

**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 )

**DISCOVERY ORDER**

Issue Date: October 16, 2012

Effective Date: October 16, 2012

**Background**

On October 3, 2012, the Commission appointed a Special Master to rule on a discovery dispute involving a subpoena duces tecum served on Melissa K. Hardesty, an employee of Kansas City Power and Light Company ("KCPL").<sup>1</sup> Ms. Hardesty is a Certified Public Accountant and holds the position of Senior Director of Taxes with KCPL.<sup>2</sup> The subpoena directs Ms. Hardesty to appear and bring with her: "(1) The items specified in **Exhibit A** which is attached hereto, and (2) all documents and materials authored by, given to, or reviewed by Ms. Melissa K. Hardesty regarding the latan 2 Advanced Coal Credits since beginning her employment with Kansas City Power & Light Company in December 2006 if not included among the items specified in **Exhibit A** attached hereto."

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<sup>1</sup> The subpoena is dated September 21, 2012.

<sup>2</sup> See prefiled testimony of Ms. Hardesty in the above captioned files.

“Exhibit A,” referenced in the subpoena, is a copy of the privilege logs that were served upon Staff in relation to Staff’s Data Requests (“DRs”) numbers 285, 286, 287, 288, 289, 301, 302, 305, 306, and 308.<sup>3</sup> All of these DRs seek the information generally described as being in relation to the Iatan 2 Advanced Coal Credits, although they seek the information in a variety of ways. The DRs specifically seek “all correspondence, e-mails, studies, reports, detailed analyses, etc. relied upon to support why Great Plains Energy Incorporated, Kansas City Power & Light Company and KCPL Greater Missouri Operations Company did not include GMO in the arbitration process for the reallocation of the Iatan 2 Advance Coal Tax Credit . . .” They further seek all documents provided to, and communications with, Deloitte Touche, L.L.P (“Deloitte”), an outside tax consulting firm in relation to the same subject matter. The objections raised by KCPL to these DRs, and the subsequent subpoena, cover any documents and communications subject to the attorney-client privilege, the attorney work-product privilege and the accountant-client privilege.

On October 9, 2012, KCPL provided the Special Master with copies of all of the documents and communications that would be at issue in redacted and unredacted form for *in camera* review. KCPL also informed the Special Master that KCPL had waived its objections to DRs 301 and 302 and produced the documents requested in those DRs. On October 11, 2012, and October 15, 2012, the Special Master convened discovery conferences to hear arguments on the dispute.

### **Discovery and Privilege**

Commission Rule 4 CSR 240.090 provides that: “Discovery may be obtained by

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<sup>3</sup> KCPL’s objections to the DRs and their privilege logs were served on the Commission’s Staff but not upon Staff Counsel. This issue was the subject of prior Commission orders prior to the parties agreeing to have the Special Master rule on the objections to the subpoena, which are the same objections raised to responding to the DRs.

the same means and under the same conditions as in civil actions in the circuit court.” Rule 56.01 governs the scope of discovery in civil actions in the circuit court, and generally, “[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action....”<sup>4</sup> Relevance, for purposes of discovery, is “broadly defined to include material “reasonably calculated to lead to the discovery of admissible evidence.”<sup>5</sup> The party seeking discovery shall bear the burden of establishing relevance.<sup>6</sup> Those provisions circumscribe discovery in a contested case by whatever device is employed.

“The discovery process’ purpose is to give parties access to relevant, non-privileged information while reducing expense and burden as much as is feasible.”<sup>7</sup> “The circuit court must ascertain that the process does not favor one party over another by giving it a tactical advantage: ‘The discovery process was not designed to be a scorched earth battlefield upon which the rights of the litigants and the efficiency of the justice system should be sacrificed to mindless overzealous representation of plaintiffs and defendants.’”<sup>8</sup>

As noted, the information sought in discovery must not only be relevant, it must not be protected by a legally recognized privilege. “According to Black’s Law Dictionary, a privileged communication is a “communication that is protected by law from forced

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<sup>4</sup> Rule 56.01(b)(1); *Ratcliff v. Sprint Missouri, Inc.*, 261 S.W.3d 534, 546 -547 (Mo. App. 2008).

