BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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<tr><td>In the Matter of the Application of Kansas City Power & Light Company for Approval to Make Certain Changes in its Charges for Electric Service to Continue the Implementation of Its Regulatory Plan.</td><td>)
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<u>Tariff No. JE-2010-0692</u></td></tr>
<tr><td>In the Matter of the Application of KCP&L Greater Missouri Operations Company for Approval to Make Certain Changes in its Charges for Electric Service.</td><td>)
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)</td><td><u>File No. ER-2010-0356</u>
<u>Tariff No. JE-2010-0693</u></td></tr>
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STAFF'S ORDERED RESPONSE TO MOTION TO COMPEL DISCOVERY

COME NOW the Staff of the Missouri Public Service Commission and for its Response to the Motion to Compel Discovery filed by Intervenor Robert Wagner ordered by the Commission states:

1. By an order issued July 13, 2010, the Commission allowed Robert Wagner and a number of other entities and associations to intervene in Case No. ER-2010-0355, and by a similar order issued July 15, 2010, the Commission allowed Robert Wagner and other entities and associations to intervene in Case No. ER-2010-0356.

2. In his applications to intervene Mr. Wagner stated he is President of the Board of Directors of the International Dark Sky Association which has intervened in utility rate proceedings in Connecticut and Oregon; however, Mr. Wagner stated he is acting *pro se*, *i.e.*, representing himself in these proceedings, not the International Dark Sky Association.

3. On October 14, 2010 Mr. Wagner filed a motion seeking an order from the Commission compelling KCP&L—Staff assumes he is referring to both Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company since they both operate

under the service mark KCP&L—to provide to him proprietary and highly confidential information KCP&L has refused to disgorge. The following day, October 15, 2010, the Commission ordered Kansas City Power & Light Company, KCP&L Greater Missouri Operations Company and the Commission's Staff to respond to Mr. Wagner's motion by October 25, 2010.

4. Staff is unable to ascertain from Mr. Wagner's motion what he has requested from one or both of the companies; however, it is the Staff's position that a *pro se* intervenor is entitled to proprietary and highly confidential information once the Commission has granted him, or her, intervention for the reasons Staff stated in an August 4, 2010, pleading filed in File No. EO-2010-0263. The relevant portions of that pleading follow:

> As in the courts, discovery in a Commission proceeding extends to any matter relevant to the subject matter of the pending action so long as the matter is not privileged. Rule 4 CSR 240-2.090(1) ("Discovery may be obtained . . . under the same conditions as in civil actions in the circuit court."); ***State ex rel. Wright v. Campbell,*** 938 S.W.2d 640, 643 (Mo. App., E.D. 1997). The term "relevant" is broadly defined to include material "reasonably calculated to lead to the discovery of admissible evidence." *Id.;* S. Ct. Rule 56.01(b)(1). "[A] party seeking production of documents which contain trade secrets [or] confidential information must establish that the documents are relevant and that it has a specific need for the documents in order to prepare for trial.". ***Wright v. Campbell,*** *supra,* 938 S.W.2d at 643; ***State ex rel. Blue Cross and Blue Shield of Missouri v. Anderson,*** 897 S.W.2d 167, 170 (Mo. App., S.D. 1995).
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> ***Discovery of the Master Plan:***
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> **What legal authority, if any, supports Staff's position that a *pro se* litigant is entitled to Highly Confidential information per Commission Rule 4 CSR 240-2.135?**
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> It is not Rule 4 CSR 240-2.135 that entitles a *pro se* litigant to HC material, but the Due Process Clause and the statutes under which the Commission operates. The simple answer to the present conundrum is that Ms. Hawley is a party to this matter and necessarily enjoys all the same rights and obligations as any other party litigant.

First, it is a fact that the Due Process Clauses of the Missouri and United States Constitutions apply to this Commission and to its treatment of Ms. Hawley.[2] Missouri courts have held that the procedural due process requirement of fair trials by fair tribunals applies to administrative agencies acting in an adjudicative capacity. *State ex rel. AG Processing, Inc. v. Thompson,* 100 S.W.3d 915, 919 (Mo. App., W.D. 2003), *Fitzgerald v. City of Maryland Heights,* 796 S.W.2d 52, 59 (Mo. App. E.D.1990), *both citing Withrow v. Larkin,* 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712, 723 (1975). "The cardinal test of the presence or absence of due process in an administrative proceeding is defined . . . as „the presence or absence of rudiments of fair play long known to the law."" *Jones v. State Dept. of Public Health and Welfare,* 345 S.W.2d 37, 40 (Mo. App., W.D. 1962). One of those well-known rudiments of fair play is equal treatment of the parties by the tribunal. While a *pro se* litigant is not due any favoritism by reason of being unrepresented, neither may a tribunal discriminate against that party.

Second, nothing in Chapters 386, 393 or 536, RSMo, authorizes this Commission to treat Ms. Hawley differently merely because she is a *pro se* litigant. For example, § 536.073.1, RSMo, states "**any party** may take and use depositions . . . " (emphasis added). The statute imposes no limitation on the discovery rights of *pro* se parties. Ms. Hawley has as much right to the un-redacted Master Plan as any other party. . . . .

