

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Joint Application of Great)	
Plains Energy Incorporated, Kansas City Power)	
& Light Company, and Aquila, Inc. for Approval)	
of the Merger of Aquila, Inc. with a subsidiary of)	Case No. EM-2007-0374
Great Plains Energy Incorporated and for Other)	
Related Relief.)	

**MOTION FOR ORDER DIRECTING COMPLIANCE WITH
COMMISSION ORDER**

COMES NOW the Staff of the Missouri Public Service Commission (Staff), the Office of the Public Counsel (Public Counsel), and Praxair, Inc. (Praxair), AG Processing, Inc. (AGP) and Sedalia Industrial Energy Users' Association (SIEUA) (Praxair, AGP and SIEUA collectively referred to as Industrial Intervenors) and for their Motion for Order Directing Compliance with Commission Order state as follows:

1. On June 5, 2007, the Staff of the Commission, on behalf of all the parties including Joint Applicants, filed a proposed procedural schedule for this case along with a recitation of certain agreements that the parties reached.

2. In its Order Adopting Procedural Schedule issued June 19, 2007, the Commission adopted the procedural schedule, and expressly ordered the parties to comply with the agreements. One of those agreements concerned workpapers:

(e) Workpapers that were prepared in the course of developing a witness's testimony should not be filed with the Commission but should be submitted to each party within 2 business days following the filing of the particular testimony. Workpapers containing highly confidential or proprietary information should be appropriately marked. Since workpapers for certain parties may be voluminous and generally not all parties are interested in receiving workpapers or a complete set of workpapers, a party shall be relieved of providing workpapers to those parties indicating that they are not interested in receiving workpapers or a complete set of workpapers.

(Order Adopting Procedural Schedule issued June 19, 2007; page 2)

3. The Commission clearly stated that parties must comply with that agreement:

The Commission has reviewed the proposed procedural schedule and finds it to be appropriate.... The Commission finds that the following conditions shall be applied to the schedule:

(A) The procedural agreements of the parties as set out above are adopted.

...
The parties are directed to comply with the conditions set out in this order, including their agreements in paragraph 2 of the June 5, 2007 Staff Response to Commission Order.

(Order Adopting Procedural Schedule issued June 19, 2007; pages 3, 9; emphasis added.)

4. As the Staff, Public Counsel and Industrial Intervenors indicated in their March 4 and March 10, 2008 filings, KCPL/GPE are now seeking to withhold workpapers. KCPL/GPE did not provide to the parties certain workpapers that the Staff, Public Counsel and Industrial Intervenors believe are, among other things, the basis for the additional supplemental surrebuttal testimony of Terry Bassham, at page 5, line 17 to page 6, line 2, and Michael W. Cline, at page 4, lines 20-23, filed on February 25, 2008. The testimony will not be reproduced here because some of the relevant passages have – for some undisclosed reason – been marked as Highly Confidential by the Joint Applicants. The relevant testimony deals with responses of Moody’s and Standard and Poor’s (S&P’s) to KCPL/GPE’s request for opinions about credit ratings based on certain assumptions.

5. There are at least two categories of documents that the Staff, Public Counsel and Industrial Intervenors believe should have been provided as workpapers. First, there are the responses from Moody’s and S&P’s. Second are the actual spreadsheet calculations that underlie the attachments to Mr. Cline’s testimony.

6. With respect to the first category, KCPL/GPE are evidently claiming that some of the documents from S&P’s and Moody’s were provided to the Staff, Public Counsel and Industrial Intervenors during settlement discussions and therefore are protected as such. The

case law is clear respecting other privileges and immunities. If a party seeks to rely on the information, the party cannot withhold it. The Western District Court of Appeals held as follows respecting the attorney-client privilege in State ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 645 S.W.2d 44, 55 (Mo.App. W.D. 1982) and the Western District Court of Appeals noted the Eastern District Court of Appeals' decision in another Commission case:

Bell claims, however, that there is presented a special legal issue here concerning the Commission's disallowance of antitrust legal fees. During the test year, AT & T was engaged in extensive antitrust litigation and allocated a portion of those expenses to each of its subsidiaries. The Commission staff requested access to certain supporting records in order to determine the reasonableness of the claimed charges and allocation. Bell declined to furnish those records on the grounds that they were protected by the attorney-client privilege. The staff thereupon recommended that the claimed antitrust expenses be disallowed because of the refusal to produce the supporting records in question. Bell now challenges the Commission's adoption of that staff recommendation.

