

**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 f)
Electric Service.)
Case No. ER-2012-0175
Tracking No. YE-2012-0405

**STAFF RESPONSE TO MOTION FOR FULL COMMISSION
RECONSIDERATION OF SEPTEMBER 28, 2012 ORDER DENYING MOTION**

COMES NOW the Staff of the Missouri Public Service Commission ("Staff"), through the undersigned counsel, and for its Response to the Motion for Full Commission Reconsideration of September 28, 2012 Order Denying Motion for Protective Order and Motions to Quash Subpoena for Attorney Client Privileged Communications filed herein on October 1, 2012 ("October 1 Motion"), by Kansas City Power & Light Company ("KCPL") and KCP&L Greater Missouri Operations Company ("GMO")(collectively "Companies" or "Movants"), respectfully states as follows:

1. First, Staff would like to clarify a minor point regarding the Attachment to Staff's Response in Compliance With Order Directing Expedited Filing (the "September 28 Response;" a copy of the September 28 Response is attached hereto and incorporated herein by this reference). As indicated in paragraph number 5 of the September 28 Response, the Attachment to that response is a copy of a GMO objection to data requests *in another case* – not in the instant rate cases – and was attached to the September 28 Response for the purpose of showing that Movants are well aware of the proper procedure for objecting to data requests; a procedure they did not follow in

the instant rate cases. In the Commission's Order Denying Motion for Protective Order and Motions to Quash, issued on September 28, 2012, beginning on the bottom of page 3 the Order states "Staff's response shows GMO's compliant service of objections" and in the middle of page 5 states "attachment A shows that movants did not reserve the privilege objection." As discussed at length in the September 28 Response, Staff does not believe GMO's (or KCPL's) service of objections in the instant cases was compliant with the Commission's rules or orders herein. *If* these two statements in the Order are referring to the Attachment to Staff's September 28 Response, the Commission should clarify its Order so there is no confusion that the Attachment shows objections in another case. Staff does not believe that this affects the ultimate ruling in the Commission's Order Denying Motion for Protective Order and Motions to Quash, which was based on the fact, as the Commission correctly found, that Movants did not properly serve their objections on Staff Counsel.

2. One other minor point of clarification of the Commission's Order Denying Motion for Protective Order and Motions to Quash, issued on September 28, 2012, is in regard to Staff's cite in its September 28 Response to the Commission's April 19 order. Near the bottom of page 3 of the Order Denying Motion for Protective Order and Motions to Quash, the Commission refers to Staff's cite to the April 19 order and then quotes a portion of paragraph 3 of the April 19 order regarding data request responses; Staff actually cited an earlier portion of paragraph 3 which provides that "**objections**, or notifications respecting the need for additional time shall be sent via e-mail to counsel for the other parties." (emphasis added) Staff points this out since the instant discovery controversy concerns Movants' failure to properly serve their objections on Staff Counsel rather than responses; however, Staff does not believe that this affects the

ultimate ruling in the Commission's Order Denying Motion for Protective Order and Motions to Quash, which was based on the fact, as the Commission correctly found, that Movants did not properly serve their objections on Staff Counsel.

3. As for Movants' October 1 Motion, while Staff certainly does not object to the full Commission considering this matter, the ultimate "relief" sought by Movants should be denied and the result reached in the Commission's Order Denying Motion for Protective Order and Motions to Quash, issued on September 28, 2012, should be affirmed. Movants argue in the October 1 Motion that the September 28 Order erred by addressing the issue of the Movants' objections to data requests – and Movants' failure to properly serve those objections on Staff Counsel – rather than the subpoena duces tecum. However, it must be remembered that the basis for Movants' argument in its September 27 Motion to Quash was that Staff had waived any challenge to the sufficiency of Movants' objections to the data requests and Staff could therefore not pursue the documents through the subpoena duces tecum process. Even in their October 1 Motion, Movants seek a finding that Staff waived any dispute regarding the subpoenaed documents, on the same basis as in their September 27 Motion. Staff's September 28 Response (copy attached hereto) addressed this argument at length, explained why Staff did not waive its rights to seek the documents, and that Movants failed to properly serve their objections. Movants should not be heard to argue on the one hand that Staff waived its rights to seek the documents based on the data requests and then, when that argument failed, to argue on the other hand that the Commission's September 28 Order erred by ruling on the issue of the Movants' objections to data requests and failure to properly serve those objections. The Commission's

September 28 Order correctly found that Movants failed to properly serve their objections and denied Movants' September 27 Motion.

