

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

In the Matter of the Application of Kansas City)
Power & Light Company for Approval to Make) **File No. ER-2010-0355**
Certain Changes for Electric Service to Continue) Tariff No. JE-2010-0692
the Implementation of Its Regulatory Plan)

In the Matter of the Application of KCP&L)
Greater Missouri Operations Company for) **File No. ER-2010-0356**
Approval to Make Certain Changes in its) Tariff No. JE-2010-0693
Charges for Electric Service)

In the Matter of The Empire District Electric)
Company of Joplin, Missouri for Authority to)
File Tariffs Increasing Rates for Electric Service) **File No. ER-2011-0004**
Provided to Customers in the Missouri Service) Tariff No. YE-2011-0154
Area of the Company)

**STAFF’S REPLY TO KANSAS CITY POWER & LIGHT COMPANY’S AND KCP&L
GREATER MISSOURI OPERATIONS COMPANY’S RESPONSE TO STAFF’S
REQUEST FOR A SPECIAL MASTER AND REQUEST FOR LEAVE TO LATE-FILE**

COMES NOW the Staff of the Missouri Public Service Commission (Staff), by and through Staff Counsel’s Office, and for its reply to *Kansas City Power & Light Company’s and KCP&L Greater Missouri Operations Company’s Response to Staff’s Request for a Special Master* to the Missouri Public Service Commission (Commission), filed November 12, 2010, respectfully states as follows:

1. On November 1, 2010, the Staff filed its *Request for a Special Master*. The Staff has requested the use of a Special Master in order to facilitate discovery and provide a level of necessary assurance. The quality of the Staff’s audit of the Iatan Project is determined in considerable part by the information that the Staff has available to review respecting the Iatan Project decisions, events, and costs. The Special Master can provide assurance respecting the legitimacy/non-abuse of KCPL’s/GMO’s exercise of its rights to withhold information from

review relative to the Iatan Project costs, events, and decisions. The Staff does not frivolously request that the Commission name a Special Master and embark on the Special Master procedure. And in doing so, the Staff has no desire that KCPL/GMO not be afforded its full due process rights as the Commission deems appropriate.

2. On November 12, 2010, Kansas City Power & Light Company (KCPL) and KCP&L Greater Missouri Operations Company (GMO) filed their *Response to Staff's Request for a Special Master* (KCPL/GMO Response). At page 2, paragraph 3 of the KCPL/GMO Response, KCPL/GMO argue that the Commission should not appoint a Special Master because they state that “the Commission has recently ruled that ‘The Companies have not engaged in any dilatory or unreasonable practices in responding to discovery during the construction audit and prudence review,’ (*Order Making Findings*, Case No. EO-2010-0259) . . .” KCPL/GMO may contend that its “quotation” is close enough, but KCPL/GMO quote its proposed finding and not the Commission’s actual finding in the Commission’s July 7, 2010 *Order Making Findings* in File No. EO-2010-0259. The Commission’s actual finding in its July 7, 2010 *Order Making Findings* in File No. EO-2010-0259 is more limited than KCPL’s/GMO’s requested finding. The Commission’s actual finding in its July 7, 2010 *Order Making Findings* in File No. EO-2010-0259 is limited to the environmental upgrades to the Iatan I generating facility: “Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company have not engaged in any dilatory or unreasonable practices in responding to discovery during the construction audit and prudence review of the environmental upgrades to the Iatan I generating facility.” Finally, the Deputy Chief Regulatory Law Judge Nancy Dippell stated at the third monthly status conference on October 7, 2010 in File Nos. ER-2010-0355 and ER-2010-0356

that the record in File No. EO-2010-0259 was not record evidence in File Nos. ER-2010-0355 and ER-2010-0356:

JUDGE DIPPELL: . . . Now, Mr. Woodsmall had brought up also that he had an issue at the last status conference about the fact that the EO[-2010-0259] case was not in fact a contested case and therefore not everybody was a party and had an opportunity to cross-examine that and wanted -- I believe the words in your motion for clarification were to ask the Commission to make a determination that they wouldn't rely on any of that information. The Commission's not going to go that far, but I will say that those documents in the previous cases are just like documents in any other previous cases or discovery in any other previous cases. And therefore, if they're part of your evidence in this case, you'll need to present them as evidence and then they'll need to be able to be cross-examined and withstand all of the other tests of whether or not they're substantial and competent evidence. Mr. Woodsmall?

