

Schallenberg, Bob

Staff Exhibit No. 11  
 Date 4-29-09 Reporter JF  
 File No. EO-2010-0259

From: Rush Tim [Tim.Rush@kcpl.com]  
 Sent: Tuesday, November 10, 2009 1:07 PM  
 To: Schallenberg, Bob; Davidson Christine  
 Cc: Ott, Jaime; Williams, Nathan; Dottheim, Steve; Hyneman, Chuck; Majors, Keith  
 Subject: RE: Data Requests Matters

**FILED**

MAY 6 2010

Bob,

I appreciated the opportunity to meet yesterday and discuss issues about our upcoming rate case and talk about some of the concerns you are having regarding the discovery process. As I told you yesterday, I was working on a response to your e-mail and I had hoped to send it out later in the day. I am sorry for the delay, but I understand that you have had some significant excitement at your offices today. I hope and pray all is well.

Missouri Public  
Service Commission

The following is my response to your e-mail. If you would like to discuss or have any questions, please feel free to give me a call. As I have noted throughout my response, I would like to get your issues and concerns addressed as soon as practical.

In your e-mail below, you make a number of statements concerning KCP&L's conduct and motivation regarding certain discovery requests. You suggest that KCP&L has been uncooperative, or has violated its own Code of Ethical Business Conduct. You also appear to suggest that KCP&L has intentionally edited or altered documents to withhold information from the Staff. KCP&L takes your comments very seriously. However, we strongly disagree with the conclusions you have reached. KCP&L has worked diligently to provide Staff the information it requests and has asserted privilege sparingly (with respect to roughly two percent of more than 1,100 data requests and with respect to less than four tenths percent of documents produced). Rather than let these issues build over time, as appears to have happened here, I would suggest taking them to the RLJ as they occur. It is not our intent to delay Staff's work. If we have improperly asserted a privilege, it is in both our interests to resolve the issue sooner rather than later. To that end, I request that the matters you outline in your e-mail be addressed in the upcoming meeting with Judge Stearley that is scheduled for this Thursday, November 12.

KCP&L has provided over 7,000 electronic documents, not including documents contained in computer disks, jump drives, or provided in hard copies, which would likely double the number to 14,000. KCP&L has responded to 1,100 data requests from the Commission's auditing staff, not counting an equal amount of data provided to the Commission's engineering Staff. You state that the length of your e-mail "shows the level of difficulty and significant time delays KCPL has caused to Staff on Staff's audit while Staff has attempted to work with KCPL in addressing KCPL's asserted concerns." It is unfortunate that you feel that way. KCP&L has worked with Staff to provide the data, information, as well as an explanation of any documents Staff requested related to the Iatan 1 and 2 projects. KCP&L has asserted attorney-client privilege on a very few documents. It is not clear how those assertions have impeded or delayed Staff's audit. It would have been my preference to have any issues we were unable to resolve ruled upon by the RLJ earlier so that no such perceived delays would occur.

In an effort to address your concerns I will break your e-mail into four categories, respond in general to those categories, and then respond to each individual data request contained in your e-mail.

- 1) A privilege log has been completed and provided to you for data related to the

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"Dave Price e-mails." Staff requested additional detail describing the privileged documents.

KCP&L legal counsel maintains our logs are sufficient as a matter of law. This issue should be addressed with the RLJ on Thursday, November 12.

2) A separate privilege log not related to the Dave Price e-mails was provided on Thursday, November 5. You requested confirmation whether any responsive non-privileged documents exist for review or formal supplemental response for Staff Data Requests 339, 342, 350, 370, 411, 413, and 490. I confirm no additional documents exist for review or supplemental response. While it has taken some time to collect, and prepare a log of privileged documents and some time to validate that no other responsive documents exist, I don't believe it has impeded the Staff's audit when the privilege log relates to only about two percent of more than 1,100 data requests or less than four tenths percent of documents provided. Again, if you believed this issue was impeding Staff's audit, I wish it would have been raised to the RLJ sooner.

