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January 16, 2001

Mr. Dale H. Roberts
Secretary/Chief Regulatory Law Judge
Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

FILED³

JAN 16 2001

**RE: Kansas City Power and Light
Case No. EM-2000-753**

Missouri Public
Service Commission

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case please find the original and eight copies of **Office of the Public Counsel's Reply to Kansas City Power and Light Company's Response to Motion to Compel**. I have on this date mailed, faxed, and/or hand-delivered the appropriate number of copies to all counsel of record. Please "file" stamp the extra enclosed copy and return it to this office.

Thank you for your attention to this matter.

Sincerely,

John B. Coffman
Deputy Public Counsel

JBC:jb

cc: Counsel of Record

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

FILED³

JAN 16 2001

Missouri Public
Service Commission

In the Matter of the Application of Kansas City)
Power & Light Company for an Order Authorizing)
the Transfer of Certain Electric Generation Assets)
Used to Provide Electric Service to Customers)
in Missouri and Other Relief Associated with)
Kansas City Power & Light Company's Plan to)
Restructure Itself into a Holding Company,)
Competitive Generation Company, Regulated)
Utility Company, and Unregulated Subsidiary.)

Case No. EM-2000-753

**OFFICE OF THE PUBLIC COUNSEL'S REPLY TO KANSAS CITY POWER AND
LIGHT COMPANY'S RESPONSE TO MOTION TO COMPEL**

COMES NOW, the Office of the Public Counsel (Public Counsel) hereby submits its Reply to Kansas City Power and Light Company's Response to Office of the Public Counsel's Motion to Compel ("Company's Response"), filed on January 2, 2001. Kansas City Power and Light Company's (Company's) January 2, 2001 Response misstates the law and characterizes the facts in a manner so inconsistent with Public Counsel's understanding that it necessitates a reply.

1. Preliminarily, it is important to recognize that by filing its Application in this case, the Company has requested to completely restructure itself and the way it is regulated. Case No. EM-2000-753 is a case that raises extremely broad issues and could result in dramatic consequences for the public. In order for the Commission to address the precedent-setting issues raised by this case, the Staff of the Commission (Staff) and the Public Counsel must be able to conduct meaningful discovery under the Commission's rules on a variety of new and complex issues.

2. Even though Company's Response contains several creative explanations of the discovery dispute at hand, it states that the only issue for the Commission to determine is "whether the Commission will adopt Public Counsel's strained interpretation of a Commission rule." Ibid, p. 2. The Commission Rule at issue is 4 CSR 240-2.090(2), which states unambiguously that objections to data requests must be made in writing and must be made within ten days of the receipt of the data requests. It is undisputed that Company did not make any written objections and did not state any "inability to answer" within ten days of the day that Company received the four data requests at issue.¹ The straightforward interpretation of this rule is that, absent a variance granted by the Commission, the party receiving data requests is required to state an objection or an "inability to answer" within ten days of receipt in order for its objection to be timely.

As Public Counsel noted in its Motion to Compel, the Commission has recently interpreted this rule in just such a straightforward manner, determining that failure to comply with this simple procedural deadline constitutes a waiver of those potential objections:

AmerenUE failed to serve its objections in writing upon the requesting party within ten days after receipt of the data requests for DRs 13, 16-21, 23, 25, 26, 29, 35, 40, 50, 55, and 4114. **AmerenUE, by its failure to timely respond, has waived its objection as to those DRs.** Therefore, the Commission shall order AmerenUE to answer DRs 13, 16-21, 23, 25, 26, 29, 35, 40, 50, 55, and 4114 without further delay.

"Order Denying Motion to Expedite and Order Granting In Part the Motion to Compel," p. 3, Case No. EM-96-149, issued on October 31, 2000. (emphasis added).