<sup>5</sup> *State ex rel. Wright v. Campbell*, 938 S.W.2d 640, 643 (Mo. App. 1997); *State ex rel. Pooker ex rel. Pooker v. Kramer*, 216 S.W.3d 670, 672 (Mo. banc 2007).

<sup>6</sup> *State ex rel. Collins v. Roldan*, 289 S.W.3d 780, 786 (Mo. App. W.D. 2009).

<sup>7</sup> *State ex rel. American Standard Ins. Co. of Wisconsin v. Clark*, 243 S.W.3d 526, 529 (Mo. App. 2008), *citing to*, *State ex rel. Ford Motor Company v. Messina*, 71 S.W.3d 602, 606 (Mo. banc 2002).

<sup>8</sup> *Id.*

disclosure.”<sup>9</sup> “Claims of privilege present an exception to the general rules of evidence which provide that all evidence, material, relevant and competent to a judicial proceeding shall be revealed if called for.”<sup>10</sup>

Generally, privileges are personal to the client and only the person who holds the privilege may waive it.<sup>11</sup> Waiver, the voluntary relinquishment of a known right, is effected by the statements of the client or is implied from his acts.<sup>12</sup> The party claiming that a privilege precludes discovery of a matter bears the burden to show the privilege applies.<sup>13</sup>

### **Analysis: Attorney-Client and Work-Product Privileges**

Missouri recognizes the attorney-client and the attorney work-product privileges.

As Missouri courts have elucidated:

Under subdivision [Rule 56] (b)(1), privileged matters are absolutely non-discoverable. 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.” To be privileged, the purpose of a communication between an attorney and client must be to secure legal advice. (Internal citations omitted).<sup>14</sup>

In addition to the attorney-client privilege,<sup>15</sup> Missouri also recognizes the work-product privilege:

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<sup>9</sup> *State ex rel. Hope House, Inc. v. Merrigan*, 133 S.W.3d 44, 49 (Mo. banc 2004); Black’s Law Dictionary 273 (7th ed. 1999).

<sup>10</sup> *State ex rel. Dixon Oaks Health Center, Inc. v. Long*, 929 S.W.2d 226, 229 (Mo. App. S.D. 1996).

<sup>11</sup> *State ex rel. St. John’s Regional Medical Center v. Dally*, 90 S.W.3d 209, 215 (Mo. App. 2002); *State ex rel. Southwestern Bell Publications v. Ryan*, 754 S.W.2d 30, 32 (Mo. App.1988); The attorney-client privilege, personal to the client, may be waived by the client. *Pipes v. Sevier*, 694 S.W.2d 918, 924 (Mo. App. 1985). The work-product privilege is encompassed by the attorney-client privilege. *Crow v. Crawford & Co.*, 259 S.W.3d 104, 122 (Mo. App. 2008).

<sup>12</sup> *Ryan*, 754 S.W.2d at 32.

<sup>13</sup> *Ratcliff*, 261 S.W.3d at 549.

<sup>14</sup> *Ratcliff*, 261 S.W.3d at 546-547.

<sup>15</sup> Privilege communications also include spousal, physician-patient, clergy, etc., but those privileges are not at issue in this matter and will not be discussed.

The work product doctrine in Missouri protects two types of information from discovery: both tangible and intangible. 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. Intangible work product consists of the mental impressions, conclusions, opinions, and legal theories of an attorney. Intangible work product has absolute protection from discovery. 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. (Internal citations omitted).<sup>16</sup>

With regard to these two privileges, Staff cites to *State ex rel. Tracy v. Dandurand*, 30 S.W.3d 831 (Mo. banc 2000) for the proposition that all material given to a retained testifying expert witness to assist the witness with formulating his or her opinion, including any and all attorney communications, must, if requested, be disclosed. Staff argues that Ms. Hardesty's status is the equivalent to that of KCPL witness Mr. Salvatore P. Montalbano. Mr. Montalbano is a tax partner with PricewaterhouseCoopers, L.L.P. who was retained by KCPL to provide testimony to support KCPL's tax calculations in its rate filings as those calculations relate to the potential imputation of advanced coal investment tax credits.

