

**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 A General Rate Increase for Electric Service.)	Case No. ER-2012-0174
)	Tracking No. YE-2012-0404

and

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

MOTION TO QUASH NOTICE OF DEPOSITION, TO QUASH SUBPOENA *DUCES TECUM* AND FOR PROTECTIVE ORDER

COME NOW Kansas City Power & Light Company ("KCP&L") and KCP&L Greater Missouri Operation Company ("GMO") and: move to quash the notice of records deposition (the "Notice") directed to Melissa Hardesty, Senior Director of Taxes for KCP&L; move to quash the subpoena *duces tecum* issued to Ms. Hardesty; and move for a protective order in regard to the notice of records deposition. In support of their motion, KCP&L and GMO states:

I. Background.

1. On September 21, 2012, the Staff served the Notice and the subpoena on undersigned counsel Mr. Steiner via e-mail (Mr. Steiner agreed to accept service), seeking to take a records deposition of Ms. Hardesty on October 1, 2012, beginning at 9:00 a.m. in Jefferson City. The Notice refers to the documents set forth in the subpoena. The subpoena requests all items specified in an exhibit attached to the subpoena.

2. This motion to quash and for a protective order is filed within 10 days of service of the Notice and subpoena and is therefore timely filed. 4 CSR 240-2.100.

3. On September 24, 2012, counsel for KCP&L and GMO spoke with Staff counsel regarding KCP&L's and GMO's objections to the Notice and subpoena as set forth herein in an effort to resolve the dispute in good faith, to no avail. Therefore KCP&L and GMO seek a determination from the Commission.

II. By failing to address this issue at the Commission-ordered discovery conferences, Staff has waived its ability to contest the Company's objections.

4. The exhibit (listing of documents) that is attached to the subpoena consists of privilege logs created by KCP&L and GMO in response to data requests that were objected to by KCP&L and GMO in a timely manner and produced to Staff in June and July 2012. As is clearly evident from the logs, it is a list of documents not produced in response to discovery because the documents are protected by the accountant-client privilege, attorney-client privilege and/or are protected attorney work product.

5. Staff never raised any issue with the objections or the privilege logs in any of the discovery conferences that took place in June and July 2012.

6. A September 6, 2012 discovery conference was scheduled, but parties were ordered to respond if they did have a discovery dispute to be discussed at such a conference (Order Directing Filing, Aug. 30, 2012). No response being filed, including none by Staff, the conference was cancelled on September 5, 2012.

7. On April 26, 2012, the Commission issued an order, *inter alia*, setting a procedural schedule. The Order includes the following at 5.a:

Discovery Conferences. Any discovery conference shall be on the record and transcribed. Each party shall bring a complete list of all outstanding data requests and other discovery to each discovery conference. Any party participating by phone shall provide to the Regulatory Law Judge ("RLJ") and all other parties a complete list of all outstanding data requests and other discovery no later than one day prior to the conference. No party is required to appear at any discovery

conference, but any party that does not appear shall have waived any claim or defense as to any discovery or response served as of the day before the conference.

8. By failing to raise any issue with the data requests that KCP&L and GMO objected to and for which they provided the privilege logs as provided for in the Order, Staff have waived its claim to any of the documents in the privilege logs. Staff is clearly trying to create a work-around of its waiver and the Commission should not allow this. The applicable portion of the Order clearly exists so that discovery disputes could be raised and either resolved or brought to the Commission's attention, all in a timely manner. Staff seeks to violate the terms, and certainly the intention, of the Order by serving the Notice and subpoena months after it should have raised its concerns and after clearly waiving its claim by not requesting a discovery conference to take place on September 6, 2012. This issue could have been raised with the RLJ several times and yet Staff did not. The Order should be enforced and the Notice and subpoena should be quashed.

9. Staff claims in its Application for subpoena *duces tecum* that although clearly Staff was aware of the objections, and the logs, "Staff Counsel's Office" was not aware of the objections or the extent of the objections. Rather than acknowledge its own lack of communication or diligence, Staff claims that KCP&L and GMO "buried" their objections in the responses to data requests. But Staff cites no regulation that requires KCP&L and GMO to have done anything other than include their objections in their responses to the DRs. Moreover, the objections were not "buried" in the data request responses. As seen on Attachment A, the objection is contained in the first portion of the response. This is also true for the other data request responses in which these objections were made.

10. KCP&L and GMO did object to the data requests that requested the same documents as set forth in the subpoena exhibit on the basis of attorney-client privileged

information, attorney work product information, and/or accountant-client privileged information. KCP&L and GMO produced privilege logs in supplemental responses.

11. The general rules applicable to discovery in a civil action in circuit court apply to cases before the Commission. 4 CSR 240.2.090(1).