3. Public Counsel takes issue with Company's recitation of the "Factual Timeline" involving this dispute. Particularly, Public Counsel was surprised to read that Company believes

¹ Actually, Company claims in its Response that it has still not made any objections to Data Requests 526 and 533, and it is unclear whether Company believes it has yet objected to Data Requests 516 and 520.

that an oral agreement was reached on October 16, 2000 (11 days after Kansas City Power and Light received Public Counsel's data requests) objection" regarding certain data requests and that somehow the October 16, 2000 telephone discussion allowed Company to "reserve the right to make a claim of privilege or assert another legal protection." Company's Response, p. 3, paragraph II, iii. Public Counsel never made any such oral agreement. Neither Company's October 20, 2000 letter, Public Counsel's October 27, 2000 letter, nor any other correspondence provides any indication that parties discussed an extension of the Commission's ten-day rule. Furthermore, Public Counsel does not recall Company taking the position that such an oral agreement had been reached on October 16, 2000 during the December 4, 2000 discovery conference held with the regulatory law judge assigned to this case.

Public Counsel acknowledges that during the October 16 telephone call Company mentioned that it might raise certain objections to Data Requests 526 or 533 (no other data requests were discussed). Public Counsel did agree to a short extension of the deadline for answering but also told Company counsel that if it decides to make such an objection, then those objections should be made pursuant to the Commission's discovery rules. The parties also agreed that if any objections were to be made that claimed a privilege, then such objections should be accompanied by a "privilege log" consistent with past practice. But at no time has Public Counsel given any indication to Kansas City Power and Light that it did not expect Company to follow the Commission's ten-day rule.

Public Counsel ended the October 16, 2000 telephone call with the expectation that any objections which were to be made to data requests propounded on October 5 would be submitted in writing by facsimile before the end of that business day (October 16, 2000).

Public Counsel does not understand how Company could have gotten the impression that Public Counsel was entering into some sort of agreement regarding the timing of objections since Public Counsel clearly told Company during the October 16 telephone call that any objections which Company wanted to make would have to be made in compliance with Commission rules. The only contemporaneous documentation of the October 16 telephone call consists of Company's October 20, 2000 letter and Public Counsel's October 27, 2000 letter. It is clear from these two letters that the discussion during the October 16 telephone call involved only Data Requests 526 and 533 and contained no discussion regarding any variance whatsoever of the Commission's ten-day rule potential Kansas City Power and Light objections to data requests 516 and 520 were never discussed in the October 16, 2000 call.

4. On pages 9 and 10 of Company's Response, it argues that the prohibition against making abstract or general objections should somehow "equitably" relieve Company of its legal obligation to make a timely objection. Public Counsel finds it hard to believe that Company was unable to determine if an objection exists within ten days. However, if this truly were Company's situation, it had other procedural remedies available to it under the Commission's rules:

a) Pursuant to 4 CSR 240-2.090(2), Company has the right to state "an inability to answer" (also within ten days), and

b) In addition, Company had the option of requesting a variance from the Commission's ten-day rule pursuant to 4 CSR 240-2.060(14).

Even if Company were in the extraordinary situation of being unable to determine if its own documents were subject to a privilege within ten days, it had the procedural obligation to describe that situation in the form of an objection or "an inability to answer" sent to the Public Counsel or to apply for a variance with the Commission.

At no time did Public Counsel state or imply that Company had the ability to ignore the Commission's ten-day rule or ignore the requirement to not make written objections.

5. With regard to Data Request 516, it is significant that Company made no attempt to contact Public Counsel, regarding any objection or even potential objection, until its submitted a "privilege log" referencing this data request on October 31, 2000 (twenty-six days after receipt of the data request). This privilege log was received by facsimile and was not accompanied with any explanation. Public Counsel implied from the initials "AC/WP" that Company was asserting an attorney/client and/or work product objection. Public Counsel promptly sent a letter to Company explaining that such an objection was untimely. The titles of three documents contained in the October 31, 2000 privilege log (Exhibit A to Company's Response) suggests that they are three internal documents that could be extremely relevant to this pending case. The privilege log contains no information to suggest that either an asserted attorney/client privilege or the work product doctrine would apply to all or part of such documents.

