

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

In the Matter of the Construction Audit and)
Prudence Review of Environmental Upgrades)
To Iatan 1 Generating Plant, and Iatan Common) **Case No. EO-2010-0259**
Plant, and the Iatan 2 Generating Plant, Including)
All Additions Necessary for These Facilities to)
Operate.)

**STAFF MOTION FOR CLARIFICATION REGARDING THE TREATMENT
IN BRIEFS OF CERTAIN RECORDS AND DOCUMENTS OF THE
MISSOURI PUBLIC SERVICE COMMISSION**

COMES NOW the Staff of the Missouri Public Service Commission (“Staff”), through the Staff Counsel Office, and submits the instant motion requesting clarification regarding the treatment in briefs of certain records and documents of the Missouri Public Service Commission (“Commission”).

1. At the hearing on April 29, 2010, Counsel for Kansas City Power & Light Company (KCPL) and KCP&L Greater Missouri Operations Company (“GMO”) provided to the Bench and the parties a copy of the Commission’s Report And Order in the Wolf Creek rate case, *Re Kansas City Power & Light Co.*, Case No. EO-85-185 and EO-85-224, 28 Mo.P.S.C.(N.S.) 228 (1986), and asked that the Commission take official notice of the case. Undersigned counsel for the Staff had no objection, but indicated that there were a number of Commission Orders in the Wolf Creek rate case involving the use of a Special Master in discovery matters that undersigned counsel requested that official notice be taken of although he did not have copies available.

2. The Regulatory Law Judge gave the undersigned counsel till May 7, 2010 to make a filing regarding these other Orders in the Wolf Creek rate case. Although on April 29, 2010, May 7, 2010 did not appear as if it would remain a state holiday, May 7, 2010 has had one

last stand as a state holiday. Regardless, undersigned counsel has endeavored to make the instant filing in a timely manner.

3. The Orders that undersigned counsel alluded to on April 29, 2010 are reported in the Commission's *Mo.P.S.C.(N.S.)* reporter series of published Commission Orders. As a consequence, undersigned counsel sees no reason to burden the Commission's Electronic Filing and Information System ("EFIS") and will merely provide the citations for these Orders, assuming that is acceptable:

Re Kansas City Power & Light Co., Order Concerning In Camera Proceeding, Case Nos. ER-85-128 and EO-85-185, 27 *Mo.P.S.C.(N.S.)* 520 (1985);

Re Kansas City Power & Light Co., Order Denying Reconsideration, Case Nos. ER-85-128 and EO-85-185, 27 *Mo.P.S.C.(N.S.)* 524 (1985);

Re Kansas City Power & Light Co., Order Concerning Discoverability Of Withheld Documents, Case Nos. ER-85-128 and EO-85-185, 27 *Mo.P.S.C.(N.S.)* 527 (1985);

Re Kansas City Power & Light Co., Supplemental Order Concerning Discoverability Of Withheld Documents, Case Nos. ER-85-128, EO-85-185, and EO-85-224, 27 *Mo.P.S.C.(N.S.)* 531 (1985);

Re Kansas City Power & Light Co., Order Concerning Second List Of Withheld Documents, Case Nos. ER-85-128, EO-85-185, and EO-85-224, 27 *Mo.P.S.C.(N.S.)* 533 (1985);

Re Kansas City Power & Light Co., Order Of Reconsideration Concerning Second List Of Withheld Documents, Case Nos. ER-85-128, EO-85-185, and EO-85-224, 27 *Mo.P.S.C.(N.S.)* 537 (1985); and

Re Kansas City Power & Light Co., Order, Case Nos. ER-85-128, EO-85-185, and EO-85-224, 27 *Mo.P.S.C.(N.S.)* 541 (1985).

4. In general on the matter of Commission Orders, undersigned counsel is not aware of the Commission in the past having required parties to make exhibits of Commission Orders or request that official notice be taken of said Orders. The Commission has permitted parties to cite and quote from said Orders and counsel have generally extended the courtesy of providing

copies of said Orders if they are obscure for one reason or another, given that not all Commission Orders are published and even those that are, often are minus any stipulations and agreements that may be part of the Order in question.