The issue here is akin to that presented in State ex rel. Util. Consumers Council v. Pub. Serv. Com., 562 S.W.2d 688, 694 (Mo.App.1978) where a utility company declined to furnish certain information on the ground that the data was entitled to protection as being "proprietary." The Eastern District of this court rejected that defense, holding:

"Though the court acknowledges that in some circumstances the proprietary nature of information may shelter it from examination, the Company here cannot hide behind the proprietary nature of the information. The Company proffered testimony and exhibits based on proprietary information. If it seeks to rely on proprietary information to carry its burden of proof and, thereby, benefit from the use of such information, then it may not protect that information from scrutiny by claiming it need not disclose...."

645 S.W.2d at 55. The Staff, Public Counsel and Industrial Intervenors note additional supportive language of their position regarding the disclosure of workpapers in this case found in State ex rel. Utility Consumers Council of Missouri v. Public Serv. Comm'n, 562 S.W.2d 688, 694 ((Mo.App. StL.D. 1978) which is not in the excerpt above:

. . . Appellant inquired about the specific amounts and the timing of future rate increases and the projected net operating income of the Company. The Company objected on the ground that public disclosure of the figures was prevented by the

Securities Act of 1933, 15 U.S.C.A. § 77e(c), since the Company had registered an issuance of securities with the Securities and Exchange Commission. The objection was sustained. As with the proprietary information, the Commission erred in sustaining this objection.
Ibid., at 695-96.

7. With respect to the second category, the spreadsheets that underlie Mr. Cline's testimony, there seems little doubt that these spreadsheets are exactly the type of material that are considered to be workpapers. Schedules MWC-18 and MWC-19 to Mr. Cline's testimony have, without explanation by the Joint Applicants, been marked as Highly Confidential. They appear to have been prepared with Microsoft PowerPoint or a similar presentation software. There are a number of slides (for example, slide number 13 in each exhibit) in the presentations that include detailed calculations that cannot be done in PowerPoint; they must have been done using spreadsheet software.

8. KCPL/GPE did not provide these spreadsheets pursuant to the Commission's June 19, 2007 order, and has refused to provide them when asked. These workpapers (spreadsheets with formulas intact) were requested at a meeting on February 28, and a follow-up request was directed to KCPL on March 3. In response to this follow-up, KCPL/GPE replied: "I checked with Michael Cline and found out that he has no supporting workpapers for his Supplemental Direct Testimony in the merger proceeding. If you have questions, please let me know."¹ In response, Public Counsel Chief Accountant sent the following request:

Is Mr. Cline asserting he has no financial models that produce the financial information in the presentation presented to the rating agencies as shown in schedules MWC-17 [*sic*] and MWC-18?

Bob Schallenberg and I discussed these models availability with Chris Giles after the scheduling prehearing last week.

Please re-address this with Mr. Cline and Mr. Giles.²

KCPL did not reply to this latest email from Mr. Trippensee.

¹ March 3, 2008 email from James M. Fischer; attached hereto as Attachment 1.

² March 3, 2008 email from Russell Trippensee; attached hereto as Attachment 2.

9. KCPL/GPE may argue that this motion does not comply with the requirements of 4 CSR 240-2.090(8). The Staff, Public Counsel and Industrial Intervenors assert that this is not truly a discovery dispute but rather a question of enforcement of compliance with a Commission order. If the Commission considers this a discovery matter such that 4 CSR 240-2.090(8) would apply, the Staff, Public Counsel and Industrial Intervenors request a waiver pursuant to 4 CSR 240-2.015. Good cause exists to waive the requirements of 4 CSR 240-2.090(8), if the Commission believes that it applies. Several conversations (in person and by email) about this topic have already transpired with KCPL/GPE, and KCPL/GPE's refusal to provide the requested workpapers remains adamant. A further phone call and a conference call would only inject further delay, and the Staff, Public Counsel and Industrial Intervenors have sought to minimize delays throughout these proceedings.

WHEREFORE the Staff, Public Counsel and Industrial Intervenors respectfully request that the Commission issue an order directing KCPL/GPE to produce: all the correspondence with ratings agencies that lead KCPL/GPE witnesses Cline and Bassham to represent the positions of the ratings agencies in their testimony; and all spreadsheets with formulas intact that underlie the testimony (including attachments) of Mr. Cline.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing has been mailed, hand-delivered, transmitted by facsimile or electronically served to all counsel of record this 11th day of March, 2008.

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