6. Company's Response uses Company's new interpretation of the October 16, 2000 telephone call and develops a convoluted estoppel argument. Response, pp. 10-11. The doctrine of estoppel cited by Company in its Response is completely inapplicable to the situation at hand.

Equitable estoppel is not normally applicable against a government entity. State ex rel. Capital City Water Company v. PSC, 850 S.W.2d 903, 910 (Mo. App. W.D. 1993). In establishing an estoppel claim against a government agency, the three basic elements of estoppel must be satisfied in addition to a showing that the government action on which the claim is based constitutes "affirmative misconduct". Id. at 910. Moreover, the party claiming estoppel has the burden of proof on every fact creating the estoppel and it must be established by clear and satisfactory evidence. Id. at 910.

Company does not allege any affirmative misconduct on behalf of Public Counsel and has no clear and satisfactory evidence of its interpretation of events. Attorney/client and work product privileges can be waived under common law (as Public Counsel explained in its Motion to Compel), when a party fails to meet procedural deadlines regarding making objections relating to those privileges.

7. The ten-day rule serves a very important purpose. Discovery disputes need to be identified promptly so that they may be properly resolved. If the Staff of the Commission (Staff) and Public Counsel can have timely discovery thwarted by a refusal to promptly comply with Commission procedure, the ability to audit regulated utilities will be seriously undermined. Allowing Company to ignore the Commission's discovery deadlines would hinder Public Counsel's statutory right to audit and investigate the records of regulated utilities. § 386.440 RSMo. 1994. If a variance is permitted from the Commission's rule on discovery, regulated utilities are likely to take advantage of such a practice to delay important discovery. Staff and Public Counsel could experience significant hindrance and obstruction as a result of the corresponding delay in fully developing contested issues, in fully developing prepared testimony, and in fully preparing cross-examination prior to hearings.

8. Public Counsel believes that the issue before the Commission is straightforward and simple. If the Commission is to follow its discovery rule and its past practice regarding the ten days to file a written objection to data requests, the Motion to Compel should be granted. To Public Counsel's knowledge, the Commission has never granted a variance from the ten-day rule, and Company never asked for such a variance in this case pursuant to 4 CSR 240-2.060(14). Public Counsel's data requests in this case are clearly designed to lead to the discovery of information that could be relevant to this important and precedent setting case.

Public Counsel has appropriately followed all of the Commission's rules and procedures regarding these discovery requests.

9. Company's response cites case law, which acknowledges that the current attorney/client privilege may be waived. Ibid. p. 8. Company argues that, although the Commission has previously ruled that failure to object within ten days of receiving data requests constitutes a waiver of any potential objection, a similar decision should not be applied to Company because of the assertion of Kansas City Power and Light's legal department that it is unable to ascertain attorney/client privilege or work product doctrine objections within ten days of receiving data requests. Id. p. 8. In support of this reasoning, Company quotes from a letter it sent to Public Counsel, dated November 16, 2000 – approximately forty-two days after the data requests in question were received. Ibid. p. 8.

The November 16, 2000 letter marks the first time that Company attempted to explain any objection or "inability to answer" relating to Data Request 516.² Assuming *arguendo* that there is any merit to Company's excuses, they apply only to one department within Company. Company's claim is that its Law Department is not able to make certain objections because other departments within the Company had not yet collected the documents within the scope of the data requests for the Law Department to review. The procedural restrictions of 4 CSR 240-2.090(2) apply to the Applicant Company as a singular electric corporation, not just to one of its departments. Company should not be allowed to claim an inability to timely object because one of its arms is unable to coordinate with one of its other many arms.

² Although Company takes the interesting position that it has never actually objected to Data requests 526 and 533, it is unclear whether or not Company believes that it has ever stated an objection or "inability to answer" with regards to Data Requests 516 or 520, pursuant to the provisions of 4 CSR 240-2.090(2).

