

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 31st day of October, 2012.

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 REGARDING MOTION FOR RECONSIDERATION OF
DISCOVERY ORDER**

Issue Date: October 31, 2012

Effective Date: October 31, 2012

The Commission is reconsidering the Special Master's Discovery Order issued on October 16, 2012, by delegation of Commission authority. The Commission finds the order was appropriate in all respects and adopts the order.

1. 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").¹ Ms. Hardesty is a Certified Public Accountant and holds the position of Senior Director of Taxes with

¹ The subpoena is dated September 21, 2012.

KCPL.² The subpoena directed 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 Iatan 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.”

“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 308.³ All of these DRs sought 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 sought “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 sought 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.

² See prefiled testimony of Ms. Hardesty in the above-captioned files.

³ 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. In this context, the subpoena was used merely as a substitute for the enforcement of the DRs after the opportunity for enforcement in scheduled discovery conferences had passed.

On October 9, 2012, KCPL provided the Special Master with copies of all of the documents and communications 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. On October 16, 2012, the Special Master issued the Discovery Order, which sustained KCPL's objections on the grounds of attorney-client and work product privileges and overruled KCPL's objections on the grounds of the accountant-client privilege. The Special Master ordered KCPL to disclose the documents for which it had asserted the accountant-client privilege concluding that KCPL had waived the privilege.

On October 23, 2012, the Commission's Staff and the Office of the Public Counsel (collectively "Movants") sought reconsideration of the Discovery Order. Movants are not objecting to the rulings regarding the attorney-client or work product privileges, nor are they objecting to the ruling that KCPL must provide the accountant-client communications that were dispute. Instead Movants object to the conclusion that any accountant-client privilege is available in the regulatory law setting. Movants assert this issue is too important to be decided by a Regulatory Law Judge sitting as a Special Master and, therefore, seek reconsideration of the Special Master's legal analysis by the full Commission.

Movants state four reasons for their disagreement with the Special Master. First, Movants claim that this ruling is a departure from a prior Commission determination, and a conclusion that the privilege exists would "bring the utility regulatory process to a grinding halt by enabling regulated companies to hide virtually all financial information

from the regulator.” Next, Movants assert the statutory accountant-client privilege is only available in circuit court actions, not administrative actions. Third, Movants contend the accountant-client privilege only exists for the accountant and cannot be invoked by the client. And finally, Movants argue that the Special Master failed to strictly construe the accountant-client privilege as is required. These arguments were previously addressed in the Discovery Order.

2. Motion Improperly Seeks an Advisory Opinion

The Commission expressly delegated its authority to the Special Master to decide the discovery dispute.⁴ And as noted above, the Discovery Order was issued on October 16, 2012, and the Movants do not contest the Special Master’s decision. The Movants are not seeking any relief in connection with the discovery dispute, and are instead seeking an advisory opinion from the Commission with regard to the legal analysis of the applicability of the accountant-client privilege. If there is no justiciable controversy, the issue is moot.⁵ “There must be a presently existing controversy for specific relief not an advisory or hypothetical situation.”⁶ The question must be ready for judicial decision, if not, the judgment is a nullity.”⁷ Any order not resolving a current controversy, but intending to have a future application, is a nullity because it is an

⁴ Section 386.240, RSMo 2000, provides: “The commission may authorize any person employed by it to do or perform any act, matter or thing which the commission is authorized by this chapter to do or perform; provided, that no order, rule or regulation of any person employed by the commission shall be binding on any public utility or any person unless expressly authorized or approved by the commission.”

⁵ *State ex rel. Missouri Parks Ass’n v. Missouri Dept. of Nat. Resources*, 316 S.W.3d 375, 384 (Mo. App. 2010); *State ex rel. AG Processing, Inc. v. Public Service Comm’n*, 276 S.W.3d 303, 306 (Mo. App. 2008).