There are a number of differences between these matters and the *Dandurand* case. *Dandurand* involved a third-party retained expert, not an employee of the party to the action. The court made clear it was referring to a witness that has no direct knowledge or involvement with the events in controversy who was given materials to review that serve as the only basis for his or her opinion.<sup>17</sup> The Court, when interpreting Rule 56.01(b)(3), stated: “The discovery of facts known and opinions held by an expert are, until the expert is designated for trial, the work product of the attorney retaining the

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<sup>16</sup> *Kenney v. Vansittert*, 277 S.W.3d 713, 719 (Mo. App. W.D. 2008).

<sup>17</sup> *State ex rel. Tracy v. Dandurand*, 30 S.W.3d 831, 834 (Mo banc 2000).

expert.” The Court further concluded that these work product materials included a confidential attorney’s report, which would have normally been protected by attorney-client privilege, which was inadvertently disclosed to the outside expert.<sup>18</sup> However, the Court also stated: “We do not mean to suggest that a trial court in other contexts lacks discretion to order the return of inadvertently-disclosed attorney-client communications. Missouri does provide strong protection for attorney-client communications.”<sup>19</sup>

In the instant matters, Ms. Hardesty is an employee of KCPL. She carries the equivalent status as the party itself – KCPL. She is not an outside retained expert witness who lacks knowledge of the case. She is directly involved and has direct knowledge of the facts associated with this controversy. *Dandurand* does not apply. Moreover, Staff stretches the holding in *Dandurand* much too far when it argues it applies to all attorney-client communications.<sup>20</sup> *Dandurand* discussed the waiver of the work-product doctrine, and one inadvertent disclosure of an attorney-client communication cannot be extrapolated to apply to all communications between attorneys and the employees of a party. Under Staff’s theory, all of the communications between Staff Counsel and every witness for Staff, including communications solely aimed at trial strategy and trial preparation, would equally be susceptible to disclosure. Under Staff’s theory, no party using its employees as witnesses would have an attorney-client privilege. This is not the law. KCPL, on the other hand, recognizing the proper distinction between types of witnesses and the proper application of *Dandurand*,

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<sup>18</sup> *Dandurand*, 30 S.W.3d at 832-835.

<sup>19</sup> *Dandurand*, 30 S.W.3d at 835. As stated by the court of Appeals in a case not overruled by *Dandurand*, “[a] disclosure made in the pursuit of ... trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the [work product immunity].” *State ex rel. Mitchell Humphrey & Co. v. Provaznik*, 854 S.W.2d 810, 813 (Mo. App. 1993).

<sup>20</sup> Staff Counsel even stated this would apply to attorney communications directed at preparing a witness for cross-examination.

waived its objections to DRs 301 and 302 and disclosed the materials supplied to its outside, third-party, retained expert, Mr. Montalbano.

Staff makes an additional argument with regard to the communications between KCPL's counsel and Ms. Hardesty. Staff argues that it is entitled to any communications between counsel and Ms. Hardesty directly referencing statements made by the Internal Revenue Service ("IRS") to KCPL with regard to the subject matter of the discovery request. Rule 56.01(b)(3) protects attorney work product by requiring a showing that the party seeking discovery is "unable without undue hardship to obtain the substantial equivalent of the materials by other means." Staff claims it has no other means to obtain the information from the IRS. KCPL responds that Staff merely needs to ask the IRS the same questions it has asked and it can obtain any information that KCPL has already received from them. Regardless, an *in camera* review of all the documents at issue reveals there are no such documents that contain direct statements from the IRS. All of the privileged communications involve the trial strategy and the mental impressions of the attorneys making the communications and these are privileged communications. And any documents that were attached to those communications satisfy the three-part work-product test in that they: (1) are documents or tangible things, (2) were prepared in anticipation of litigation or for trial, and (3) were prepared by or for a party or a representative of that party.<sup>21</sup> Furthermore, KCPL has engaged in no conduct or action that could constitute a waiver of these privileges.

