

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

In the Matter of)	
Kansas City Power & Light Company's)	File No. ER-2012-0174
Request for Authority to Implement)	Tracking No. YE-2012-0404
A General Rate Increase for Electric Service)	

and

In the Matter of)	
KCP&L Greater Missouri Operations Company's)	File No. ER-2012-0175
Request for Authority to Implement)	Tracking No. YE-2012-0405
General Rate Increase for Electric Service)	

**ORDER DENYING MOTION FOR PROTECTIVE ORDER
AND MOTIONS TO QUASH**

Issue Date: September 28, 2012

Effective Date: September 28, 2012

The Missouri Public Service Commission is denying the *Motion to Quash Notice of Deposition and to Quash Subpoena Duces Tecum and for Protective Order* ("motion") because the objections supporting the motion were waived by failure to timely serve them on Staff counsel as required by the Commission's April 19¹ order.

A. Procedural Background

The motion addresses the notice of deposition ("notice") and subpoena duces tecum ("subpoena"), which Staff served on September 21 upon Melissa Hardesty, Senior Director of Taxes for Kansas City Power & Light Company ("KCPL"). KCPL and KCP&L Greater Missouri Operations Company (GMO) filed the motion on

¹ All dates are in 2012.

September 27 with objections to the notice and subpoena (“objections”).² On September 28, Staff filed an expedited response³ and movants filed a reply.⁴

The documents are those listed in Kansas City Power & Light’s privilege log and other documents related to Iatan 2 Advance Coal Credits. KCPL and GMO (“movants”) ask the Commission to quash, and issue a protective order addressing, the notice and subpoena. The notice and subpoena require Ms. Hardesty to appear on Monday, October 1, at 9:00 a.m. and produce certain documents (“the documents”).

In support, movants cite privileges against discovery. In the alternative, movants argue that Staff waived discovery of the documents by failure to timely challenge the objections when raised as to data requests objections. In response, Staff argues that movants waived those objections by failure to serve them on Staff counsel timely.

B. Waiver of Dispute

Movants cite objections to discovery of the documents, already made in response to data requests. Movants argue that Staff waived any challenge to the sufficiency of those objections by failure to raise those challenges at a discovery conference. In support, movants cite two Commission orders.

The Commission’s order dated April 26 generally provides that any party waives any claim or defense related to discovery unless raised at a discovery conference:

. . . No party is required to appear at any discovery conference, but any party that does not appear shall have waived any claim or defense as to any discovery or response served as of the day before the conference [⁵]

² *Objections to Notice of Records Deposition of Melissa K. Hardesty and to Subpoena Duces Tecum to Melissa K. Hardesty*, filed on September 27, 2012.

³ *Response in Compliance with Order Directing Expedited Filing*, filed on September 28, 2012.

⁴ *Response to Staff*, filed on September 28.

⁵ *Order Consolidating Cases for Hearing and Setting Procedural Schedule, and Amending Notice of Hearing*, issued April 26, pages 3-4.

At the June 28 and July 25 conferences, Staff raised no claim or defense as to any discovery or response to discovery, waiving any challenge to any objection served as of July 24.

As to any discovery or response to discovery served as of, between July 24 and September 4, movants argue that Staff waived any claim or defense under the Commission's August 30 order:

The Missouri Public Service Commission will cancel the discovery conference set for September 6, 2012, unless any party files a response to this order requesting otherwise and describing a discovery dispute for the Commission's resolution.⁶

Responses were due September 4 and no party, including Staff, filed a response. Movants argue that, together, the two orders provided a waiver of any dispute not raised in response to the August 30 order. Staff disputes that reading but movants are correct. Any dispute not raised was waived.

C. Waiver of Objections

However, Staff argues that there was no dispute because the objections to the data requests were not served as required in the Commission's April 19, order. Staff cites the Commission's order dated April 19, which provides:

Data request responses will be served on counsel for the requesting party and on the requesting party's employee or representative who submitted the data request and shall be served electronically, if feasible and not voluminous as defined by Commission rule.[⁷]

That language comes verbatim from the *Proposed Procedural Order*, which Staff filed on April 13 jointly with other parties, and to which the Commission received no objection or alternative from movants. Staff's response shows GMO's compliant service of

⁶ *Order Directing Filing*, issued August 30.