⁶ *Id.*

⁷ *Id.*

improper advisory opinion.⁸ On this basis alone, the Commission should deny the motion. Because the motion seeks relief that is improper, the Commission will, *sua sponte*, treat the motion as a motion for reconsideration of the Special Master's determination that required KCPL to disclose the communications at issue to its Staff.

3. Discovery and Privilege

Commission Rule 4 CSR 240.090 provides that: "Discovery may be obtained by 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...."⁹ Relevance, for purposes of discovery, is "broadly defined to include material reasonably calculated to lead to the discovery of admissible evidence."¹⁰ The party seeking discovery shall bear the burden of establishing relevance.¹¹

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 disclosure."¹² "Claims of privilege present an exception to the general rules of evidence

⁸ *Missouri Park Ass'n*, 316 S.W.3d at 385; *Jackson County Bd. of Election Comn'rs ex rel. Brown v. City of Lee's Summit*, 277 S.W.3d 740, 744 (Mo. App. 2008).

⁹ Rule 56.01(b)(1); *Ratcliff v. Sprint Missouri, Inc.*, 261 S.W.3d 534, 546 -547 (Mo. App. 2008).

¹⁰ *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).

¹¹ *State ex rel. Collins v. Roldan*, 289 S.W.3d 780, 786 (Mo. App. W.D. 2009).

¹² *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).

which provide that all evidence, material, relevant and competent to a judicial proceeding shall be revealed if called for.”¹³

Generally, privileges are personal to the client and only the person who holds the privilege may waive it.¹⁴ Waiver, the voluntary relinquishment of a known right, is effected by the statements of the client or is implied from his acts.¹⁵ The party claiming that a privilege precludes discovery of a matter bears the burden to show the privilege applies.¹⁶

4. Recognizing the Accountant-Client Privilege

Missouri recognizes a statutorily created accountant-client privilege. Section 326.322, RSMo Supp. 2010, 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

¹³ *State ex rel. Dixon Oaks Health Center, Inc. v. Long*, 929 S.W.2d 226, 229 (Mo. App. S.D. 1996).

¹⁴ *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).

¹⁵ *Ryan*, 754 S.W.2d at 32.

¹⁶ *Ratcliff*, 261 S.W.3d at 549.

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.

(Emphasis added).

"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.¹⁷ Without this protection, the client might withhold certain unfavorable information, making the accountant unable to adequately perform his services.¹⁸ The accountant-client relationship can therefore be seen as analogous to the attorney-client relationship.¹⁹ Like the other privileges addressed, the accountant-client privilege is personal to the client,²⁰ and as with all privileges, the person who holds the privilege may waive it.²¹

a. The Statute

While Movants reference a prior Commission decision in File Number TO-2005-0237 (an investigatory docket, not a contested case) for its premise that the Commission can simply ignore Section 326.322, RSMo Supp. 2010, or declare it inapplicable to Commission cases, Staff cites no authority, nor can any be found, that would give this Commission such authority. Because the PSC "is purely a creature of

¹⁷ *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).

¹⁸ *Fed. Ins. Co.*, 816 S.W.2d at 331.

¹⁹ *Id. Ayers Oil Co. v. American Business Brokers, Inc.*, 2009 U.S. Dist. LEXIS 73725 (E.D. Mo. 2009).

²⁰ *State ex rel. St. John's Regional Medical Center v. Dally*, 90 S.W.3d 209, 215 (Mo. App. 2002).

²¹ *Id.*, *State ex rel. Southwestern Bell Publications v. Ryan*, 754 S.W.2d 30, 32 (Mo. App.1988).

statute, [its] powers are limited to those conferred by [statute] either expressly, or by clear implication as necessary to carry out the powers specifically granted.”²²

Missouri courts have recognized that a “declaratory judgment action provides an appropriate method of determining controversies concerning the construction of statutes and powers and duties of governmental agencies thereunder.”²³ The declaration of the validity or invalidity of statutes and administrative rules is purely a judicial power and this power of the state is vested in the courts designated in Mo. Const. Art. V, § 1.²⁴ Simply stated, the courts declare the law.²⁵ The Commission has no power to declare any principle of law or equity.²⁶ The Commission has no power to declare statutes unconstitutional.²⁷