3) Data request 673 requested all e-mails sent by Dave Price during his employment at the Company. KCP&L had to review over 12,000 e-mails, many with attachments or multiple attachments to determine whether these e-mails contained attorney-client communication. Obviously, this took an extended period of time to determine. KCP&L informed Staff that it would review the e-mails for attorney-client communications prior to providing them in a response to data request 673. KCP&L did not object to this data request or indicate formally it would withhold privileged information because until the e-mails were reviewed it was not known that such information existed. Also, the lack of a formal objection does not result in a waiver of the attorney-client privilege. It is my understanding that the RLJ has supported the Company's position on this issue.

4) Data Request 631 requested information previously provided to the KCC Staff. You have alleged improper conduct and an intentional attempt by KCP&L to "frustrate the discovery actions of the MoPSC." This is false. KCP&L inadvertently provided information to the KCC Staff and CURB that contained attorney-client communications. Once it was discovered, the information was requested to be returned from the KCC and CURB, documents were removed that contained privileged information, and resubmitted to the KCC and MoPSC. KCP&L informed Staff what was occurring in late July 2009. As I understand, there were e-mail exchanges between Ms. Jamie Ott and Ms. Vicky Schatz on this issue.

Again, I suggest we discuss these privilege issues with Judge Stearley this Thursday, November 12.

Following are additional responses to individual data requests.

Data Request 363 – The Curtis Blanc May 1, 2009 e-mail to Nathan Williams indicates that all non-privileged responsive information is contained in the Schiff Reports provided to the Staff. Staff requests that we identify to which Staff Data Request (s) the Schiff reports were provided that contain the responsive material referenced in Mr. Blanc's e-mail. The Schiff reports were provided very early in the year and two additional reports were provided later in the year dated July 7<sup>th</sup>, and November 28<sup>th</sup> 2008. You reviewed these reports in Mr. Fischer's office where they are still available for review. Mr. Blanc has no knowledge whether those documents contain specific responsive information to the Schiff Hardin evaluation of the Kiewit contract. What he meant was that to the extent any non-privileged information exists it would be contained in those Schiff Reports. No other non-privileged documentation exists.

Data Request 403 - Staff requests a supplemental response indicating whether Mr. Ballard had a written performance appraisal. Although a draft appraisal for Mr. Ballard might have been prepared, it was never finalized. No signed and approved performance appraisal exists. KCP&L's response to Data Request 403 is correct.

Data Request 411 and 413 - The Curtis Blanc May 1, 2009 e-mail to Nathan Williams indicates that no privileged documents exist. Mr. Blanc was not aware that privileged documents existed at the time he prepared that e-mail. Privileged documents do exist, as indicated on the privilege log.

Data Request 433 - The Curtis Blanc May 1, 2009 e-mail to Nathan Williams indicates that all non-privileged response information is contained in the Schiff Reports provided to Staff. Staff requests that we identify to which Staff Data Request (s) the Schiff reports were provided that contain the responsive material referenced in Mr. Blanc's e-mail. Similar to Data Request 363 Mr. Blanc has no knowledge whether those documents contain specific responsive information to the Schiff Hardin presentations. What he meant was that to the extent any non-privileged information exists it would be contained in those Schiff Reports. No other non-privileged documentation exists.

Data Request 443 - Staff requests a copy of KCP&L's response for inclusion in Staff's report to be filed with the Commission. This information was provided for your review and you reviewed it on October 20<sup>th</sup>. This information continues to have commercial implications related to contractors and contractor closeout. Although KCP&L will continue to make the information available for Staff's review, a copy will not be provided until such time as commercial issues are no longer relevant. This is consistent with the Commission's rules concerning the treatment of highly confidential information.

Data Request 353, 358, 360, 373 - A Privilege log was provided on November 6.

