

**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

**STAFF’S MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

**COMES NOW** Staff (Staff) of the Missouri Public Service Commission (Commission) and, pursuant to 4 CSR 240-2.090 moves the Commission for an order compelling Kansas City Power & Light (KCPL) to provide Staff unredacted copies of the invoices which KCPL initially provided to the Kansas Corporate Commission Staff (KCC) in unredacted form.

1. In Staff’s construction audit and prudence review which the Commission ordered Staff to conduct in the Commission’s April 15, 2009, *Order Regarding Construction and Prudence Audits of the Environmental Upgrades at Iatan I, Jeffrey Energy Center and The Sibley Generating Facility*, Staff requested copies of invoices KCPL had provided to the KCC. At the time of Staff’s request KCPL had provided the invoices to the KCC in unredacted form.

2. Staff made its request for those invoices on June 17, 2009, when Staff submitted to KCPL data request (DR) 0631 requesting: “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 regarding their investigation into Iatan 1 and Common Facilities.”

3. KCPL did not object or provide documents in response to Staff DR 0631 until August 4, 2009, when it delivered 13 CDs containing redacted copies of invoices. Still to this

day KCPL has not objected to Staff DR 0631, instead it has withheld portions of those invoices by redaction.

4. Commission Rule 4 CSR 240-2.090(2), with regard to response times for DRs, in part, provides:

The party to whom data requests are presented shall answer the requests within twenty (20) days after receipt unless otherwise agreed by the parties to the data requests. If the recipient objects to data requests or is unable to answer within twenty (20) days, the recipient shall serve all of the objections or reasons for its inability to answer in writing upon the requesting party within ten (10) days after receipt of the data request, unless otherwise ordered by the commission. If the recipient asserts an inability to answer the data request within the twenty (20) day time limit, the recipient shall include the date it will be able to answer the data requests simultaneously with its reasons for its inability to answer.

5. 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 rebuttal testimony – March 11, 2009 – and the other for rate design rebuttal testimony – March 17, 2009.

6. With the reaching of stipulations and agreements in Case Nos. ER-2009-0089 and ER-2009-0090, counsel for KCPL raised the question with counsel for Staff of the necessity of KCPL maintaining the shortened response times for data request involving the construction audit and prudence review. Staff indicated its position that the shortened response times should continue. After the Commission issued its June 10, 2009, *Order Approving Non-Unanimous Stipulations and Agreements and Authorizing Tariff Filing and Order Regarding Joint Motion*

*to Extend Filing Date*, agreement was reached that the shortened response times would continue.

7. Neither under the Commission's November 20, 2008, procedural Order nor under the Commission's rule has KCPL timely objected to Staff DR 0631. For this reason alone the Commission should compel KCPL to provide unredacted copies of all the invoices it initially gave the KCC regarding the KCC's investigation into Iatan 1 and Iatan Common Facilities.

8. Undersigned Staff counsel, Jaime Ott certifies Staff has complied with the prerequisites of 4 CSR 240-2.090 to obtaining a Commission Order compelling production, without redactions, of the invoices Staff requested by Staff DR 0631 be produced. Staff attempted to resolve this dispute with KCPL through numerous telephone conferences and letters with KCPL counsel Victoria Schatz. On September 14 and 16, 2009, pursuant to Commission Rule 4 CSR 240-2.090(8)(B) Staff's attorney, Jaime Ott, and KCPL's attorney, Victoria Schatz, conferred by telephone with Regulatory Law Judge, Harold Stearely, the presiding officer in this case. Regulatory Law Judge Stearley opined KCPL did not have to provide Staff with unredacted copies of the invoices which KCPL initially provided to the KCC.

9. KCPL asserted to Staff and to Regulatory Law Judge Stearley that KCPL's disclosure to the KCC of information in the invoices is protected from disclosure by the attorney-client privilege or the attorney work product doctrine was inadvertent and that after Staff served KCPL with Staff Dr 0631, KCPL approached the KCC obtained the KCC's agreement to substitute the unredacted copies of invoices KCPL had already provided with redacted copies based on KCPL's assertion of the attorney-client privilege or the attorney word product doctrine.

10. Staff believes that any agreement by the KCC to accept redacted copies of invoices in lieu of unredacted copies of invoices, made after Staff requested copies of the invoices KCPL actually provided to the KCC and after the KCC entered into a stipulation and agreement (filed June 18, 2009) to resolve the rate case pending before the KCC, *In the Matter of the Application of Kansas City Power & Light Company to Modify Its Tariffs to Continue the Implementation of Its Regulatory Plan*, Docket No. 09-KCPE-246-RTS, is irrelevant.