The Commission has no power to declare that the statutorily-created accountant-client privilege is inapplicable to regulated utilities, and the Special Master thoroughly distinguished the prior Commission decision in TO-2005-0237. That case involved an investigation, not a contested case, of small telephone companies who utilized the services of non-employee auditors. Moreover, regardless of the Commission’s order in

²² *State ex rel. Office of Public Counsel and Missouri Indus. Energy Consumers v. Missouri Public Service Comm’n*, 331 S.W.3d 677, 682 (Mo. App. 2011).

²³ *State Tax Comm’n v. Administrative Hearing Comm’n*, 641 S.W.2d 69, 75-76 (Mo. banc 1982).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* Similarly, the Commission has no power to declare the validity or invalidity of any city ordinance. *State Tax Comm’n v. Administrative Hearing Comm’n*, 641 S.W.2d 69, 75-76 (Mo. banc 1982). Nor can it enforce, construe nor annul contracts, or determine damages or enter a money judgment.” *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Comm’n of State of Mo.*, 116 S.W.3d 680, 696 (Mo. App. 2003). The Commission also has no jurisdiction to promulgate an order requiring a pecuniary reparation or refund.” *DeMaranville v. Fee Fee Trunk Sewer, Inc.*, 573 S.W.2d 674 (Mo. App. 1978). The Commission cannot subject property to private use, cannot abate a nuisance or award consequential damages. *American Petroleum Exchange v. Public Service Comm’n*, 172 S.W.2d 952, 955 (Mo. 1943). The Commission does not have the authority to do equity or grant equitable relief. *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Comm’n of State of Mo.*, 116 S.W.3d 680, 696 (Mo. App. 2003).

that case, a review of the actual facts in 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.

There is no *stare decisis* in terms of this prior Commission decision,²⁸ and the Commission's decision in TO-2005-0237 has no precedential effect.²⁹ The Commission's prior decision, if based upon a power it does not possess, cannot be used to convey that power to the Commission now.

b. The Scope of the Privilege

As was discussed at length by the Special Master, the recognition of the accountant-client privilege does not shield a regulated utility's financial information from the Commission; it only protects communications between the client and the accountant. The Movant's fear that following the law and adhering to Section 326.322, RSMo Supp. 2010, would eviscerate the regulatory investigation or enforcement process is illusory.

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 accountant-client privilege. Indeed, KCPL made no attempt at invoking this privilege with regard to its employee accountants or its business records. The regulatory process is not 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.

²⁸ *State ex rel. Office of Public Counsel v. Public Service Comm'n*, 367 S.W.3d 91, 109 (Mo. App. 2012).

²⁹ *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003).

As mentioned, TO-2005-0237 (the Commission's prior case involving the accountant-client privilege) involved 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 GMO.³⁰ 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.³¹ "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."³² There is a limit to the Commission's regulatory power, and rates established by the Commission must not be confiscatory.³³ Consequently, the Commission (even if it had the power to, which it does not) cannot arbitrarily dismiss the statutory accountant-client privilege to the detriment of KCPL's and GMO's constitutional safeguards.

5. Application of the Privilege in Judicial Proceedings

Movants argue that the accountant-client privilege can only be exercised to avoid examination during a judicial process (i.e., a circuit court action) and cannot apply in *any* administrative proceeding. Again, Movants cite no law on point to support this position, but rather analogize to cases and statutes distinguishing the two "processes." As the

³⁰ Section 536.010(4), RSMo, Supp. 2010.

³¹ *State ex rel. Noranda Aluminum, Inc. v. Public Service Comm'n*, 356 S.W.3d 293, 305 -308 (Mo. App. 2011).

³² *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).

³³ *State ex rel. Union Elec. Co. v. Public Service Comm'n*, 687 S.W.2d 162, 166 (Mo. banc 1985).

Special Master noted, there are equally as many cases analogizing the similarities between the two processes and their functions.