Data request 490 - KCP&L initially allowed the Staff to review the R&O packets which were the basis for the development of the contingency funds for Iatan 1. Commercial issues were still pending at the time the Staff requested the R&O packets. Since commercial issues have been resolved related to Iatan 1, R&O packets were provided in supplemental response to Data request 633. KCP&L has explained R&O packets to the Staff (Dave Elliot) but will be glad to do so again with you or any other Staff members.

As indicated above, your primary concern appears to be obtaining a privilege log and confirmation that no responsive non-privileged documents exist for certain data requests. I apologize it has taken additional time to finalize the log and search for any responsive non-privileged documents. The additional time required was partially due, however, to the general nature of the Staff's data requests and the voluminous number of documents that fell within their scope. In any event, it is difficult to see how this extra time has impeded Staff's audit as you suggest. KCP&L has been transparent throughout the construction of the Iatan 1 and 2 projects (e.g., the quarterly reports and related meetings) has answered nearly 1,100 data requests, and provided over 7 to 14 thousand documents. The assertion of privilege on a dozen or so data requests is extremely reasonable in any rate case discovery process. KCP&L has and will continue to cooperate with the Staff's audit. In fact my request would be to resolve any and all issues with the assistance of the RLJ as soon as it becomes apparent that we are unable to resolve a discovery issue. I suggest all of these matters be addressed with Judge Stearley on Thursday.

Tim Rush  
816 556-2344

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**From:** Schallenberg, Bob [mailto:bob.schallenberg@psc.mo.gov]  
**Sent:** Tuesday, November 03, 2009 3:47 PM  
**To:** Rush Tim; Davidson Christine

4/28/2010

**Cc:** Ott, Jaime; Williams, Nathan; Dottheim, Steve; Hyneman, Chuck; Majors, Keith  
**Subject:** Data Requests Matters

I am sorry we were unable to meet Tuesday October 20, 2009. I'm glad to hear your health has returned. Here is an update as to the status of the discovery issues noted in my 10/17/09 e-mail, that e-mail follows for reference purposes. Additionally, I have included other outstanding discovery matters. There may be other matters being discussed by our attorneys as result of their Friday October 30, 2009 meeting. My goal is to consolidate all the discovery matters into one central document. I understand Chuck Hyneman is working with Christine Davidson regarding the issue of data request responses received or outstanding subsequent to their due date. I believe Keith Majors will be contacting the Company, if he has not already done so, attempting to identify all data requests that KCPL has asserted the attorney-client/work product privilege.

KCPL provided responsive material for Staff Data Requests 403 and 443, which were part of the 7/17/09 Staff Data Requests group. Provision of this material for review removes these items from the list of outstanding discovery issues in my 10/17/09 e-mail from the 7/17/09 Staff Data Requests group.

After Staff's 10/20/09 review of material provided by KCPL, outstanding discovery issues remain related to KCPL's provision of either non-privileged responsive documents for review or a formal supplemental response that no such documentation exists for Staff Data Requests 339, 342, 350, 370, 411, 413, and 490. Staff is still requesting the date it will be provided the privilege logs for Staff Data Requests 339, 342, 350, 363, 370, and 433. The specific outstanding matters for the 7/17/09 Staff Data Requests are contained in the following paragraphs.

For Staff Data Request 339, KCPL supplemented its response (339S) referring to the Recommendation to Award (RTA) provided in the response to Staff Data Request 336 for the selection of the Owner's Engineer for the Iatan projects. Staff is seeking in Staff Data Request 339 any documentation related to the development of the Burns & McDonnell contract prior or subsequent to the RTA. If no non-privileged documentation exists, then Staff continues to seek review of this information as last requested on 7/17/09, but first requested on 1/14/09. If privileged documentation exists, then Staff continues to seek the date Staff will be provided a privilege log identifying the documents being withheld from discovery as well as information indicating the validity of the privilege being asserted. If privileged documentation does not exist, then Staff continues to seek formal confirmation by KCPL it has no such documents.