4. It is not entirely clear, but Movants' October 1 Motion appears to take issue with the Commission's analysis of the cases of *Rock v. Keller*, 278 S.W. 759 (1925) and *Gipson v. Target Stores, Inc.*, 630 S.W.2d 107 (Mo. Ct. App. 1981), contained in the September 28 Order, which analysis concludes that "The authorities cited by movants say nothing about discovery objections." Staff submits that the September 28 Order is correct.

5. One other item mentioned in Movants' October 1 Motion which merits brief comment is that on page 9, close to the middle of the page, Movants cite Commission Rule 4 CSR 240-2.090(2) for what Movants claim to be "the general rule that privilege assertions may be included in responses rather than as separate objections." However, the cited Rule says no such thing; in fact, the cited Rule does not even contain the word "privilege."

6. If the Commission even reaches Movants' actual privilege arguments contained in their October 1 Motion, most of the privilege arguments in the October 1 Motion are simply a rehash of the privilege arguments Movants made in their September 27 Motion, to which Staff fully responded in its September 28 Response, particularly in paragraphs 9 through 11 thereof. Rather than restate those responses, Staff would refer the Commission to the attached copy of its September 28 Response.

7. However, one matter in Movants' October 1 Motion concerning their privilege allegations merits brief comment. Paragraph numbered 5 of Movants' October 1 Motion refers to the privilege logs provided by Movants in lieu of documents and states "They [the privilege logs] also provide the customary privilege log information

concerning the author of the document, the recipient and a **description of the communication.**" (emphasis added) In the middle of page 7 of the October 1 Motion Movants again refer to the privilege logs and state "Staff has not challenged the sufficiency of the privilege logs." However, in paragraph numbered 11 of its September 28 Response, in regard to any documents as to which any claim of privilege remains after application of paragraphs 9 and 10 thereof, Staff stated that "Perhaps if Movants' privilege logs had been more descriptive as to the subject(s) of the withheld documents Staff could be more precise." A cursory review of the privilege logs shows that they do not sufficiently describe the documents withheld. In fact, given that tangible and intangible attorney work product are afforded different degrees of privilege, and that the party claiming a privilege precludes discovery of a matter bears the burden to show the privilege applies (*See, Ratcliff v. Sprint Missouri, Inc.*, 261 S.W.3d 534 (Mo. App. 2008)), it is impossible to tell from the logs what portions of the requested documents might or might not be truly privileged. Rather than provide redacted copies, Movants have simply withheld entire documents.

It is for this reason that Staff stated in its September 28 Response that, as for any documents as to which any claim of privilege remains *after the application of paragraphs 9 and 10 thereof*, if the Commission believes there may be some legitimate privilege applicable to such documents which causes the Commission to hesitate requiring the Movants to provide such documents to Staff, the Commission should at least require Movants to provide the documents to one of the Commission's Regulatory Law Judges for review and determination as to whether such documents should be provided to Staff. Movants should also be required to specify which portions of the documents they claim are subject to attorney-client privilege as opposed to work

product privilege so the RLJ can make his determination, and should be required to provide redacted documents to Staff.

WHEREFORE, Staff respectfully requests that the Commission issue its Order (1) affirming the Commission's Order Denying Motion for Protective Order and Motions to Quash, issued on September 28, 2012, with the minor clarifications mentioned above in paragraphs 1 and 2; (2) denying Movants' Motion for Full Commission Reconsideration of September 28, 2012 Order Denying Motion for Protective Order and Motions to Quash Subpoena for Attorney Client Privileged Communications; and (3) requiring compliance with the Subpoena Duces Tecum and Notice of Records Deposition previously filed herein¹.

Respectfully submitted,

/s/ Jeffrey A. Keevil

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¹ Since the date originally contained on the subpoena duces tecum and notice of records deposition has passed, without the subpoenaed documents being provided, the Commission may wish to consider including a date specific by which the documents are to be provided to Staff.