“When the Commission determines facts from disparate evidence and applies the law to come to decision in a particular controversy, it acts as an adjudicator, and so exercises quasi-judicial power.”³⁴ The Commission performs a quasi-judicial function when hearing contested proceedings because of the many shared trappings customarily associated with adjudications conducted by the courts.³⁵ These traditional judicial powers or “trappings” include investigating facts, conducting hearings, summoning witnesses, examining documents and handing down judgments.³⁶ Because deciding legal rights in a contested case is a judicial power,³⁷ the Commissioners of the Public Service Commission occupy quasi-judicial positions.³⁸ And because of the functional comparability of their judgments to those of the judge, to protect the administrative officers from harassment and embarrassment, and to maintain independence to prevent

³⁴ *State ex rel. Gulf Transport Co. v. Public Service Comm'n of State*, 658 S.W.2d 448, 465 (Mo. App. 1983), citing to *State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69, 75[10, 11] (Mo. banc 1982); *National Labor Relations Board v. Wyman-Gordon Company*, 394 U.S. 759, 770, 89 S.Ct. 1426, 1432, 22 L.Ed.2d 709 (1969). See also *State ex rel. Atmos Energy Corp. v. Public Service Comm'n of State of Mo.*, 2001 WL 1806001, 9 (Mo. App. 2001) (superseded on other grounds in *State ex rel. Atmos Energy Corp. v. Public Service Comm'n of State of Mo.*, 103 S.W.3d 753 (Mo banc 2003)).

³⁵ *State ex rel. Praxair, Inc. v. Missouri Public Service Comm'n*, 344 S.W.3d 178, 186 (Mo. banc 2011).

³⁶ *Wright v. Over-The-Road and City Transfer Drivers, Helpers, Dockmen and Warehousemen, Local Union No. 41, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 945 S.W.2d 481, 492 (Mo. App. 1997).

³⁷ *State ex rel. Atmos Energy Corp. v. Public Service Comm'n of State of Mo.*, 2001 WL 1806001, *9 (Mo. App. 2001) (reversed/superseded on other grounds in *State ex rel. Atmos Energy Corp. v. Public Service Comm'n of State of Mo.*, 103 S.W.3d 753 (Mo banc 2003)).

³⁸ *Central Missouri Plumbing Co. v. Plumbers Local Union*, 35 908 S.W.2d 366, 370 (Mo. App. 1995).

weakening the enforcement of impartial policy, the courts have extended judicial immunity to these officials.³⁹

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.⁴⁰ (Emphasis added).

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 attempt to preclude judicial review of the agency's decisions.⁴¹ (Emphasis added). Indeed, Missouri's Constitution, Art. V, Section 18 ensures judicial review for: "All final decisions, findings, rules and orders on any administrative officer or body existing under the constitution or by law, **which are judicial or quasi-judicial and affect private rights.**" (Emphasis added). The "process" for contested cases before the Commission is a judicial function by its nature,⁴² and the accountant-client privilege is applicable to this judicial process.

³⁹ *State ex rel. Bird v. Weinstock*, 864 S.W.2d 376, 382 (Mo. App. 1993); *Edwards v. Gerstein*, 237 S.W.3d 580, 585 (Mo. banc 2007). Quasi-judicial officers also include: grand jurors, prosecutors, administrative hearing officers, agency officials who decide whom to prosecute, and agency attorneys who actually conduct the prosecution. *Id.*

⁴⁰ *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).

⁴¹ "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).

⁴² See Footnotes 34 through 41. The final judicial decision in a contested case is reviewable by the courts as required by Missouri's Constitution. See Section 386.510, RSMo, Cum. Supp. 2010.

6. Who Holds the Accountant-Client Privilege

Movants contend the accountant-client privilege only exists for the accountant and cannot be invoked by the client. Section 326.322, RSMo Supp. 2010, and the case law interpreting it, make clear that the privilege is personally held by the client and can only be waived by the client.⁴³

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.⁴⁴ 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.

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.