For Staff Data Request 342, Staff is seeking any documentation related to the Schiff Hardin evaluation of the Burns & McDonnell contract for design and engineering services for Iatan 1 and 2. KCPL's response indicates that it has 1) attorney-client privileged documents that are being withheld and 2) non-privileged documents that are being made available for review. If no non-privileged documentation exists, then Staff continues to seek formal confirmation by KCPL it has no such documents. If non-privileged documentation exists, then Staff continues to seek review of this information as last requested on 7/17/09, but first requested on 1/14/09. If privileged documentation exists, then Staff continues to seek the date a privilege log identifying the documents being withheld from discovery will be provided as well as information indicating the validity of the privilege being asserted. If privileged documentation does not exist, then Staff continues to seek formal confirmation by KCPL it has no such documents.

For Staff Data Request 350, KCPL supplemented its response (350S) referring to the unsigned bid evaluation and Dunn & Bradstreet Overview material of Alstom Power Inc for the prime contractor services for the Iatan 1 AQCS and Iatan 2 boiler provided in response to Staff Data Request 348. The KCPL response to Data Request 350 notes that privileged responsive information is being withheld. There is no mention regarding the provision of responsive non-privileged information that may exist. Staff is seeking in Staff Data Request 350 any documentation related to the development of the Alstom Power Inc contract prior or subsequent to the unsigned bid evaluation and Dunn & Bradstreet Overview material of Alstom Power Inc. If no non-privileged documentation exists, then Staff continues to seek formal confirmation by KCPL it has no such documents. If non-privileged documentation exists, then Staff continues to seek review of this information as last requested on 7/17/09, but first requested on 1/14/09. If privileged documentation exists, then Staff continues to seek the date a privilege log identifying the documents being withheld from discovery will be provided as well as information indicating the validity of the privilege being asserted. If privileged documentation does not exist, then Staff continues to seek formal confirmation by KCPL it has no such documents.

For Staff Data Request 363, Staff is seeking any documentation related to the Schiff Hardin evaluation of the Kiewit contract for the Balance of Plant work at Iatan. KCPL's initial response indicates that it has 1) attorney-client documents that it is not producing and 2) non-privileged documents that it is making available for review. The Curtis Blanc May 1, 2009 e-mail to Nathan William indicates that all non-privileged responsive

information is contained in the Schiff Reports provided to Staff. Staff is requesting that you identify to which Staff Data Request(s) the Schiff Reports were provided that contain the responsive material referenced in Mr. Blanc's e-mail. If privileged documentation exists, then Staff continues to seek the date a privilege log will be provided to Staff identifying the documents KCPL is not producing, as well as information indicating the validity of the privilege being asserted. If privileged documentation does not exist, then Staff continues to seek formal confirmation by KCPL it has no such documents.

For Staff Data Request 370, KCPL supplemented its response (370S) referring to the Recommendation to Award (RTA) provided in KCPL's response to Staff Data Request 368 for the foundation work for Iatan. Staff is seeking in Staff Data Request 370 any documentation related to the development of the Kissick contract prior or subsequent to the RTA. If no non-privileged documentation exists, then Staff continues to seek formal confirmation by KCPL it has no such documents. If non-privileged documentation exists, then Staff continues to seek review of this information as last requested on 7/17/09, but first requested on 1/14/09. If privileged documentation exists, then Staff continues to seek the date a privilege log identifying the documents KCPL is not producing, as well as information indicating the validity of the privilege being asserted. If privileged documentation does not exist, then Staff continues to seek formal confirmation by KCPL it has no such documents.

For Staff Data Request 403, the information was provided for review on Tuesday October 20, 2009. However, the Company's response contains errors (e.g., Mr. Ballard did have a written performance appraisal). Staff requests a supplemental response updating KCPL's response to reflect the facts as they are actually known today by KCPL.

For Staff Data Request 411, Staff is seeking documents related to the selection of Schiff Hardin to provide independent oversight and project controls advice for Iatan 1 and 2. KCPL's response was that non-privileged documents responsive to this Staff Data Request would be made available for review. Staff continues to seek review of this information as last requested on 7/17/09, but first requested on 1/14/09. The Curtis Blanc May 1, 2009 e-mail to Nathan William indicates that no privileged responsive documents exist. The outstanding items for this data request is either provide the documents for review as last requested on 7/17/09 or indicate in writing that no responsive documents exist relative to this Staff Data Request.