⁷ *Order Governing Pre-Filed Testimony and Discovery*, issued on April 19.

objections. Movant's filings show no corresponding compliance with the April 19 order, as to the documents. An objection to a data request, like any procedural matter, may be waived if not properly raised.⁸

Movants reply that privilege is not an objection. In support, they cite a Commission order ("earlier order") in movants' last general rate action.⁹ That earlier order stands upon the premise that a party may wait until a question during examination of a witness at an evidentiary hearing to raise privilege:

"The proper time for objection is when a question calling for a disclosure of privileged matter is asked and before it is answered." [10]

But the full paragraphs, quoting that language, show that no discovery was at issue in those opinions:

The evidence fails to show that the relation of attorney and client existed between the witness and Alice Keller. But, waiving that question, appellants should have made their objection on the score of privilege at the first opportunity; otherwise, it was not timely, and they waived the privilege. *State v. Powell* (Mo. Sup.) 217 S. W. 35 (3). "The proper time for objection is when a question calling for a disclosure of privileged matter is asked and before it is answered." 40 Cyc. 2395. The evidence was clearly relevant on the question of the mental capacity of the testatrix. [11]

And:

It is not completely clear as to what privilege counsel for defendant was asserting. All of the objections were apparently based upon relevancy except for the one

⁸ "[I]f a matter is procedural and required by rule, then it generally may be waived if not timely raised. *McCracken v. Wal-Mart Stores E., LP*, 298 S.W.3d 473, 476 (Mo. banc 2009). The rules of court, then, may be waived. *Snyder v. State*, 334 S.W.3d 735, 739 (Mo.App. W.D.2011)." *Cornelious v. State*, 351 S.W.3d 36, 49 (Mo. App., W.D. 2011).

⁹ *In the Matter of the Application of Kansas City Power and Light Company for Approval to Make Certain Changes in its Charges for Electric Service To Continue the Implementation of Its Regulatory Plan*, File No. ER-2009-0089, Order Regarding Staff's Motion to Compel, issued on December 9, 2009, pages 16-17.

¹⁰ *Rock v. Keller*, 278 S.W. 759, 766 (1925).

¹¹ *Id.*

statement made at the bench out of the hearing of the jury. Considerable testimony had gone in with respect to the report prior to counsel making this evaluation of the report. Even if we are to consider that this statement embodied an objection on the basis of the report being a privileged communication between attorney and client, the privilege had been waived. The objection of privilege must be raised at the first opportunity. Otherwise it is not timely and it is thereby waived. The proper time for objection is when the question calling for disclosure of privileged matters is asked and before it is answered. *Rock v. Keller*, 312 Mo. 458, 278 S.W. 759, 766(4) (1926). Here there was not only a failure to properly object in time but there was also a failure to positively assert disapproval on the basis of attorney-client privilege or request relief. [¹²]

The authorities¹³ cited by movants say nothing about discovery objections.

Moreover, attachment A shows that movants did not reserve the privilege objection. Movants simply did not serve it on counsel as required by the April 19 order. Therefore, the Commission will deny the motion.

THE COMMISSION ORDERS THAT:

1. The *Motion to Quash Notice of Deposition and to Quash Subpoena Duces Tecum and for Protective Order* is denied.

¹² *Gipson v. Target Stores, Inc.*, 630 S.W.2d 107, 109 (Mo. Ct. App. 1981).

¹³ The remainder of the citations, in the earlier order's discussion of this issue, consists of chain cites to Commission rulings. Commission rulings do not constitute precedential authority. Section 386.490.2, RSMo Supp. 2011; *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Comm.*, 142 S.W.3d 228, 235 (Mo. App., W.D. 2004).

2. This order is effective immediately upon issuance.

BY THE COMMISSION



Steven C. Reed
Secretary

(S E A L)

Daniel Jordan, Regulatory Law Judge,
by delegation of authority pursuant
to Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 28th day of September, 2012.