CD and DVD computer disks and jump drives, or provided in hard copy. Of these, over 65,900 documents were provided to the MPSC audit and engineering Staff in the ER-2009-0089 case, with the remaining documents provided in the concurrent ER-2009-0090, HR-2009-0092 and 09-KCPE-246-RTS dockets. Additionally, KCP&L has responded to a total of 2,861 data requests during these cases, not including a large amount of data provided to the Commission's engineering staff. This total includes 1,457 data requests in this case (1,100 from the Commission's auditing staff) as well as an additional 878 data requests in the companion KCP&L Greater Missouri Operations Company rate cases (Case No. ER-2009-0090 and HR-2009-0092), and 526 data requests in Kansas Docket 09-KCPE-246-RTS. The Staff has access to all of these data requests and responses. Attached to this Affidavit as Exhibit A is a summary table of the data provided. As can be seen in this summary table, a substantial amount of data was provided to the Commission's engineering staff. Although this information was not

included in either EFIS or CaseWorksEX (described below), it should be readily available to Staff.

3. With regard to the scope of discovery in this case, it should be noted that KCP&L has worked diligently to timely provide Staff with the requested information requested and has objected and asserted the attorney-client or work product privilege sparingly (privilege has been asserted with respect to roughly only two percent of the data requests and many of those data requests have been subsequently answered). We asserted objections to approximately 50 data requests with unprivileged documents supplied. Subsequently, we withdrew in whole or in part over 20 of those data requests as a result of negotiations with Staff.

4. To put our responses to Judge Stearley's inquiry in context, I would like to provide some background on KCP&L's process for responding to data requests.

- a. A data request is submitted by a party in the proceeding asking for specific information from KCP&L. It is initially reviewed by someone in my department and forwarded to the department that the reviewer feels can best answer the question. A data request point person(s) is assigned within every department at KCP&L and has the responsibility for coordinating the data request to its completion. Before it is sent to the appropriate point person, a date for completion is assigned and a prompt response is requested. KCP&L uses an electronic system ("CaseWorks") to help in the data management process for responding to the data requests, including attachment of requested documents, and publishing those requests for parties to view. CaseWorks

assists the Company in maintaining a systematic process and workflow to timely respond to data requests and allows parties to the proceeding timely access to both the data request and response.

- b. In addition to publishing responses on the internet for parties to view in an externally viewable version of CaseWorks (“CaseWorksEX”), the Company also submits responses to all data requests submitted by the MPSC Staff in the Missouri Public Service Commissions Electronic Filing and Information System (EFIS). The EFIS system does not allow other parties beyond the MPSC Staff to see the data response provided to the MPSC Staff. CaseWorksEX allows parties to see requests and responses from all parties. It also is the vehicle which allows the MPSC Staff to view responses to data requests from other cases, including the Company’s cases in Kansas.
- c. The Company also responds to data requests in hard copy form. The MPSC Staff personnel located in the Kansas City office request two copies of documents responsive to each request they have submitted, in addition to provision of the responses published in both CaseWorksEX and EFIS, which constitutes a third submittal of the same response. For many responses, due to the sheer volume of some of the data requested, CDs, DVDs and jump drives containing large volumes of data are used as the medium for transmitting documents to the MPSC Staff.
- d. Lastly, sometimes data is so sensitive that the Company only makes the data available for review in its offices. This often includes personnel data, and other sensitive data. We have also worked with the Staff and provided data

normally retained at our offices for Staff's review in Jefferson City at our legal counsel's office.

As you can see from this summary, the Company uses a number of duplicative methods to accurately and timely respond to data requests by MPSC Staff and other parties to a proceeding. We continue to make all efforts to accommodate the MPSC Staff in every way possible to assist in their receipt and review of requested information.

5. On occasion, the Company may find it necessary to request an extension of time to respond to a data request if it believes in good faith additional time will be required to process and timely respond to the data requests. This generally occurs when a large number of data requests are received on one day (for example, the Company received 50 data requests from Staff on October 6, 2009) or when a data request requires a substantial review of information. For example, data request 0673 requested that KCP&L "provide for review all David Price e-mails either received or sent while in the employ of KCPL," which would require the review of over 35,000 e-mails. After discussing the subject with the Staff, it was determined that KCP&L would only review sent e-mails. As a result, KCP&L was required to retrieve and review over 12,000 e-mails for attorney-client or work product privilege. In addition to a formal request for extension, I also notified the audit staff that this would take a significant, undetermined amount of time to complete.

6. During the construction audit, numerous meetings, phone conversations and e-mail correspondence have taken place, which are not necessarily reflected in the data request process. If the Company has questions or concerns regarding a request, we

routinely contact the requester in an attempt to clarify to the request. Additionally, we often provide responses to requests that may not be formally written as a data request, but were requests made at meetings, by phone or through e-mail by a requesting party. These responses are in addition to the count provided in Paragraph 2, above.