For Staff Data Request 413, Staff has been seeking documents related to the negotiation of the Schiff Hardin contract to provide independent oversight and project controls advice for Iatan 1 and 2. KCPL's response indicates that it has 1) attorney-client privileged documents that it is not producing and 2) non-privileged documents that it will make available for review. KCPL still has made no documents available for review despite Staff's requests. Staff continues to seek review of this information as last requested on 7/17/09, but first requested on 1/14/09. The Curtis Blanc May 1, 2009 e-mail to Nathan Williams indicates that no privileged responsive documents exist. The outstanding matters for this Staff Data Request is either provide the documents for review as last requested on 7/17/09 or indicate in writing that no responsive documents exist for this Staff Data Request.

For Staff Data Request 433, Staff has been seeking documents related to the Schiff Hardin reports and presentations provided to KCPL's senior management, EOC, and project personnel. KCPL's response indicates that it has 1) attorney-client privileged documents that it is not producing and 2) non-privileged documents that it will make available for review. KCPL still has made no documents available for review despite Staff's requests. The Curtis Blanc May 1, 2009 e-mail to Nathan Williams indicates that all non-privileged responsive information is contained in the Schiff Reports provided to Staff. Staff is requesting that you identify to which Staff Data Request(s) the Schiff Reports were provided that contain the responsive material referenced in Mr. Blanc's e-mail. If privileged documentation exists, then Staff continues to seek the date a privilege log identifying the documents being withheld from discovery will be provided as well as information indicating the validity of the privilege being asserted. If privileged documentation does not exist, then Staff continues to seek formal confirmation by KCPL it has no such documents.

For Staff Data Request 490, Staff is seeking copies of all documentation supporting the development, review, analysis and approval of the contingency and executive contingency included in the control budget estimate for environmental upgrades at Iatan 1. KCPL's response did not assert any privilege or immunity objections related to this Staff Data Request. The response indicates that all documentation supporting the development, review, analysis and approval of the contingency and executive contingency included in the control budget estimate for environmental upgrades at Iatan 1 would be made available for review. The KCPL response indicates that information was provided to the Staff in early 2008 as part of its investigation in Case No. EM-2007-0374. Staff has not been able to identify the information referenced in this response. Staff continues to seek review of this information as last requested on 7/17/09, but first requested on 1/14/09. If no documentation exists, then Staff continues to seek formal confirmation of such a fact as well as a supplemental response modifying the current response which indicates that there is such material and it is

available for review. In addition, Staff requests KCPL review the accuracy of the representation that the current Control Budget Estimate for latan 1 AQCS is \$484 million. The latan 1 AQCS Cost Reports indicate that the current Budget for latan 1 AQCS is \$484 million and the current Control Budget for latan 1 AQCS is \$376.8 million.

There are discovery issues regarding Staff Data Requests outside the long unresolved 7/17/09 Staff Data Requests group. The specific issues for those data requests are contained in the following paragraphs.

For Staff Data Request 443, Staff requests a copy of KCPL's response to Staff Data Request 443 for inclusion in Staff's Report to be filed with the Commission.

For Staff Data Request 353, Staff is seeking any documentation related to the Schiff Hardin evaluation of the Alstom contract for construction of the latan 1 AQCS and latan 2 boiler. KCPL's initial response indicates that it has attorney-client privileged documents that it is not producing and 2) non-privileged documents that it will make available for review. The Curtis Blanc May 1, 2009 e-mail to Nathan Williams indicates that all non-privileged responsive information is contained in the Schiff Reports provided to Staff. Staff is requesting that you identify to which Staff Data Request(s) the Schiff Reports were provided that contain the responsive material referenced in Mr. Blanc's e-mail. If privileged documentation exists, then Staff continues to seek the date a privilege log identifying the documents KCPL is not producing will be provided as well as information indicating the validity of the privilege being asserted. If privileged documentation does not exist, then Staff continues to seek formal confirmation by KCPL it has no such documents.