10. There is another reason why Company's excuse rings hollow. Even if circumstances within Company exist as Company now describes them, Company should have been able to state an "inability to answer" within the ten day time limit. Even if Company could be excused for not making a timely objection with regard to Data Requests 516, there is no reason that Company could not have stated an "inability to answer" within ten days, instead of waiting over a month after the ten-day time limit had expired to explain its purported predicament to Public Counsel. If Company had articulated an objection or "an inability to answer" with regard to Data Requests 516 a month earlier, Public Counsel would have been able to exercise its due process rights in raising this discovery issue to the Commission one month earlier.

11. Because Public Counsel has only the scant information given to it via "privilege logs" regarding the nature of the documents that Company has now labeled "AC/WP" Public Counsel is unable to argue the merits of these objections as they relate to the yet unseen documents. If the Commission does not compel responses to the data requests at issue on procedural grounds, Public Counsel hereby requests that the Commission establish a procedure whereby Public Counsel might be afforded an opportunity to challenge the privilege or privileges Company now claims. If the Commission does not rule favorably on Public Counsel's Motion to Compel as a result of Company's failure to object, to state an "inability to answer," or to request a waiver from the Commission's discovery rule within ten days, then Public Counsel requests that the Commission order Company to produce the documents in question to the Commission exclusively or to a designated special master so that a determination may be made regarding the validity of any privileges asserted.

Public Counsel would suggest that, in that event, the Commission look to the procedure used in the Kansas City Power and Light rate case, re: Kansas City Power and Light Company (Wolf Creek rate case), Case No. EO-85-185 et al, whereby documents and portions of documents were reviewed by a special master to determine whether privileges asserted with regard to data requests were in fact valid. If the Commission believes that there is merit to Company's claims in opposition to Public Counsel's Motion to Compel, then Public Counsel is requesting that it receive at least the due process afforded during the Wolf Creek rate case.

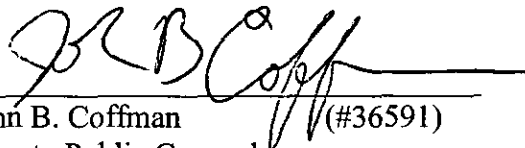
12. This discovery dispute is unusual in that Public Counsel cannot recall attorneys for any other regulated utility claiming that they were unable to ascertain an attorney/client or work product doctrine objection within the ten-day time limit. Furthermore, it is a deviation from standard practice that Company has asserted that the entire documents listed on its "privilege logs" in this matter fall within some privilege. Usually, when an attorney/client or work product doctrine objection is asserted, the privilege is asserted with regard to only certain portions of a document - which are then redacted (blacked-out) in part. Public Counsel finds it hard to believe that the entirety of the documents within the scope of Data Request 516 fall within a proper privilege. Therefore, it is entirely possible that, while portions of these documents would fall within the privilege (if they had not been waived), other portions of the document could not be covered by any privilege.

WHEREFORE, since Company did not timely assert an objection, did not assert an "inability to answer," and did not apply to the Commission for a waiver of 4 CSR 240-2.090(2), Public Counsel alternatively requests that the Commission compel a complete response to the data requests at issue.

If the Commission does not grant Public Counsel's Motion to Compel on the stated procedural grounds, Public Counsel respectfully requests that the Commission establish a special procedure to determine the merits of these (potential) objections, including an on-the-record hearing, whereby the documents for which Company asserts a privilege may be reviewed directly by the Commission or by a designated special master in order to determine if any of the privileges asserted properly apply to any of the documents in question or any portions thereof.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed or hand-delivered to the following this 16th day of January 2001:

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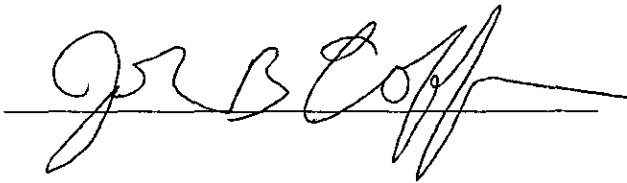
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A handwritten signature in black ink, appearing to read "E. G. Bushmann", written over a horizontal line.