After a full review of the documents provided by KCPL to meet its burden to show the privilege applies, the Commission sustains KCPL's objections on attorney-client and work product privileges. No documents where these privileges have been asserted

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<sup>21</sup> *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 367 (Mo. banc 2004).

shall be disclosed to Staff.

### **Analysis: Accountant-Client Privilege**

Missouri also recognizes a statutory accountant-client privilege. Section 326.322 provides:

1. Except by permission of the client for whom a licensee performs services or the heirs, successors or personal representatives of such client, a licensee pursuant to this chapter shall not voluntarily disclose information communicated to the licensee by the client relating to and in connection with services rendered to the client by the licensee. The information shall be privileged and confidential, provided, however, that nothing herein shall be construed as prohibiting the disclosure of information required to be disclosed by the standards of the public accounting profession in reporting on the examination of financial statements or as prohibiting disclosures in investigations, in ethical investigations conducted by private professional organizations, or in the course of peer reviews, or to other persons active in the organization performing services for that client on a need-to-know basis or to persons in the entity who need this information for the sole purpose of assuring quality control.

2. A licensee shall not be examined by judicial process or proceedings without the consent of the licensee's client as to any communication made by the client to the licensee in person or through the media of books of account and financial records, or the licensee's advice, reports or working papers given or made thereon in the course of professional employment, nor shall a secretary, stenographer, clerk or assistant of a licensee, or a public accountant, be examined, without the consent of the client concerned, regarding any fact the knowledge of which he or she has acquired in his or her capacity as a licensee. This privilege shall exist in all cases except when material to the defense of an action against a licensee.

"The purpose of the accountant-client privilege is to create an atmosphere where the client will provide all relevant information to the accountant without fearing future disclosure in subsequent litigation.<sup>22</sup> Without this protection, the client might withhold certain unfavorable information, making the accountant unable to adequately perform

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<sup>22</sup> *Sears, Roebuck & Co. v. Gussin*, 350 Md. 552, 714 A.2d 188, 193 (Md. 1998); *Fed. Ins. Co. v. Arthur Anderson & Co.*, 816 S.W.2d 328, 331 (Tenn. 1991).



his services.<sup>23</sup> The accountant client relationship can therefore be seen as analogous to the attorney-client relationship.<sup>24</sup> Like the other privileges addressed, the accountant-client privilege is personal to the client,<sup>25</sup> and as with all privileges, the person who holds the privilege may waive it.<sup>26</sup>

KCPL has asserted the accountant-client privilege with regard to a number of the documents responsive to Staff's DRs and this privilege protects "any communication made by the client to the licensee (i.e. the accountant) in person or through the media of books of account and financial records, or the licensee's advice, reports or working papers given or made thereon in the course of professional employment." This privilege is held personally by KCPL and can only be waived knowingly and voluntarily by KCPL.

Staff, citing to a prior Commission case, argues there can be no accountant-client privilege in cases before the Commission, because to recognize such a privilege "would effectively eviscerate the utility regulatory process by enabling regulated companies to hide virtually all financial information from the regulator."<sup>27</sup> Staff also argues that only the accountant can assert the privilege and can only do so to avoid examination by judicial process. Staff's argument continues that judicial process is distinct from administrative process so the privilege cannot even apply to the accountant in this administrative proceeding.

The prior Commission case upon which Staff relies, File Number TO-2005-0237,

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<sup>23</sup> *Fed. Ins. Co.*, 816 S.W.2d at 331.

<sup>24</sup> *Id.*" *Ayers Oil Co. v. American Business Brokers, Inc.*, 2009 U.S. Dist. LEXIS 73725 (E.D. Mo. 2009).

<sup>25</sup> *State ex rel. St. John's Regional Medical Center v. Dally*, 90 S.W.3d 209, 215 (Mo. App. 2002).