For Staff Data Request 358, Staff is seeking in any documentation related to the selection of Kiewit as the prime contractor for the Balance of Plant (BOP) at latan. The Staff Data Request incorrectly referred to Alstom as the latan BOP prime contractor that KCPL appropriately corrected to be Kiewit in its response. KCPL did not object to the Staff Data Request on the basis of having responsive attorney-client privileged documents that it is not producing. The Curtis Blanc May 1, 2009 e-mail to Nathan Williams indicates that KCPL is not providing a "Memorandum dated March 26, 2007 from Kenneth Roberts to William Riggins concerning Contracting Methods for Kiewit." Staff continues to seek the date a privilege log identifying the information regarding the specific privileged being claimed will be received as well as other information indicating the validity of the privilege being asserted.

For Staff Data Request 360, Staff is seeking documentation related to the negotiation of the Kiewit contract for the Balance of Plant (BOP) work at latan. KCPL's initial response identifies KCPL's objection to providing documents protected by the attorney-client privilege and/or attorney work product doctrine. The Curtis Blanc May 1, 2009 e-mail to Nathan Williams indicates that KCPL has withheld the following documents: 1) Memorandum dated September 11, 2007 from Virgil Montgomery to William Riggins concerning Draft Contract for Balance of Plant at latan 1 and Unit 2; 2) Memorandum dated August 7, 2007 from Virgil Montgomery to William Riggins concerning Draft Contract for Balance of Plant at latan 1 and Unit 2; 3) Memorandum dated October 24, 2007 from Kenneth Roberts to William Downey concerning Kiewit Contract - Talking Points; and 4) Memorandum dated October 28, 2007 from Carrie Okizaki to William Riggins concerning Draft Contract for Balance of Plant at latan 1 and Unit 2. Staff continues to seek the date a privilege log identifying the information regarding the specific privileged being claimed will be provided as well as other information indicating the validity of the privilege being asserted.

For Staff Data Request 373, Staff is seeking any documentation related to the Schiff Hardin evaluation of the Kissick contract for the foundation work at latan. KCPL's initial response indicates that it has attorney-client privileged documents that it is not producing and makes no mention of the provision of non-privileged documents responsive to Staff's Data Request. The Curtis Blanc May 1, 2009 e-mail to Nathan Williams indicates that all non-privileged responsive information is contained in the Schiff Reports provided to Staff. Staff is requesting that KCPL identify to which Staff Data Request(s) the Schiff Reports were provided that contain the responsive material referenced in Mr. Blanc's e-mail. Since Mr. Blanc's e-mail further indicates that privileged documentation exists, Staff continues to seek the date a privilege log identifying the documents being withheld from discovery will be provided as well as information indicating the validity of the privilege being asserted.

For Staff Data Request 491S, Staff is seeking copies of all documentation supporting the development, review, analysis and approval of the contingency and executive contingency included in the control budget estimate for latan 2. KCPL's response did not include the assertion of any privilege or immunity objections related to this Staff Data Request. The response indicates that all documentation supporting the development, review, analysis and approval of the contingency and executive contingency are contained in the KCPL response to Staff Data Request 490. As previously indicated, Staff Data Request 490 addresses the same information for the latan 1 AQCS. KCPL claims that responsive information was provided to the Staff in early 2008 as part of its investigation in Case No. EM-2007-0374. Since Staff has not been afforded the

opportunity to review the material, Staff cannot comment on the accuracy of KCPL's claim. Staff continues to seek review of the information it seeks in Staff Data Request 490 as last requested on 7/17/09, but first requested on 1/14/09. If no documentation exists, then Staff continues to seek formal confirmation by KCPL it has no such documents as well as a supplemental response modifying the current indication that such material is available for review.