7. In addition to providing the substantial documentation above, KCP&L conducted over 100 meetings and document review sessions with the MPSC audit and engineering Staff during both the main rate case and the subsequent construction audit. The majority of these meetings included multiple company subject matter experts in order to address Staff's request for additional information and explanations.

8. Counsel for the Company and Staff have also engaged in a series of meetings in which discovery issues are addressed in an attempt to reach resolution. In early September 2009, KCP&L's counsel and Staff's counsel established a weekly call to discuss and attempt to resolve any outstanding discovery issues. In addition, counsel discuss matters as needed when they arise. All of these discussions are focused on Staff's concerns with discovery and KCP&L's attempt to resolve those concerns.

9. Additionally, since July 2009 Staff's counsel has sent KCP&L two Golden Rule letters. On July 28, 2009, Staff's counsel sent a letter relating to DRs 0631, 0637, 0633, and 0339. Additionally, on August 14, 2009 Staff's counsel sent a letter to KCP&L regarding DR 0415 and general discovery issues.

10. Numerous phone conferences and e-mail exchanges with counsel followed in an attempt to resolve the Golden Rule issues. As a result, KCP&L believes issues relating to DRs 0633 and 0339 have been fully resolved through compromise. DR 0631 was the subject of a two-part discovery conference with Regulatory Law Judge Stearley

on September 14, 2009 and September 15, 2009 in which he found 1) KCP&L did not waive any privilege through the inadvertent disclosure of un-redacted legal invoices to the Kansas Corporation Commission (“KCC”) Staff and Citizens’ Utility Ratepayers Board (“CURB”) in response to Kansas data requests and 2) upheld the appropriateness of KCP&L’s redactions for attorney client and work product privilege on the invoices. That DR is the now the subject of Staff’s Motion to Compel.

11. During the same discovery conference Judge Stearley found that KCP&L’s accommodation to provide a highly confidential document regarding sensitive employee personnel issues requested in DR 0637 at the law office of KCP&L’s counsel Jim Fischer in Jefferson City was appropriate, so long as Staff is granted reasonable access. To KCP&L’s knowledge, this issue is fully resolved.

12. Throughout the discovery process, KCP&L has gone to great lengths to cooperate with Staff and ease the process. Examples of this include:

- a. Offering without solicitation to re-redact in black privileged information in legal invoices that had been previously redacted through white redaction tape when Staff raised concerns about discerning redactions;
- b. Accommodating Staff’s request to review certain highly confidential and sensitive documents in Jefferson City, instead of at KCP&L’s offices in Kansas City;
- c. Providing unsolicited keys to Staff’s legal counsel to assist their understanding of our invoice and voucher numbering system;

- d. Initiating, in mid-2009, an “informal data request” process to expedite in a systematic manner the many follow-up requests that we received for elaboration on a prior response;
- e. Assigning an internal person as a single point of contact to coordinate requests for meetings, clarifications and other follow-up issues for auditing Staff. (An internal person has been assigned to the engineering Staff throughout the engineering Staff review of the construction project; and
- f. Compromising and providing data for over 20 of KCP&L’s approximately 50 asserted objections.
- g. As mentioned earlier, providing access to Company subject matter experts in over 100 meetings with the Staff on a wide range of topics.

Background and Description of the Inadvertent Disclosure

13. KCP&L has taken great strides to timely provide responses to the immense number of discovery requests while maintaining its internal review process and protecting highly confidential and attorney-client and work product privileged information. However, even with the Company’s best efforts in place, we experienced a rare clerical error that resulted in an inadvertent disclosure of attorney-client and work product information contained in legal invoices that KCP&L fully intended to be redacted and designated as attorney-client and/or work product privileged before production. This error occurred in the release of information to the KCC Staff and CURB in response to Kansas Data Requests 0267, 0267S2, 0267S3 and 0267S5, related to all vendor invoices. To my knowledge, that is the only inadvertent disclosure of privileged information that has occurred throughout this discovery process.

14. The following is a summary of the system established to protect privileged information contained in the legal invoices from disclosure:

- a. Information containing potential attorney-client or work product privileged information was reviewed, processed, and redacted or released through attorneys in the Law Department.
- b. Legal invoices, in particular, Schiff Hardin legal invoices, were excluded from the Company's normal invoice approval process of scanning all invoices, including all supporting documentation, into the Company's Voucher Imaging Payment System. Legal invoices are routed directly to the Law Department, reviewed by the Law Department and supporting documentation is removed and retained by the Law Department prior to submission for scanning into the Company's Voucher Imaging Payment System and processed for payment.
- c. As with other potential attorney-client or work product privileged information, if legal invoices were requested in discovery, they were to be reviewed, processed, and redacted or released through attorneys in the Law Department.
- d. Despite our best efforts, there was an inadvertent disclosure of certain attorney-client and work product privileged information that was contained on various legal invoices provided to the KCC Staff and CURB.
- e. The inadvertent disclosure occurred due to an error in the process described above whereby these certain legal invoices were scanned into the Voucher Imaging Payment System without being submitted to the Law Department for review and removal of supporting documentation first. This error in the process resulted in the Company providing un-redacted legal invoices,

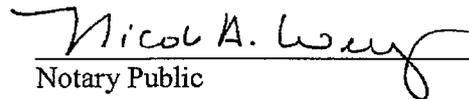
including supporting documentation, in a data request without first going to the Law Department for review and release of the information.