MR. WOODSMALL: So as we stand right now, they are not part of the record. The record will start brand new at the hearing?

JUDGE DIPPELL: Right. They are not part of the evidentiary record.

(Vol. 3, Tr. 61, ls. 2-25).

3. At page 3, paragraph 6 of the November 12, 2010 KCPL/GMO *Response*, they suggest that Regulatory Law Judge Harold Stearley would be the most appropriate Regulatory Law Judge to serve as a Special Master in that, among other things, he has dealt with privilege/immunity issues respecting Iatan documents in the docket numbers of the concluded preceding rate cases, Case Nos. ER-2009-0089 and ER-2009-0090, of KCPL and GMO. The Staff certainly has no objection to Judge Stearley serving as the Special Master. But the Staff would point out what KCPL/GMO have not: Judge Stearley is the Commission's Regulatory Law Judge assigned to the pending rate increase case of The Empire District Electric Company (Empire), File No. ER-2011-0004, and the same issues respecting Iatan 1, Iatan 2, and Iatan Common Plant that are in the pending KCPL/GMO rate cases are likely to be in the Empire rate case to which Judge Stearley is presently assigned as Regulatory Law Judge. It is not presently

known whether parties to the Empire rate case will want to relitigate the Iatan issues or might be willing to accept the record from the KCPL/GMO rate cases and the Commission's Report And Order on Iatan Project issues in File Nos. ER-2010-0355 and ER-2010-0356. If Judge Stearley is to serve as the Special Master in File Nos. ER-2010-0355 and ER-2010-0356, then there may be some question as to whether he should continue to serve as the Regulatory Law Judge in File No. ER-2011-0004.

4. At page 3, paragraph 5 of the KCPL/GMO *Response*, KCPL/GMO, apparently wanting to address few details, fleetingly note that in the most recently concluded Union Electric Company, d/b/a AmerenUE rate increase case, File No. ER-2010-0036, "the Commission empowered the Special Master to review the privileged materials and prepare an order for the Commission's approval," according to KCPL/GMO. In File No. ER-2010-0036, the Office of the Public Counsel filed a motion to compel regarding certain data requests that it had submitted to AmerenUE seeking billing records for the expert witnesses and attorneys who were participating in the case for AmerenUE. AmerenUE had provided the requested material, but had redacted some information claiming that it was protected from discovery by the attorney-client privilege or as attorney work product. AmerenUE claimed that the information redacted from the billing statements would reveal its trial strategy and should be protected from disclosure. In a March 10, 2010 *Order Regarding Public Counsel's Motion To Compel AmerenUE To Respond To Data Requests* (March 10, 2009 *Order*), the Commission appointed Regulatory Law Judge Harold Stearley as a Special Master to review the unredacted billing records and to prepare an appropriate order for the Commission's approval/consideration at its March 17, 2010 agenda meeting. The March 10, 2010 Order noted that AmerenUE's rate case

was scheduled to begin in five (5) days, but the rate case expense issue for which Public Counsel was seeking the information in question was not scheduled to be heard until March 23, 2010.