For Staff Data Request 673 David Price e-mails,—Staff requested this information on July 30, 2009. Staff never received any objection or assertion by KCPL it would not produce responsive documentation. Staff did not become aware KCPL would withhold information until Staff received the Company's response on October 15, 2009 (Roger Steiner's October 14, 2009 letter to Jaime Ott). The Company indicated in its response that KCPL was not producing documents that it asserted were covered by the attorney-client privilege or attorney work product doctrine. In addition, KCPL only informed Staff of a thirty (30) day extension in a separate communication, making KCPL's response due by August 31, 2009. Staff is evaluating whether it must seek a Commission order to protect the audit from further KCPL non-compliance with the clear provisions of the Commission's discovery rules. Any assistance KCPL can provide to achieve compliance without the Staff having to seek Commission action would be appreciated. Staff is requesting the earliest date KCPL will be able to discuss with a Regulatory Law Judge presiding in this case the matter of KCPL not producing information KCPL asserts is privilege without submitting an objection to Staff. On the privilege logs provided one cannot determine the validity of the privilege being asserted based on the information that is included. KCPL should supplement the privilege logs with the following information, and include the following information in future privilege logs: 1) identify the attorney in the communication by name and capacity, 2) identify who is claiming the privilege, 3) identify the client in the communication by the relationship between the attorney in the communication and those with whom the attorney is communicating, and 4) identify the legal nature of the communication that KCPL asserts entitles it to attorney-client privilege protection (i.e., opinion on law, legal services, or legal proceeding assistance). Regarding the assertion of the attorney work product doctrine, please identify the attorney(s) and potential litigation in anticipation of which, or during which, the material was prepared for litigation.

As a general clarification question, when KCPL does not produce a document based on its assertion the document contains attorney-client privileged material or attorney work product doctrine material is KCPL asserting that all the information in the document is protected from disclosure, or is KCPL not producing the entire document even when KCPL is asserting only a portion of its contents are being asserted to be covered by the attorney-client privilege and/or the attorney work product doctrine?

KCPL's actions in this audit appear inconsistent with GPE's Code of Ethical Business Conduct (October 30, 2007). The GPE Code of Ethical Business Conduct contains a section on page 9 regarding "Cooperation with Investigations." This section states:

Consistent with applicable law, we are required to cooperate fully, promptly, and truthfully in any internal or external investigation, including responding to requests for information, participating in investigatory interviews and disclosing all known information relating to the subject matter of the investigation. We will not destroy or alter any Company record with intent to obstruct any pending or threatened investigation

When Staff asked KCPL in Staff Data Request 671 whether this section applied to the MoPSC Staff's Audit of Iatan 1 & 2, Sibley 3, and Jeffrey 1-3, KCPL responded:

Yes. Consistent with applicable law, the Code of Ethical Business Conduct (the "Code") applies to all investigations. Directors, officers and employees are subject to the Code and are responsible for cooperating in investigations.

The length of this e-mail shows the level of difficulty and significant time delays KCPL has caused to Staff on Staff's audit while Staff has attempted to work with KCPL in addressing KCPL's asserted concerns. Considerable audit time and resources have been consumed in acquisition of responsive material to Staff Data Requests. In Staff's July 28, 2009 letter to Ms. Schatz from Ms. Ott, Ms. Ott noted KCPL's failure to comply with Commission rules regarding asserting any rights it may have to withhold information. This letter also noted a prior incidence of KCPL failing to follow Commission rules when needing more time to respond to Staff Data Requests. KCPL has continued to disregard compliance with these Commission rules as evidenced in its response to Staff Data Request 673 mentioned previously in this e-mail.