12. Civil Procedure Rule 56.01(b)(1) states that parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action. "If a relevant matter is privileged, it has complete immunity from discovery. See Rule 56.01(b)(1)." *State ex rel. Mitchell Humphrey & Co. v. Provasnik*, 854 S.W.2d 810, 812 (Mo. App. 1993).

III. The Accountant-Client Privilege is recognized under Missouri law.

13. In its Application for subpoena, Staff claims that there is no accountant–client privilege at the PSC, citing one 2005 Commission decision. That case did not find that no such privilege existed, as doing so would be ignoring the privilege specifically set forth in § 326.322, RSMo (and the predecessor § 326.151). Rather, that Commission determined that the privilege, although existing to benefit clients, could only be asserted by the accountant. This is contrary to the plain language of the statute that allows the client to permit disclosure, which clearly shows that the privilege rests with the client and can be asserted by the client. In the 2005 case cited by Staff, the companies asserting the privilege had not cited any cases indicating the privilege can be asserted by the client. Essentially then, if this Commission adopts the 2005 order cited by Staff, the accountant-client privilege can be readily vitiated by requesting the documents from the client instead of the accountant. It would lead to a meaningless statute, which is contrary to the law and the plain language of the statute.

14. "The purpose of the accountant-client privilege is to create an atmosphere where the client will provide all relevant information to the accountant without fearing future disclosure in subsequent litigation. *Sears, Roebuck & Co. v. Gussin*, 350 Md. 552, 714 A.2d 188, 193 (Md. 1998); *Fed. Ins. Co. v. Arthur Anderson & Co.*, 816 S.W.2d 328, 331 (Tenn. 1991). Without this protection, the client might withhold certain unfavorable information, making the accountant unable to adequately perform his services. *Fed. Ins. Co.*, 816 S.W.2d at 331. The accountant-client relationship can therefore be seen as analogous to the attorney-client relationship. *Id.*" *Ayers Oil Co. v. American Business Brokers, Inc.*, 2009 U.S. Dist. LEXIS 73725 (E.D. Mo. 2009).

15. As with the attorney-client privilege and the physician-patient privilege, Rule 56.01(b)(1) affords full protection to the accountant-client privilege created by § 326.322, RSMo. All of these privileges inure to the client or patient. They exist to encourage open communication between a person or entity and their attorney, doctor or accountant and protect those communications absolutely. Each of these privileges is asserted by the client or patient. KCP&L and GMO asserted these privileges by objecting to Data Requests and providing a privilege log. The communications are protected and the Notice and subpoena, to the extent they seek documents which fall under the accountant-client privilege, should be quashed.

IV. Staff's expert witness argument fails.

16. Next, Staff argues that although no expert witness designation occurs in PSC cases, that *State ex rel. Tracy v. Dandurand*, 30 S.W.3d 831 (Mo banc 2000) applies and that every document provided to Ms. Hardesty and to Mr. Montalbano must be disclosed. *Dandurand* was about one issue: "Does a party continue to have an attorney-client privilege as to documents that the party has provided to its retained expert witness who is designated to

testify?" *Id.* at 832. The expert witness was retained solely for the purpose of testifying, and so his knowledge was solely based upon documents provided to him. He brought copies of the documents with him to his deposition *duces tecum*. The Court found that providing the documents to the retained expert waived the attorney-client privilege as to those documents. Under Rule 56.01(b)(3) and *Dandurand* provide that until the expert is designated for trial, the discovery of facts known and opinions held by a retained expert witness are the work product of the attorney retaining the expert. *Dandurand*, 30 S.W.3d at 834.

17. *Dandurand* could only apply to attorney client privileged documents provided to Mr. Montalbano solely for the purpose of him having facts upon which to base an expert opinion. Mr. Moltalbano is testifying on whether the Staff's coal tax credit recommendations would constitute an IRS normalization violation. *Dandurand* would certainly not apply to all of the documents listed in the logs as Mr. Montelbano is not a recipient of many of them. Additionally, *Dandurand* says nothing about documents from a retained expert witness and sent to the client or attorney. There are documents in the logs that are from Mr. Montelbano to Ms. Hardesty. *Dandurand* provides no guidance for such documents and Staff has provided no other adequate basis for their disclosure.

18. *Dandurand* does not apply to Ms. Hardesty. She is an employee of KCP&L. She is not a retained expert witness whose only factual knowledge is based upon what attorneys have given her.

V. Staff has not met the burden for the necessity exception.

19. Finally, Staff argues that anything left on the logs after the accountant-client privilege is ignored and *State ex rel. Tracy v. Dandurand* is applied must be turned over to them under the substantial need provision of rule 56.01(b)(1). Staff makes the conclusory statement,

without any factual underpinnings, that it can only obtain the information from KCP&L and is "clearly 'unable without undue hardship to obtain the substantial equivalent of the material by other means.'" Staff fails to set forth adequate bases of undue hardship or of substantial need. Staff simply states that only KCP&L knows why it acted as it did regarding the Coal Credits and apparently, Staff believes that is the relevant inquiry, as opposed to the ways that KCP&L could have acted and how it in fact acted. Staff also apparently needs every single document identified in the logs before it obtains what it needs. This is not the law as to work product protection.