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 **2nd day of October, 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/ Jeffrey A. Keevil_____

except in the case of a failure to appear which is not applicable to the present situation; neither does the quoted order authorize the production of “privilege logs” in lieu of documents, as stated in Movants’ Motion. However, assuming that a party would be deemed to have waived its discovery claims or defenses by not raising something at the discovery conference, such a waiver should not be deemed to have occurred in this instance.

3. This is because, as stated in Staff’s Application for Subpoena Duces Tecum (the “Application”), Staff Counsel was unaware of the instant discovery dispute until September 10, 2012, and was not aware of the extent of the dispute until September 17, 2012¹. This in turn was caused, again as stated in the Application, by Movants’ failure to properly serve its objections to the data requests on Staff Counsel. While the Commission’s rule on data requests, 4 CSR 240-2.090(2) provides that “the term data request shall mean an informal written request for documents or information which may be transmitted directly between agents or employees of the commission, public counsel or other parties,” the rule specifically states that “If the recipient **objects** to data requests . . .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 requests, unless otherwise ordered by the commission.” (emphasis added) The Commission’s rule on service, 4 CSR 240-2.080(16)(A), provides that **service** on a party represented by counsel shall be accomplished by serving the party’s **attorney** by one of several listed methods. Accordingly, Movants were required by rule to serve their objections on Staff Counsel, which they failed to do

¹ Since counsel was unaware of any dispute until September 10 at the earliest, Movants’ reference to the August 30 Order, which required a filing by September 4, 2012, is misplaced and misleading.

(Movants do not dispute that service was not made on Staff Counsel). Furthermore, although Movants' Motion references the April 26 and August 30, 2012 Orders, Movants fail to mention the Commission's April 19, 2012, Order Governing Pre-Filed Testimony and Discovery, which stated in paragraph 3 that objections "shall be sent via e-mail to counsel for the other parties." This was not done, and is not disputed by Movants.

4. As the Commission is aware, the time for objecting to data requests is shorter than the time for responding to the data requests (see 4 CSR 240-2.090(2) and paragraph 4 of the Commission's April 19 Order). Therefore, since Movants' objections were contained within their responses to data requests, it appears that Movants not only failed to properly serve their objections on Counsel for Staff, but Movants' objections were also untimely.

5. Furthermore, Movants are well aware of the proper procedure for objecting to data requests, as shown in the attachment to this Response. This attachment is a copy of a GMO objection filed in another case by one of the multiple law firms representing Movants in the instant cases. For whatever reason, Movants failed to follow the correct procedure, as reflected in the attachment, in the instant cases.

6. Had Movants properly and timely served their objections on Staff Counsel as required by both Commission rule and order, Staff Counsel would have been aware of the discovery dispute and able to raise these matters at a discovery conference. After failing to properly (or timely) serve their objections, in violation of both Commission rule and order, Movants should not now be heard to complain that Staff failed to raise the matter at a discovery conference, and Staff should not be deemed to have waived any discovery claims or defenses by not raising them sooner.

7. Movants' Motion seems to imply, if not overtly argue, that Staff was seeking to "hide the ball" by seeking documents through the subpoena process which had been previously requested by Staff, and withheld by Movants, through data requests. If Staff had been attempting to "hide the ball" through the subpoena process, Staff would not have stated in its Application that "Exhibit A attached hereto is a copy of several 'privilege logs' received from KCPL in response to data requests previously issued by Staff in the current rate cases." If Staff had been attempting to "hide the ball", Staff would not have attached the actual privilege logs themselves, which contain the Movants' claimed privilege objections, to the Application or Subpoena. If Staff had been attempting to "hide the ball", Staff would not have addressed Movants' claimed privilege objections in its Application. Any implications to the contrary by Movants in their Motion are simply disingenuous and should be disregarded. In fact, the current situation is somewhat similar to the recent situation in Ameren Missouri's rate case, Case No. ER-2012-0166, which led to the issuance of the Commission's Order Regarding Motion to Quash Notice of Deposition of Thomas Voss and to Quash Subpoena Duces Tecum, issued on September 12, 2012. In that case, Staff sought documents via subpoena duces tecum which had previously been requested through data requests, but which had not been raised at a discovery conference. The Commission's Order denied the Motion to Quash and motion for protective order in that case, and the Commission should also deny Movants' Motion.