5. On March 16, 2010 in File No. ER-2010-0036, Regulatory Law Judge Stearley issued by delegation of authority an *Order Regarding The Office Of The Public Counsel's Motion To Compel* (March 16, 2010 Order). Judge Stearley noted in the March 16, 2010 Order at page 12 that “[t]he *in camera* review provides an extra procedural safeguard that assertion of privilege will not be abused.” At pages 3 and 4, Judge Stearley set out judicial pronouncements respecting attorney-client privilege and work product doctrine that he would apply:

Under subdivision [Rule 56] (b)(1), privileged matters are absolutely non-discoverable. *Id.*; *May Dep't Stores Co. v. Ryan*, 699 S.W.2d 134, 136, 137 (Mo. App. E.D. 1985). The attorney-client privilege prohibits “the discovery of confidential communications, oral or written, between an attorney and his client with reference to ... litigation pending or contemplated.” *State ex rel. Terminal R.R. Ass'n of St. Louis v. Flynn*, 363 Mo. 1065, 257 S.W.2d 69, 73 (Mo. banc 1953) (citation omitted). To be privileged, the purpose of a communication between an attorney and client must be to secure legal advice. *St. Louis Little Rock Hosp., Inc. v. Gaertner*, 682 S.W.2d 146, 150 (Mo. App. E.D. 1984).⁸

⁸ *Ratcliff*, 261 S.W.3d at 546-547.

* * * *

The work product doctrine in Missouri protects two types of information from discovery: both tangible and intangible. *Ratcliff v. Sprint Mo., Inc.*, 261 S.W.3d 534, 547 (Mo. App. W.D. 2008). Tangible work product consists of documents and materials prepared for trial and is given a qualified protection under Rule 56.01(b)(3); its production may be required on a showing of substantial need. *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 367-68 (Mo. banc 2004). Intangible work product consists of the mental impressions, conclusions, opinions, and legal theories of an attorney. *Ratcliff*, 261 S.W.3d at 547. Intangible work product has absolute protection from discovery. *Bd. of Registration for Healing Arts v. Spinden*, 798 S.W.2d 472, 476 (Mo. App. W.D. 1990). The doctrine limits discovery in order to prevent a party in litigation “from reaping the benefits of his opponent's labors” and to guard against disclosure of the attorney's investigative process and pretrial strategy. *Westbrooke*, 151 S.W.3d at 366 n. 3; *State ex rel. Atchison, Topeka & Santa Fe Ry. Co. v. O'Malley*, 898 S.W.2d 550, 553 (Mo. banc 1995).¹⁰

¹⁰ *Kenney v. Vansittert*, 277 S.W.3d 713, 719 (Mo. App. W.D. 2008).

6. The Commission in its March 16, 2010 *Order* directed AmerenUE to provide the Office of the Public Counsel (Public Counsel) an unredacted copy of an invoice dated December 15, 2009 that AmerenUE received from Connie Murray, Consultant, but denied Public Counsel's request respecting further disclosure in relation to certain other materials. The Commission's *Order* noted that AmerenUE had provided Judge Stearley with unredacted versions of the disputed invoices and a conference call was held between him, counsel for AmerenUE, and Public Counsel in order to facilitate clarification regarding the individual redactions and further argument from the parties.

7. KCPL/GMO do not mention the March 3, 2010 Commission *Order Regarding MEUA's Motion To Compel The Members Of MIEC To Respond To Data Requests* (March 3, 2010 *Order*) in File No. ER-2010-0036. Missouri Energy Users' Association (MEUA) filed a motion to compel that requested the Commission to direct the 18 individual members of the Missouri Industrial Energy Consumers (MIEC) to answer certain data requests submitted to it by MEUA. MIEC filed its *Opposition To Motion To Compel* which asserted, among other things, that data request numbers 1.5 and 1.11 sought to discover information protected under the attorney-client privilege:

MEUA - 1.5: Please provide all documents, emails, or notes within [Company name's] control or possession which discuss the arrangement reached between MIEC and Noranda regarding Noranda's inclusion in MIEC.

* * * *

MEUA - 1.11: Please provide all documents, e-mails, or notes with (sic) [Company name's] control or possession which discuss the positions to be taken in the case by MIEC or Noranda.