- f. In preparing the response to Kansas Data Requests 0267, 0267S2, 0267S3 and 0267S5, a Company employee unknowingly transferred these certain legal invoices and supporting documentation onto computer disks that were provided to the KCC Staff and CURB. The inadvertent disclosure consisted of 121 un-redacted legal invoices out of a total of 6,414 vendor invoices contained on 14 DVDs provided to Kansas Staff and CURB in the above mentioned data requests.
- g. Once discovered, the inadvertent disclosure was brought to the attention of the KCC Staff and CURB and was rectified without objection with all invoices containing privileged information destroyed and replaced with redacted invoices.
- h. I understand that the legal counsel for KCC Staff was notified of the inadvertent disclosure on July 13, 2009 and the matter was fully concluded on August 18, 2009 with the agreement that KCC Staff and CURB would destroy and/or erase the un-redacted invoices from any computer upon which they were downloaded and KCP&L would provide a DVD containing the redacted replacement invoices. Because the invoices had been loaded onto the KCC Staff and CURB's computers, some level of coordination was required to identify and replace the invoices in question.

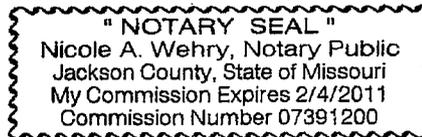
I hereby swear and affirm that the information presented herein is true and correct to the best of my information, knowledge and belief.


Tim Rush

Subscribed and sworn before me this 18th day of November, 2009.


Notary Public

My Commission expires on Feb. 4, 2011.



**Discovery Request from Judge Harold Stearley
Source: Regulatory Affairs Department**

ER-2009-0089 KCPL-MO	ER-2009-0090 GMO-Elec	HR-2009-0092 GMO-Steam	09-KCPE-246-RTS KCP&L-KS	All Cases
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Approximate number of Documents/Invoices Provided in Response to Data Requests

Number of Data Requests	1,457 (a)	761	117	526	2,861
Number of Attachments					
Electronic in CaseWorks	24,478	9,963	1,548	4,382	
CD's, DVD's, jump drives	31,754	13,501		7,757	
Hard copy (estimate)	120	30			
Provided to Engineering	78				
Hard copy from Legal Dept	9,500				
Total Attachments	<u>65,930</u>	<u>23,494</u>	<u>1,548</u>	<u>12,139</u>	<u>103,111</u>
Data file size (Megabytes)					
Electronic in CaseWorks	193	137	50	96	
CD's, DVD's, jump drives	56,490	10,759		8,612	
Provided to Engineering	1,286				
Total Electronic Files-Mb	<u>57,968</u>	<u>10,896</u>	<u>50</u>	<u>8,708</u>	<u>77,622</u>

Approximate Total Page Count of These Documents

Electronic files (b)	2,898,421	544,809	2,494	435,379	
Hard copy attachments (c)	1,800	1,400			
To Audit Staff	1,400			11,800	
Audit from KCPL Legal	54,494				
To Engineering Staff	10,400				
Total Approx Pages	<u>2,966,515</u>	<u>546,209</u>	<u>2,494</u>	<u>447,179</u>	<u>3,962,396</u>

Number of Meetings to Discuss Information and Resolve Issues

Main Case	49 (d)	13	1	4	
Construction Audit					
Audit Staff	24				
Engineering Staff	13				
Total	<u>86</u>	<u>13</u>	<u>1</u>	<u>4</u>	<u>104</u>

NOTES

(a) MPSC Staff - 1,098; Other Parties - 359

(b) Conversion rates from megabyte to pages differ depending on file type.
 MicroSoft Word = 63 pages per Mb; Excel = 161 pages/Mb, Images = 15 pages/Mb.
 A approximate average conversion of 50 pages per Mb was used.

(c) New ream of paper - 2 inches = 500 sheets. Use conversion of 2-1/2 inches = 500 sheets

	Inches	No. of Pages
KCPL-MO		
To Audit Staff	9	1,800
To Engineering Staff	43	8,600
KCPL-MO		<u>10,400</u>
GMO-Elec	7	1,400
GMO-Steam	0	0
KCPL-KS	0	0
		<u>11,800</u>

(d) Includes 27 joint KCPL/GMO meetings