

**BEFORE THE PUBLIC SERVICE COMMISSION
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) Case No. ER-2010-0355
Service to Continue the Implementation of Its)
Regulatory Plan)

In the Matter of the Application of KCP&L)
Greater Missouri Operations Company for) Case No. ER-2010-0356
Approval to Make Certain Changes in its Charges)
for Electric Service)

**OPPOSITION TO STAFF’S REQUEST FOR A PRIVILEGE LOG AND TO SUBMIT
STAFF DATA REQUEST NO. 651(4) TO THE SPECIAL MASTER**

Kansas City Power & Light Company (“KCP&L”) and KCP&L Greater Missouri Operations Company (“GMO”) state the following in opposition to Staff’s Request for a Privilege Log and to Submit Staff Data Request No. 651(4) to the Special Master:

I. The Communications Staff Seeks Are Confidential and Cannot Be Produced.

As Staff correctly points out, the Missouri statute relevant to this issue is Section 435.014(2).¹ Pursuant to Section 435.014(2), “mediation proceedings shall be regarded as settlement negotiations.” “Neither the parties nor the mediator may disclose the substance of those discussions.” Williams v. Kansas City Title Loan Co., 314 S.W.3d 868, 872 (Mo. App. W.D. 2010). Accordingly, any communication relating to the dispute made during mediation proceedings is a confidential communication, and no communication made in setting up or conducting such proceedings is subject to discovery, unless that communication is otherwise discoverable. See Section 435.014(2). Section 435.014 thus has a “preclusive effect on

¹ All statutory citations are to the Missouri Revised Statutes (2000), as amended by the Cumulative Supplement (2009).

discovery.” Group Health Plan, Inc. v. BJC Health Systems, Inc., 30 S.W.3d 198, 203 (Mo. App. E.D. 2000).

Missouri Supreme Court Rule 17.06 echoes Section 435.014(2) and supporting caselaw, affirming that “[n]o admission, representation, statement or other confidential communication made in setting up or conducting such [alternative dispute resolution] process shall be admissible as evidence or subject to discovery, except that, no fact independently discoverable shall be immune from discovery by virtue of having been disclosed in such confidential communication.” Rule 17.06(a). Because alternative dispute resolution processes are regarded as settlement negotiations, “[n]o individual or organization providing alternative dispute resolution services pursuant to this Rule 17 or any agent or employee of the individual or organization shall be subpoenaed or otherwise compelled to disclose any matter disclosed in the process of setting up or conducting the alternative dispute resolution process.” Rule 17.06(b).

Mediation communications with MarksADR and all documents included in KCP&L’s “correspondence file” associated with the MarksADR contract clearly constitute confidential communications that are not subject to discovery pursuant to Section 435.014(2). KCP&L cannot disclose these communications. See Williams, 314 S.W.3d at 872. Furthermore, these communications are not otherwise discoverable under Missouri Supreme Court Rule 56.01(b)(1), which limits the scope of discovery to non-privileged matters relevant to the subject matter involved in the pending action.

Despite Staff’s intimation that documents covered by its Data Request 651(4) “may be independently discoverable,” Staff has made no showing that these documents are indeed independently discoverable. See Staff’s Request for a Privilege Log and to Submit Staff Data Request No. 651(4) to the Special Master at 3. Staff’s attempt to circumvent Missouri’s clear

prohibition on discovery of mediation communications by suggesting that there is some other basis for their discovery should be rejected.

II. Staff's Request Amounts to No More Than A Fishing Expedition.

There is no basis to require a privilege log detailing the contents of these communications as Staff has given no basis to believe that these communications are discoverable. The purpose of a privilege log is to provide the requesting party with a rationale for the withholding of documents, enabling that party to assess the applicability of the privilege or protection. See, e.g., Fed. R. Civ. P. 26(b)(5). KCP&L has already provided Staff with sufficient reason for its withholding of these confidential communications. Section 435.014(2) is clear: no communication made in setting up or conducting mediation proceedings is subject to discovery. Without proof that these communications are otherwise discoverable, Staff's request for a privilege log amounts to nothing more than a fishing expedition that the Commission should reject.

III. Staff's Request is Untimely.

The Commission recognizes the doctrine of laches, which acts to bar a claim filed so late that its delay works to the disadvantage of the other parties. See In the Matter of the Application of Union Electric Company, Case No. EM-96-149, Report and Order (July 12, 2001), 2001 Mo. PSC LEXIS 866 *3. "Laches is neglect, for an unreasonable and unexplained length of time under circumstances permitting diligence, to do what, in law, should have been done." Id. (citing Lake Development Enterprises, Inc. v. Kojetinsky, 410 S.W.2d 361, 367 (Mo. App. St.L. 1966)).

KCP&L timely submitted its response to Staff's Data Request 651(4) on August 7, 2009. Staff could have filed a motion to compel its requested information anytime after that date. Yet more than a year has passed before Staff filed its Request for a Privilege Log and to Submit Staff

Data Request No. 651(4) to the Special Master on December 3, 2010. Staff now makes its request to the Commission less than two months before the commencement of the evidentiary hearings in these cases, prejudicing KCP&L and GMO. Staff provides no explanation for its delay. Its request should therefore be denied. See In the Matter of the Determination of Prices, Terms, and Conditions of Conditioning for xDSL-capable Loops, Case No. TO-2001-439, Order Denying Motion to Compel and Motion for Continuance (Aug. 9, 2001), 2001 Mo. PSC LEXIS 1070 *4 (denying late requests to compel discovery because the requesting party's mere two-month delay in filing such requests would work an undue hardship on the participants to the case, disrupt the Commission's procedures for hearing, and the requesting party did not provide sufficient justification for its delay).

WHEREFORE, KCP&L and GMO respectfully request that the Commission deny Staff's Request for a Privilege Log and to Submit Staff Data Request No. 651(4) to the Special Master.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing Opposition to Staff's Request for a Privilege Log and to Submit Staff Data Request No. 651(4) to the Special Master was emailed to counsel of record on this 13th day of December, 2010.

/s/ Lisa A. Gilbreath
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Company