KCPL's actions relative to Staff Data Request 631 are viewed by Staff as improper. Staff understands that discovery disputes will occur. Staff previously has encountered discovery obstacle patterns similar to activities KCPL has used that have delayed the scope of the Staff's current audit. Staff encountered similar issues with KCPL when addressing the Wolf Creek rate case. Staff relies heavily on the Commission's discovery rules

when faced with these situations. Blatant disregard for the Commission rules in an effort to alter the unprotected status of information existing at the time a Data Request is served on the Company while not acknowledging your actions is inappropriate. Staff has not uncovered such actions by a utility since KCPL edited external auditor workpapers before providing copies to the Staff. Staff would view KCPL's actions differently if KCPL had acknowledged that it was objecting to producing material it asserted was attorney-client protected as provided in the Commission's rules and had requested an extension on the basis it needed time to retrieve from the KCC the invoices it had previously provided to the KCC and replace them with redacted invoices.

KCPL continues to assert privileges and doctrines/immunities against Staff discovery in the MoPSC Staff audit when it did so only sparingly against the KCC Staff. The Response to Staff Data Request 690 indicates only one time KCPL has asserted attorney-client privilege or attorney work product doctrine relating to the latan 1, latan 2 and common plant construction audits performed by the KCC Staff or the Citizens' Utility Rate Board. This one event was not caused by KCPL's desire to prevent information from being disclosed to the KCC Staff. In fact the KCC Staff received and had in its possession information that KCPL desired to withhold from the MoPSC Staff—unredacted invoices. KCPL then demanded that the KCC Staff return this information and allow it to be replaced by the information KCPL desired to provide the MoPSC—redacted invoices. In order to frustrate the discovery actions of the MoPSC Staff and its attorneys, KCPL did not object to Staff Data Request 631 requesting KCPL provide to the MoPSC Staff copies of the data disks in the KCC's possession when the Staff submitted its Data Request 631. The Staff notes that KCPL in furtherance of its efforts to frustrate the discovery actions of the MoPSC Staff and its attorneys, KCPL did not request an extension to respond to Staff Data Request 631 within the prescribed time period and the Commission's rules require that had KCPL done so KCPL would have had to provide the reasons for its inability to answer within the prescribed time period. Such an extension request would have alerted the MoPSC Staff that something was amiss since the Staff Data Request only required the copying of existing disks for a response. KCPL chose to answer the Staff Data Request late with absolutely no communication to Staff of what was occurring, which leads Staff to no other conclusion than that KCPL sought to mask its actions from Staff. At this time, Staff is evaluating its alternatives regarding the proper actions to take to address this matter. If KCPL can offer any options or wishes to discuss solutions to remedy the situation and address it or similar matters with other late KCPL responses, Staff would welcome such communication.

KCPL has withheld from Staff an unspecified number of documents based upon its assertions of attorney-client privilege and attorney work product doctrine. The Staff's initial test of these assertions regarding the Schiff Hardin invoices illustrated to Staff a significant abuse of the privilege by KCPL. This matter still is not fully resolved today. It is Staff's intent to identify the documents being withheld related to the latan construction audit, thus Staff is pressing its requests for privileged logs. After this stage is completed, Staff will seek to receive all non-privileged information contained in these documents and seek verification that KCPL has properly applied its privileges. KCPL is not producing documents that are not even covered by a privilege and provides no basis for not producing the information. While Staff has not been successful in establishing a special master process which would protect KCPL's rights but provide Staff assurance that the audit is based on all known relevant information, Staff will continue to strive to establish this process as soon as possible.

KCPL has waited approximately three (3) months to respond to a Staff request to provide information the Company represented would be made available for review after being contacted by Staff. As indicated above in this memorandum, certain Staff requests to review information KCPL represented would be available for review on KCPL's premises in Kansas City are still not resolved by KCPL; thus, the actual delay in production of the documents supposedly available for review has already exceeded three (3) months.

Because KCPL provided a copy of the Strategic Talent Solutions (STS) report as part of a David Price e-mail included in KCPL's response to Staff Data Request 673, made after KCPL attorneys reviewed the response, created "privilege logs," and redacted material from it before providing the response to Staff, Staff no longer is seeking a copy of the STS Report by other Staff Data Request.

Thank you for your time to review this response and any assistance you can provide to improve this continuing problem situation.