7. Narrow Application of the Privilege

Movants argue that the Special Master failed to strictly construe the accountant-client privilege as is required.⁴⁵ As part of this argument, Movants assert the Special

⁴³ *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).

⁴⁴ See Footnotes 14, 20, 21 and 43.

⁴⁵ Movants cite to *State ex rel. Health Midwest Development Group, Inc. v. Daugherty*, 965 S.W.2d 841, 843-45 (Mo. Banc 1998).

Master found the public policy behind the accountant-client privilege trumped the public policy of the Commission's enabling statutes. Both claims are erroneous.

The Special Master did strictly construe the accountant-client privilege, finding that the privilege covers only communications between an accountant and the client:

- (1) not the business or financial records of the regulated utility. Consequently, all parties to these actions have full access to all of the records required to review the companies' finances for purposes of determining just and reasonable rates.
- (2) in contested cases involving the determination of the rights, duties and privileges of the regulated utilities. These cases are judicial in nature and carry Constitutional implications.
- (3) in the specific instance involving a single issue. The determination involved the company seeking an opinion on a single issue of taxation from an external auditor when the remaining parties still had full access to all of the tax records of the companies. The privilege was found only to apply to the "communications" between the client and the accountant, not the financial records of the companies. There is nothing preventing any other party to this action from taking the same course of action and seeking an opinion of the specific tax issue.⁴⁶
- (4) when the accountant is an external accountant. It was not found to be applicable to the employee accountants of the companies. Thus no internal communications between the companies and the companies' employees was shielded by the privilege.

Further, the Special Master's order made no public policy determinations as alleged.

8. The Special Master's Decision

Once the Special Master determined the accountant-client privilege applied to the specific facts of these cases, the Special Master determined whether the privilege had been waived. KCPL conceded that the tax credit at issue is an asset of the company. The company's assets and liabilities are brought into the action by the utility when it seeks a rate increase. Consequently, KCPL had knowingly and voluntarily

⁴⁶ Indeed, similar to the reasoning behind recognition of the attorney work-product privilege, the privilege exists, in part, to prevent another party from reaping the benefits of an opponent's labors for the same or related cause of action. *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 366 (Mo. banc 2004).

waived its accountant-client privilege. KCPL was ordered to disclose the documents at issue to the Commission's Staff.

It appears to the Commission that Movants misunderstand the distinction between the proper recognition of the existence of a privilege and how that privilege may be waived. Because privilege may be waived when the issue involving the privilege is placed into controversy, and because the privilege may be waived by application of the "fairness doctrine,"⁴⁷ there will rarely, if ever, be a time when the accountant-client privilege may be asserted and sustained in the regulatory context. The Special Master recognized the proper application of the privilege, strictly construed its application, and properly determined that the companies had waived the privilege.

THE COMMISSION ORDERS THAT:

1. The Staff of the Missouri Public Service Commission's and the Office of the Public Counsel's motion for reconsideration of the Special Master's Discovery Order is denied.
2. The Discovery Order issued by the Special Master on October 16, 2012, is adopted by the Commission.

⁴⁷ Privilege may also be waived when invoked in some fundamentally unfair way. The so-called "fairness doctrine" is grounded in the notion that it is unfair to permit a party to make use of privileged information as a sword when it is advantageous for the privilege holder to do so, and then as a shield when the party opponent seeks to use privileged information that might be harmful to the privilege holder. The rationale is that a party should not be able to use a privilege to prejudice an opponent's case or to disclose some selected communications for self-serving purposes. Accordingly, a privilege may be waived when a party asserts a claim that in fairness requires examination of protected communications. *State ex rel. St. John's Regional Medical Center v. Dally*, 90 S.W.3d 209, 215 (Mo. App. 2002).

3. This order is effective immediately upon issuance.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'S. C. Reed', written in a cursive style.

Steven C. Reed
Secretary

(S E A L)

Gunn, Chm., Jarrett, Kenney,
and Stoll, CC., concur.

Stearley, Deputy Chief Regulatory Law Judge