<sup>26</sup> *Id.*, *State ex rel. Southwestern Bell Publications v. Ryan*, 754 S.W.2d 30, 32 (Mo. App.1988).

<sup>27</sup> Staff cites to File Number TO-2005-0237, *In the Matter of the an Investigation of the Fiscal and Operational Reliability of Cass County Telephone Company and New Florence Telephone Company, and Related Matters of Illegal Activity*. The specific order referenced is the Order Denying Motion to Quash, issued on May 5, 2005, wherein, the Commission denied a motion to quash two subpoenas issued by Staff in an investigation.

involving Cass County and New Florence Telephone Companies, is inapplicable. The instant matters do not involve small telephone companies whose only auditors may have been non-employees. KCPL and GMO both have their own internal accountants and auditors and their financial books and records are fully discoverable from the companies directly without implicating the privilege. Indeed, KCPL made no attempt at invoking this privilege with regard to its employee accountants or its business records. The regulatory process has not been threatened with the invocation of the privilege in this instance where KCPL has sought an outside accountant's opinion on a single issue of taxation, an issue to which Staff already has access to the company's tax records.

Additionally, TO-2005-0237 was an investigatory docket, not a contested case, and certainly not a rate case carrying constitutional implications. Because these matters are "contested cases" involving proceedings before an agency in which legal rights, duties or privileges are being determined, the Commission must ensure the procedural and substantive due process rights of KCPL and the GMO.<sup>28</sup> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience.<sup>29</sup> "Every utility does have an undoubted constitutional right to such a fair and reasonable return, and this is a continuing right which does not cease after beginning rates are initially determined."<sup>30</sup> There is a limit to the Commission's regulatory power, and rates established by the Commission must not

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<sup>28</sup> Section 536.010(4), RSMo, Supp. 2010.

<sup>29</sup> *State ex rel. Noranda Aluminum, Inc. v. Public Service Comm'n*, 356 S.W.3d 293, 305 -308 (Mo. App. 2011).

<sup>30</sup> *State ex rel. Laclede Gas Co. v. Public Service Comm'n*, 535 S.W.2d 561, 569 (Mo. App. 1976). Conversely, no customer of a public utility has any vested right to utility service or to any particular rate. Customers have no constitutional guarantees of due process or equal protection with regard to setting rates. *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20, 30-32 (Mo. banc 1975).

be confiscatory.<sup>31</sup> Consequently, the Commission cannot arbitrarily dismiss the statutory accountant-client privilege to the detriment of KCPL's and GMO's constitutional safeguards.

Staff's assertion that it can dodge the privilege by simply directing their inquiry to the company as opposed to the accountant, demonstrates a basic misunderstanding of the concept of a privilege that is personally held by the client. The privilege exists to protect both the client and the accountant; specifically it protects the communications between them. Only the client can waive the privilege. Staff's argument, if accepted, would eliminate all privileges because it is premised on the theory that directing an inquiry to the party holding the privilege magically nullifies that privilege.

Staff's additional claim that the accountant-client privilege only applies to "judicial proceedings" or "judicial process," and not "administrative proceedings" is equally unconvincing. Staff cites no case on point but rather analogizes to cases and statutes distinguishing the two "processes." There are equally as many cases analogizing the similarities between the two processes and their functions. As the Missouri Supreme Court has told us:

Administrative agencies often perform judicial or quasi-judicial functions in response to the complexities of modern government, economy and technology. This delegation of administrative decisional authority is not only possible but desirable. The delegation of functions normally associated with the judiciary, such as determining facts, applying the law, and entering judgments does not violate the separation of powers clause because the provision primarily separates powers, not functions.<sup>32</sup>

The Court has also affirmed the legislature's power to confer judicial or quasi-judicial decision making authority to executive agencies as long as the legislature makes no

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<sup>31</sup> *State ex rel. Union Elec. Co. v. Public Service Comm'n*, 687 S.W.2d 162, 166 (Mo. banc 1985).