20. Intangible work product is protected without exception. "It is an absolute immunity from discovery of mental impressions, conclusions, opinions, and legal theories of an attorney or other representatives of a party concerning the litigation." *State ex rel. Spear v. Davis*, 596 S.W.2d 499, 500-01 (Mo. App. 1980). Accordingly, and as set forth in Rule 56.01(b)(3), the Commission cannot simply order that all documents be provided to Staff -- certain documents retain their privileged nature regardless of any showing of substantial need (provided there is a showing). Only tangible work product is discoverable, and then, only after the requisite showing has been made. Here, that showing has clearly not been made.

VI. Conclusion.

21. When it established its procedural schedule in April, the Commission specifically provided for monthly discovery conferences so that discovery issues would be resolved as data requests were answered and not delayed until the final weeks before hearing. Staff should not be permitted to ignore the directive of the Commission by use of a subpoena *duces tecum* when data requests for the same documents were already served, responded to, objected to, and staff failed to raise any issue with those objections in a timely manner as contemplated by and set forth in the Commission's procedural order.

22. Additionally, the objections are valid and lawful and KCP&L and GMO repeats these same objections in their Objections to the Subpoena *Duces Tecum* and Notice of Deposition filed on this date.

23. Any other documents requested in the subpoena *duces tecum* that are not in the logs were already produced in response to: Data Request Nos. 0292R, 0299R, 0184, 0200.2, 0216.2, 0275, 0276, 0277, 0278, 0279, 0280, 0281, 0282, 0283, 0284, 0285, 0286, 0287, 0288, 0289, 0290, 0291, 0292, 0293, 0294, 0295, 0296, 0297, 0298, 0299, 0300, 0301, 0302, 0303, 0304, 0305, 0306, 0307, 0308, 0309, 0310, 0311, 0312, 0313, 0314, 0315, 0316, 0317, 0318, 0319, 0320, 0321, 0322, 0323, 0324, 0325, 0326, 0327, 0328, 0329, 0330, 0331, 0332, 0333, 0334, 0335, 0336, 0337, 0338, 0339, 0340, 0341, 0342, 0343, 0344, 0345, 0346, 0347, 0448, 0449, 0453, 0468, 0470, 0515, 0516, 0517, 0518, and 0314.1 in Case No. ER-2012-0174; Data Request Nos. 123, 124, 124.1, 124.2, 124.3, 124.5, 135, 386, 539 and 566 in Case No. ER-2010-0355; Data Request Nos. 120 and 121 in Case No. ER-2010-0356; and Data Request Nos. 966 and 865R in Case No. EO-2010-0259.

For the foregoing reasons, KCP&L and GMO respectfully request this Commission to issue an order quashing the subpoena *duces tecum* and the Notice of Deposition issued by Staff. KCP&L and GMO further request this Commission to issue an order holding Staff to the waiver as set forth in the April 26, 2012 Order, finding that Staff waived any claim to the documents in the privilege logs by failing to present the issue to the RLJ as required in that Order.

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 27th day of September, 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

Company Name: KCPL
Case Description: 2012 KCP&L Rate Case
Case: ER-2012-0174

Response to Featherstone Cary Interrogatories – Set MPSC_20120524
Date of Response:

Question No. :0287

a. Provide any and all rationale and provide documentation, including but not limited to any and all written communication including all correspondence, e-mails, studies, reports, detailed analyses, etc that was relied on to support why Great Plains Energy Incorporated, Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company did not include GMO in the arbitration process for the reallocation of the Iatan 2 Advance Coal Tax Credit or at any time prior to or subsequent to Empire District Electric Company's July 2009 filing its notice to arbitrate for these Tax Credits.

RESPONSE: (do not edit or delete this line or anything above this)

a.

KCP&L objects to the extent this request seeks attorney-client privileged information, attorney work product information, and/or accountant-client privileged information. A privilege log will be produced in a supplemental response.

A disc containing non-privileged materials responsive to data requests 0285, 0286, 0287, 0288, and 0289 will be provided to Staff. The materials are deemed **HIGHLY CONFIDENTIAL** pursuant to 4 CSR 240-2.135.

Additional documentation has also been provided as a response to Data Requests: 0289, 0294, 0295, 0307, 0309, 0310, 0313, 0314, 0315, 0317, 0321, 0322, 0324, 0330, 0331, and 0334.

Attachment:
Q0287 MO Verification.pdf