11. Further, with regard to any claim by KCPL that it originally inadvertently failed to object or redact information from the invoices it delivered to the KCC based on the attorney-client privilege or the attorney work product doctrine, Staff relates the following:

- a. KCPL filed its companion Iatan 1 rate case before the KCC the same day it filed its Iatan 1 rate case with this Commission – September 5, 2008. The KCC issued its *Suspension Order, Discovery Order and Suspension Order* in that case on September 26, 2008.
- b. On January 14, 2009, Staff submitted several data requests to KCPL in this case. On January 23, 2009 Staff received some forty-six objections to those data requests. Some objections were based on relevancy, others were based on assertions of privilege. After a number of discussions with Staff, KCPL withdrew its relevancy objections based on the information being requested related to Iatan 2. KCPL, after it realized it had no documents within the scope of those data request, also later withdrew objections to a number of data requests that were based on attorney-client privilege and attorney work product it had made to timely preserve the objection. Among the data requests Staff submitted to KCPL on January 14, 2009 was Staff data request 0415 which requested as follows: “an

unedited copy of all invoices from Schiff Hardin for work charged to the costs of Iatan 1 or 2.” In response, on January 23, 2009, KCPL objected to Staff DR 0415 “to the extent it calls for production for information protected by the attorney-client privilege and/or attorney work product doctrine, but will otherwise provide responsive information.”

- c. Staff challenged KCPL’s objections to the group of data request Staff submitted on January 14, 2009. As indicated above, Staff and KCPL informally resolved many of their discovery disputes. However, KCPL steadfastly asserted throughout their discussions that the attorney-client privilege and attorney work product doctrine protected KCPL from providing unredacted Schiff Hardin invoices in response to Staff DR 0415.

12. Regardless of how KCPL may have conducted itself in its companion case before the KCC with regard to discovery, as indicated above, with regard to Staff data requests in this case, KCPL has aggressively sought to protect from discovery by Staff of documents, and portions of documents, KCPL has asserted it was not required to produce.

13. Staff DR 631 remains unresolved. In addition to failing to timely object, or even object at all, Staff believes 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, and that KCPL did not do so inadvertently.

14. In addition, Section 386.450, RSMo (2000) provides that the Commission “may require, by order served upon any corporation, person or public utility . . . the production . . . any books accounts, papers or records kept by said corporation, person or public utility in any office place within or without this state.”

15. Because the assertions of attorney-client privilege and attorney work product privilege asserted by KCPL are to the production of information on Schiff Hardin invoices, the Commission should be made aware of, or be reminded of, activities of Schiff Hardin before this Commission.

16. Schiff Hardin, LLP is a general practice law firm located in the Sears Tower on South Wacker Drive, in Chicago Illinois, and has been assisting KCPL in its project management duties at Iatan 1. Kenneth M. Roberts is an equity partner, co-chair of the Construction Law Group and member of the executive committee of Schiff Hardin. Mr. Roberts testified in this case on behalf of KCPL, as did Danile F. Meyer of Meyer Construction Consulting, who identifies himself as have been retained by Schiff Hardin.<sup>1</sup>

17. Mr. Roberts testified<sup>2</sup> that KCPL engaged Schiff Hardin:
- a. to help KCPL develop project control procedures to monitor the cost and schedule for the infrastructure projects contained in KCPL's Comprehensive Energy Plan (CEP);
  - b. to monitor the CEPs progress and costs, including the review and management of change order requests;
  - c. to negotiate contracts with vendors; and
  - d. to resolve disputes with vendors that might arise.

18. Not every activity by Schiff Hardin to carry out Schiff Hardin's engagement with KCPL would be attorney-client or attorney work product protected.

WHEREFORE, for the foregoing reasons discussed Staff requests the Commission to issue an Order in which it (1) orders KCPL to provide Staff with the unredacted copies of the invoices it provided to the Kansas Corporation Commission,.

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<sup>1</sup> Mr. Meyer in his Rebuttal Testimony at page 1, lines 9-10, identifies the work that he has performed for Schiff Hardin since the early 1990s as “[p]rimarily cost and cost analysis work, project oversight, some scheduling work, some litigation support, all in the construction industry and primarily in the power industry.”

<sup>2</sup> Direct testimony of Kenneth M. Roberts filed September 5, 2008.

Respectfully submitted,

/s/ Jaime N. Ott

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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 30<sup>th</sup> day of October, 2009.

/s/ Jaime N. Ott \_\_\_\_\_