MEUA filed a *Reply To Objection Of MIEC* in which it cited Missouri Rule of Civil Procedure 57.01(c) as providing specific procedures for MIEC to follow should it want to assert the attorney-client privilege:

Missouri Supreme Court Rule 57.01(c)(3) Interrogatories to Parties – Response. *Objections and Privileges.* If information is withheld because of an objection, then each reason for the objection should be stated. *If a privilege or the work product doctrine is asserted as a reason for withholding information, then without revealing the protected information, the objecting party shall state information that will permit others to assess the applicability of the privilege or work product doctrine.*

(Emphasis supplied). The Commission stated at page 5 of its March 3, 2010 *Order* issued by the regular Regulatory Law Judge assigned to the case, not the Special Master Regulatory Law Judge, that MEUA:

. . . is not, however, entitled to pry into the internal workings of the association, as that information likely is not relevant in this proceeding and may be privileged. Therefore, the Commission will deny MEUA’s motion to compel responses to DRs 1.5, and 1.11. *However, the Commission will direct the members of MIEC to supply a privilege log regarding the information sought in those data requests. . .*

(Emphasis supplied).

8. The Staff would note that the Commission has found that the Staff and Public Counsel have broad authority to seek documentation from regulated companies apart from the general authority all other parties have to obtain discovery in a contested case. (*Re Union Electric Company, d/b/a AmerenUE, Case No. ER-2007-0002, Order Regarding Public Counsel’s Motion To Compel Discovery, March 15, 2007*) (*See Section 393.140(9): “. . . The commission may require of all such corporations or persons specific answers to questions upon which the commission may need information” and Sections 386.280.2 and 393.140(8)*).

9. At pages 3-4, paragraph 8 of *KCPL/GMO Response*, KCPL/GMO state that the Staff challenged KCPL/GMO’s assertion of privilege/immunity a year ago in the docket numbers of their concluded preceding rate cases, Case Nos. ER-2009-0089 and ER-2009-0090. KCPL/GMO mention the Commission’s December 9, 2009 *Order Regarding Staff’s Motion to Compel*, but they do not mention the November 18, 2009 Affidavit of Tim Rush wherein Mr.

Rush, at page 3, paragraph 3, swore that KCPL “has objected and asserted the attorney-client or work product privilege *sparingly* (privilege has been asserted with respect to roughly only two percent of the data requests and many of those data requests have been subsequently answered).” (Emphasis supplied). Mr. Rush’s Affidavit stating that KCPL/GMO asserted privilege/immunity “sparingly” covers the following Staff Data Requests which KCPL/GMO raises further issues respecting in the indicated paragraph of its November 12, 2010 *Response*. KCPL/GMO does not assert in its November 12, 2010 *Response* that Judge Stearley has previously reviewed these Staff Data Requests and the unredacted KCPL/GMO responses, other than respecting Staff Data Request No. 360:

Staff Data Request No.	KCPL/GMO 11/12/10 Response Paragraph No.	KCPL/GMO 11/12/10 Response Objecting To Staff Special Master Request After Rush Affidavit Claiming KCPL/GMO Has Used Privilege/Immunity “ <i>Sparingly</i> ”
360Supplement	16	KCPL/GMO estimates hundreds of documents potentially responsive relating to negotiation of Balance of Plant work contract with Kiewit ¹
398 398Supplement	17	KCPL/GMO would need to review all communication with Duane Morris LLP since 2008
418	18	KCPL/GMO estimates thousands of documents potentially responsive respecting Schiff Hardin’s review and reporting re project controls ²
630.3	19	KCPL/GMO would have to review Sonnenschein invoices since 2005 to determine what documents were produced by that firm

10. A footnote “1” appears at the end of paragraph 10, bottom of page 5, of the KCPL/GMO November 12, 2010 *Response*. The footnote states that “[f]or the other data

¹ Kiewit is the second largest vendor respecting Iatan Project costs. This vendor has the largest number of change orders, which are basically contract amendments. The underlying documents supporting the development of the contract are significant in performing an audit/review of the Kiewit contract and change orders.