8. Another similarity between the ER-2012-0166 situation and the present discovery controversy is that in both the ER-2012-0166 case with Mr. Voss and the current case with Ms. Hardesty, Staff is only seeking the documents and is not seeking

to require the witness appear to be deposed. In Staff's Notice of Records Deposition filed herein, Staff stated "This is a records deposition and **no appearance by Ms. Hardesty is required**. Instead, the documents indicated on the Subpoena Duces Tecum addressed to Ms. Hardesty should be produced for inspection and copying not later than the date and time designated in this notice. The provision of a copy of the requested documents by mail or otherwise to the undersigned received by the designated date and time shall constitute full compliance with this subpoena." (emphasis added) Having already identified and collected the requested documents in order to construct the privilege logs, and not being required to produce Ms. Hardesty to be deposed, Movants' claims² that producing the documents would be unduly burdensome and oppressive are without merit.

9. As stated in Staff's Application, Movants' claim of accountant-client privilege must fail because the Commission has previously found that it is not available to regulated companies when the regulator seeks from the regulated companies the information asserted to be privileged. *An Investigation of the Fiscal and Operational Reliability of Cass County Telephone Company and New Florence Telephone Company, and Related Matters of Illegal Activity*, Case No. TO-2005-0237, 2005 WL 1076329 (Mo.P.S.C.), *Order Denying Motion to Quash*, issued May 5, 2005. As discussed in the *Cass County* case, this privilege applies, if at all, when a party seeks to obtain information about another party directly from the other party's external auditor. In this case, Staff is seeking information directly from the regulated companies, and the privilege, as found by the Commission in *Cass County*, should not and does not

² The "unduly burdensome and oppressive" claims appear in Movants' Objections to Notice of Records Deposition of Melissa K. Hardesty and to Subpoena Duces Tecum to Melissa K. Hardesty, Kansas City Power & Light Company, filed the same day as Movant's Motion to Quash.

apply. Furthermore, if the privilege was as extensive as argued by Movants, this one privilege would effectively eviscerate the utility regulatory process by enabling regulated companies to hide virtually all financial information from the regulator, as most utility financial information is prepared by accountants. Accordingly, Movants' claim of accountant-client privilege fails and any documents claimed to be privileged on this basis should be provided to Staff.

10. Regarding the Movants' other claims of privilege, as also stated in Staff's Application, Mo. Sup. Ct. Rule 56.01(b) allows for discovery of facts known and opinions held by expert witnesses. In interpreting the Rule, the Missouri Supreme Court has held that "[a]ll material given to a testifying expert must, if requested, be disclosed. This indeed is a 'bright line' rule. . ." *State ex rel. Tracy v. Dandurand*, 30 S.W.3d 831, 836 (en banc)(2000). The Court in *Tracy* was clear that the materials which must be disclosed include all materials provided to or reviewed by the expert, **not** just materials relied upon by the expert. *Id.* at 835. The privilege involved in the *Tracy* case was the attorney-client privilege. *Id.* at 832. Movants' claim that only "documents provided to Mr. Montalbano" are addressed by *Tracy* ignores the clear language of the rule itself which provides for discovery of "facts known and opinions held" by expert witnesses, which would permit discovery of documents written by him. Movants' claim that *Tracy* only applies to documents given to Mr. Montalbano "upon which to base an expert opinion" ignores the fact that the Court in *Tracy* made it clear that the materials which must be disclosed include all materials provided to or reviewed by the expert, **not** just materials relied upon by the expert. *Tracy* at 835. Therefore, as stated in Staff's Application, Movants have waived any claim to privilege they might have otherwise had

as to any of the requested documents authored by, addressed to, copied to, reviewed by or otherwise provided to Mr. Montalbano and such documents should be provided to Staff.