<sup>32</sup> *Dabin v. Director of Revenue*, 9 S.W.3d 610, 613 (Mo. banc 2000), quoted in, *Mitchell v. Nixon*, 351 S.W.3d 676, 680 (Mo. App. 2011).

attempt to preclude judicial review of the agency's decisions.<sup>33</sup> The "process" for contested cases before this agency is a judicial function by its nature.

Staff apparently has also forgotten that there is no *stare decisis* in terms of prior administrative decisions,<sup>34</sup> and the Commission's decision in TO-2005-0237 has no precedential effect.<sup>35</sup> Moreover, a review of that file reveals that the companies involved had waived the privilege. They had provided staff with their outside auditor's reports. The companies then attempted to assert the privilege with regard to the accountant's work papers, an assertion too late in time after its voluntary waiver.

What Staff is seeking in this matter is not the documents provided by KCPL or GMO to Deloitte in soliciting Deloitte's opinion, because Staff already has access to the company's business and tax records. Rather Staff is seeking Deloitte's opinion, the communications between Deloitte and KCPL, which is precisely what is protected by the accountant-client privilege.

Having determined that the accountant-client privilege applies to the specific facts of this case; however, is not the end of the inquiry. The Special Master must also determine whether the privilege has been waived. The accountant-client privilege belongs to the client,<sup>36</sup> and a waiver of that privilege "presupposes both knowledge and acquiescence."<sup>37</sup> The privilege is waived if the client places the subject matter of the

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<sup>33</sup> "Thus, while the legislature may allow for judicial or quasi-judicial decision-making by legislative or executive (administrative) agencies, it may not preclude judicial review of those decisions." *State ex rel. Praxair, Inc. v. Missouri Public Service Comm'n*, 344 S.W.3d 178, 186 (Mo. banc 2011).

<sup>34</sup> *State ex rel. Office of Public Counsel v. Public Service Comm'n*, 367 S.W.3d 91, 109 (Mo. App. 2012).

<sup>35</sup> *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003);

<sup>36</sup> *State ex rel. St. John's Regional Medical Center v. Dally*, 90 S.W.3d 209, 215 (Mo. App. 2002).

<sup>37</sup> *Frazier v. Metropolitan Life Ins. Co.*, 141 S.W. 936, 938 (Mo. App. 1911), citing to, *Haysler v. Owen*, 61 Mo. 270 (1875).

protected communication at issue in the action.<sup>38</sup> KCPL has conceded that the tax credit at issue is an asset of the company. All of the company's assets and liabilities are brought into an action by the utility when it seeks a rate increase. Consequently, KCPL has knowingly and voluntarily waived its accountant-client privilege in relation to the requested documents and the Commission overrules KCPL's objections resting upon this privilege. KCPL shall disclose those documents to the Commission's Staff.

There have been a number of documents for which KCPL has asserted multiple privileges. The Commission makes clear that the documents to be disclosed to Staff shall include only those where the sole objection relied upon was the accountant-client privilege. The Commission further reminds the parties that the ruling in this order pertains only to discovery. The issue of admissibility of any evidence acquired through discovery is still subject to normal evidentiary standards and objections at hearing. The Regulatory Law Judge presiding over these actions shall rule on the admissibility of all evidence.<sup>39</sup>

**THE COMMISSION ORDERS THAT:**

1. The parties shall comply with the discovery rulings of the Special Master as delineated in the body of this order.

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<sup>38</sup> *State ex rel. Southwestern Bell Publications v. Ryan*, 754 S.W.2d 30, 32 (Mo. App.1988). This waiver is no different than the waiver of the physician-patient communication privilege when a patient places the subject matter of a medical injury at issue in a malpractice suit. *Id.*

<sup>39</sup> Commission Rule 4 CSR 240-2.130(3).

2. This order is effective immediately upon issuance.

**BY THE COMMISSION**



Steven C. Reed  
Secretary

( S E A L )

Harold Stearley, Deputy Chief Regulatory  
Law Judge, by delegation of authority  
pursuant to Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,  
on this 16<sup>th</sup> day of October, 2012.