² Schiff Hardin was hired by KCPL to assist in the Comprehensive Energy Plan (CEP) construction projects. The Iatan Project is the largest element of the CEP. Although Schiff Hardin, LLP is a law firm, KCPL is not asserting that all of the work performed by Schiff Hardin, its equity partners, or employees, is protected by attorney-client privilege or attorney work product immunity. KCPL/GMO have prefiled prepared direct testimony of Mr. Kenneth M. Roberts, an equity partner in Schiff Hardin, and Mr. Daniel F. Meyer, and employee of Schiff Hardin, in File Nos. ER-2010-0355 and ER-2010-0356.

requests, Company believes it can either provide a privilege log or that no privileged documents exist.” Even if KCPL/GMO provide a privilege log, that still does not address the issue of KCPL/GMO redactions of parts, or all, of pages or documents covered by the privilege/immunity logs that KCPL/GMO agree to provide.

11. The case law is clear respecting attorney-client privilege and attorney work product doctrine/immunity. If a party in its case seeks to rely on certain information, the party cannot withhold it on the basis that it is protected by attorney-client privilege or attorney work product doctrine/immunity. 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, 55-56 (Mo.App. W.D. 1982) and the Western District Court of Appeals noted therein the Eastern District Court of Appeals’ decision in an earlier Commission case involving Union Electric Company:

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....”

We also note in passing that there is a very general consensus among public utility commissions and courts throughout the country that this attempted allocation of antitrust expenses by AT&T to its subsidiaries is unjustified because there is a lack of benefit to the local ratepayers.³ [Citations omitted].

There is additional supportive language found in *State ex rel. Utility Consumers Council of Missouri v. Public Serv. Comm’n*, 562 S.W.2d 688, 695-96 ((Mo.App. StL.D. 1978):

. . . 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. . . .

Id. at 695-96.

12. Pursuant to 4 CSR 240-2.080(15), parties are allowed ten (10) days from the date of filing in which to respond to any pleading unless otherwise ordered by the Commission. The Staff’s request for leave to late-file is necessitated by the requirements of other Commission cases and business in addition to the instant cases. Although paragraph 20 of the Commission’s Orders of August 18, 2010 in these cases waives 4 CSR 240-2.045(2) and 2.080(11) with respect to prefiled testimony and other pleadings, and states that the Commission will treat filings made through the Commission’s Electronic Filing and Information System (EFIS) as timely filed if filed before midnight on the date the filing is due, the Staff was still not able to file before the midnight deadline.

³ Staff would note this language in this particular paragraph of the Court’s decision that finds that the basis for the Commission disallowance of a utility expense is lack of benefit to ratepayers. There is no requirement of a showing by a party or finding by the Commission of “imprudence,” “bad faith,” or “abuse of discretion.” See also *State ex rel. Laclede Gas Co. v. Public Serv. Comm’n*, 600 S.W.2d 222, 228-29 (Mo.App. W.D. 1980), *appeal dismissed*, 449 U.S. 1072, 101 S.Ct. 848, 66 L.Ed.2d 795 (1981).

13. Neither the Staff nor undersigned counsel miss filing deadlines to vex the Commission or Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company.

14. The Staff and undersigned counsel apologize for any inconvenience this late filing has caused or may cause.

WHEREFORE, Staff respectfully requests leave to late-file its reply to *Kansas City Power & Light Company's and KCP&L Greater Missouri Operations Company's Response to Staff's Request for a Special Master* to the Missouri Public Service Commission (Commission), filed November 12, 2010, and requests again that the Commission appoint a Special Master in the above referenced cases to handle all discovery requests in which any privilege or immunity, but in particular either attorney-client privilege or the attorney work product doctrine, is being asserted.

Respectfully submitted,

/s/ Steven Dottheim

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 23rd day of November, 2010.

/s/ Steven Dottheim