5. The Staff would note that there are documents from Case Nos. ER-2009-0089 and ER-2009-0090 that presumably the Regulatory Law Judge directed to be added to the EFIS file for Case No. EO-2010-0259 and which are shown as having been filed in Case No. EO-2010-0259 on March 16 or 17, 2010. Items 29 and 32 in EFIS contain a document of interest, a complete “Highly Confidential” copy, in addition to a “Public” copy, of the June 19, 2009 Preliminary Report Of The Staff Respecting Its Construction Audit / Prudence Review Of Environmental Upgrades To Iatan 1 And Iatan Common Plant As Directed In The Missouri Public Service Commission’s April 15, 2009 Orders Regarding Construction Audits And Prudence Reviews And Modified In The June 10, 2009 Orders Regarding Joint Motion To Extend Filing Dates In Case Nos. ER-2009-0089, ER-2009-0090 And HR-2009-0092. KCPL/GMO Exhibit 6 is only the “Public” copy of the Staff’s June 19, 2009 Preliminary Report, not a “Highly Confidential” copy. The Staff requests that it not be barred from referring in its briefs to the content of the “Highly Confidential” version of this document that is in items 29 and 32 in EFIS in Case No. EO-2010-0259.

6. Another example of what has been incorporated in Case No. EO-2010-0259 is Item 30 and Item 33. Item 30 contains “Highly Confidential,” “Proprietary,” and “Public” copies of the Staff Report Of The Construction Audit / Prudence Review Of Environmental Upgrades To Iatan 1 And Iatan Common Plant filed on December 31, 2009 in Case No. ER-2009-0089. Item 33 contains “Highly Confidential,” “Proprietary,” and “Public” copies of the Staff Report Of The Construction Audit / Prudence Review Of Environmental Upgrades To Iatan

1 And Iatan Common Plant filed on December 31, 2009 in Case No. ER-2009-0090. As the Commission is aware, the Staff Report filed in Case No. ER-2009-0089 on December 31, 2009 and the Staff Report filed in ER-2009-0090 on December 31, 2009 are not identical to each other.

7. Sections 536.070(5) and 536.070(6) RSMo. RSMo. 2000 are relevant as are *Hilke v. Firemen's Retirement System*, 441 S.W.2d 730, 732-33 (Mo.App. St.L. 1969)(“*Hilke*”), and Section 386.410.1 RSMo. 2000 to how the Commission should treat documents it has incorporated by its own motion in Case No. EO-2010-0259 and documents which were utilized by KCPL/GMO and the Staff at the hearing on April 28-29, 2010:

536.070(5): Records and documents of the agency which are to be considered in the case shall be offered in evidence so as to become a part of the record, the same as any other evidence, but the records and documents may be considered as a part of the record by reference thereto when so offered.

536.070(6): Agencies shall take official notice of all matters of which the courts take judicial notice. . . .

Hilke v. Firemen's Retirement System, 441 S.W.2d 730, 732-33 (Mo.App. St.L. 1969)¹:

. . . the procedural standards of administrative bodies differ from those of courts. While the fundamental principles of judicial inquiry must be observed in administrative proceedings, the strict judicial procedure of the courtroom should not be required before an administrative body of laymen; there the proceedings may be simpler and less technical than in the courtroom. (*Davis v. Long*, Mo.App., 360 S.W.2d 307(9).)

¹ In a recent appellate decision, *David L. Moore, D.D.S. v. Missouri Dental Board*, Case No. WD71065, Opinion Filed, March 9, 2010, the Western District Court of Appeals summarized the *Hilke* decision as follows at page 8 of its loose-leaf opinion:

In *Hilke v. Firemen's Retirement System of St. Louis*, 441 S.W.2d 730 (Mo. App. 1969), medical reports prepared at the behest of an administrative body charged with determining disability were referred to informally throughout an evidentiary proceeding, and were used to question the licensee by his own counsel. Though never formally offered into evidence or referred to as being offered by reference, the court concluded that the multiple references to, and use of, the reports throughout the proceeding sufficed to comport with section 536.070(5), as there was a generalized sense that both parties were treating the referenced records as a part of the evidence. *Id.* at 733. . .

* * * *

. . . counsel treated the medical reports as documents properly before the Board for its consideration. Although the record does not show the reports were offered in evidence in ritualistic language, we hold that the method of putting them before the Board for its consideration fully met the less formal procedural requirements of an administrative hearing. . . . the reports constituted substantial evidence . . .

386.410.1: All hearings before the commission or a commissioner shall be governed by rules to be adopted and prescribed by the commission. And in all investigations, inquiries or hearings the commission or commissioner shall not be bound by the **technical** rules of evidence. [Emphasis added].

Of course, the Commission is well aware that Section 386.410.1 does not say that in investigations, inquiries or hearings the Commission or Commissioner shall not be bound by the **fundamental** rules of evidence. (Emphasis added).

WHEREFORE the Staff files its motion requesting clarification regarding the treatment in briefs of certain records and documents of the Missouri Public Service Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or emailed to all counsel of record this 8th day of May, 2010.

/s/ Steven Dottheim