As for Ms. Hardesty, Movants simply claim *Tracy* does not apply because she is an employee of KCPL. However, *Tracy* is not so limited. Ms. Hardesty has pre-filed testimony in these rate cases; her testimony is in the form of “expert” testimony, as it is replete with opinion testimony. Therefore, unless Movants wish to withdraw her as a witness, she is, in the words of *Tracy*, a “testifying expert” witness in these cases, and for the same reasons recited above applicable to Mr. Montalbano, Movants have waived any claim to privilege they might have otherwise had as to any of the requested documents authored by, addressed to, copied to, reviewed by or otherwise provided to Ms. Hardesty and such documents should be provided to Staff.

11. As for any documents as to which any claim of privilege remains after paragraphs 9 and 10 above, Movants claim that Staff has not met its burden for the “necessity exception” under Mo. Sup. Ct. Rule 56.01(b)(3). As stated in the Application, since the bases for KCPL’s and GMO’s actions or inactions – why they did or did not do certain things – and the timing thereof (what did they reasonably rely upon, and when) are crucial to resolution of the issue(s) regarding the Coal Credits, Staff can only obtain this information from Movants and is clearly “unable without undue hardship to obtain the substantial equivalent of the materials by other means.” In their Motion, Movants attempt to diminish the importance of “why” Movants did what they did, but clearly the reasons for Movants’ actions or inactions are important; as are the ways Movants could have acted and what they did, which also may be disclosed by the requested

documents. Perhaps if Movants' privilege logs had been more descriptive as to the subject(s) of the withheld documents Staff could be more precise, but the Commission should keep in mind that Movants have not claimed that the requested information is not relevant, and based on Movants' privilege logs the requested documents all relate to the Coal Credits issue, or the tax treatment thereof, in some manner. Therefore, KCPL's claim of privilege should fail as to any remaining documents not required to be disclosed pursuant to paragraphs 9 or 10 above and such documents should be provided to Staff.

In regard to the documents addressed by this paragraph 11, if the Commission believes there may be some legitimate privilege applicable to such documents which causes the Commission to hesitate requiring the Movants to provide such documents to Staff, the Commission should at least require Movants to provide the documents to one of the Commission's Regulatory Law Judges for review and determination as to whether such documents should be provided to Staff.

WHEREFORE, having fully responded as ordered by the Commission's Order Directing Expedited Filing, Staff respectfully requests that the Commission issue its Order (1) denying Movants' Motion to Quash Notice of Deposition, to Quash Subpoena Duces Tecum and for Protective Order; (2) denying Movants' Objections to Notice of Records Deposition of Melissa K. Hardesty and to Subpoena Duces Tecum to Melissa K. Hardesty, Kansas City Power & Light Company; and (3) requiring compliance with the Subpoena Duces Tecum and Notice of Records Deposition³ previously filed herein.

³ As stated in paragraph 8 herein, Staff is only seeking the documents requested in the Subpoena Duces Tecum and no appearance by Ms. Hardesty is required.

Respectfully submitted,

/s/ Jeffrey A. Keevil

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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 **28th 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/ Jeffrey A. Keevil

September 6, 2012

Mr. Stuart W. Conrad
Finnegan Conrad & Peterson, L.C.
3100 Broadway, Suite 1209
Kansas City, MO 64111

Re: Ag Processing, Inc. Data Requests No. 17-50
Case No. HC-2012-0259

Dear Stu:

KCP&L Greater Missouri Operations Company ("GMO" or "Company") provides the following objections to certain of the above data requests that you served on August 29, 2012.

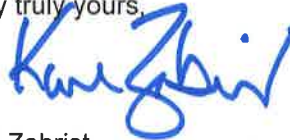
DR No. 17. GMO objects to this data request as calling for information that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence because it seeks monthly surveillance financial reports for years that are not at issue in this case.

DR No. 44. GMO objects to this data request as vague and ambiguous regarding the phrase "correspond to dates and presentation of Schedule TMN-3."

DR No. 46. GMO objects to this data request as vague and ambiguous.

DR No. 48. GMO objects to this data request as calling for information that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence. The request seeks information relating to the year 2005 while the complaint in this case only relates to matters occurring in 2009.

Very truly yours,



Karl Zobrist

KZ/cjn

cc: Mr. Roger W. Steiner