Third, the Commission's own rules do not impose any limitation on the rights of *pro se* parties. Rule 4 CSR 240-2.010(11) provides that "Party means any applicant, complainant, petitioner, respondent, **intervenor** or public utility in proceedings before the commission" (emphasis added). The rule does not distinguish *pro* se parties. The Commission allowed Ms. Hawley to intervene, over Rolla"s strenuous objection, and she is now a party like any other. Rule 4 CSR 240-2.090(2), pertaining to data requests, states "**[p]arties** may use data requests as a means for discovery" (emphasis added). The rule contains no limitation on the use of data requests by *pro se* parties.

Rolla relies on Commission Rule 4 CSR 240-2.135(4), which provides that "[h]ighly confidential information may be disclosed only to the attorneys of record, or to outside experts that have been retained for the purpose of the case." Rolla contends that this rule does authorize the Commission to treat *pro se* litigants differently from other parties. Rolla does not explain how that can be in view of the clearly contrary requirements of controlling constitutions and statutes. In particular, Rolla provides a lengthy explication of its view of the purpose and basis of the cited rule in ¶ 8 of its motion of August 2. That discussion is both incorrect and misleading, as is explained below.

[2] Mo. Const., Art. I, § 10; U.S. Const., Amd. 14, § 1.

The treatment of Highly Confidential ("HC") information by Rule 4 CSR 240-2.135(4) codifies a practice that originated long before that rule was promulgated and which had no particular basis in the special obligations of members of the Bar. Rather, it arose with the progressive de-regulation of telecommunications companies. Not so very long ago, telephone service was provided by regulated, monopolistic public utilities just like electric service and gas service. With the introduction of competition into that industry, certain information – business plans and strategies, negotiated contract prices, incremental costs, measures of market share and market penetration, and the like – had to be kept secret because its disclosure would be advantageous to competitors.[3] When competing telephone companies litigated at the Commission, as they did with increasing frequency after the enactment of the Telecommunications Act of 1996, it was necessary to make such information available for the purposes of litigation without disclosing it to competitors. The solution was the practice now codified at Rule 4 CSR 240-2.135(4), which allows attorneys and outside experts who had signed a non-disclosure agreement to access the HC information for a party's benefit while keeping it from the party itself. This compromise meets the requirements of Due Process and the controlling statutes without forcing wholesale disclosure of competitively sensitive information.

With telecommunications companies, the issue now confronting the Commission simply did not arise – there were never any carriers that litigated *pro se*. It is Staff's view that the Commission should not apply its rule in a way that violates Ms. Hawley's constitutional and statutory rights. To do so will surely result in embarrassment to the Commission when this case is reviewed by the courts. Ms. Hawley has no attorney and no outside expert and, as a natural person, she cannot be compelled to retain either in order to engage in this litigation. She is acting as her own attorney and, as Staff has asserted, therefore has a right to access the un-redacted Master Plan on the same conditions as any other attorney. Having allowed her into the case as a party, the Commission must accord Ms. Hawley all the rights thereof.

What Protective Order is Rolla Entitled To?

What *protective* order is Rolla entitled to per Commission Rules 4 CSR 240-2.085 or 2.135?

Were this matter pending in circuit court, Rolla would be entitled to a protective order forbidding any party from further disclosing confidential information obtained through discovery:

> (c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a

[3] Monopolistic providers of utility services, like Rolla, don't have competitors.

> party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following;
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> (7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.

Supreme Court Rule 56.01(c)(7).

However, no such protective order is required here because the Commission's rules already prohibit further disclosure. Rule 4 CSR 240-2.135(16) provides:

> All persons who have access to information under this rule must keep the information secure and may neither use nor disclose such information for any purpose other than preparation for and conduct of the proceeding for which the information was provided. This rule shall not prevent the commission's staff or the Office of the Public Counsel from using highly confidential or proprietary information obtained under this rule as the basis for additional investigations or complaints against any utility company.

Neither Rule 4 CSR 240-2.085 nor 2.135 envisions the situation currently confronting the Commission. Rule 4 CSR 240-2.135(5) may authorize the *ad hoc* crafting of a protective order to meet unusual circumstances:

> If any party believes that information must be protected from disclosure more rigorously than would be provided by a highly confidential designation, it may file a motion explaining what information must be protected, the harm to the disclosing entity or the public that might result from disclosure of the information, and an explanation of how the information may be disclosed to the parties that require the information while protecting the interests of the disclosing entity and the public.

In Staff's opinion, such a protective order may not properly impose any restrictions or limitations on Ms. Hawley than apply to those parties to whom Rolla has already disclosed the un-redacted Master Plan.

Wherefore, if the sole basis for Kansas City Power & Light Company's and/or KCP&L Greater Missouri Operations Company's refusal to provide proprietary and highly confidential information to Mr. Wagner is that he is representing himself, acting *pro se*, then the Staff

recommends that the Commission order the companies to provide that requested information to Mr. Wagner.

Respectfully submitted,

/s/ Nathan Williams___________________

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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 18th day of October 2010.

/s/ Nathan Williams___________________