BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Proposed Amendments To 4 CSR 240-2.135, Confidential Information	)))	Case No. AX-2017-0068

COMMENTS OF
KANSAS CITY POWER & LIGHT COMPANY AND
KCP&L GREATER MISSOURI OPERATIONS COMPANY

COME NOW Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company ("GMO")(collectively, "KCP&L" or "Company") hereby submit the following comments in response to the proposed amendments to Rule 4 CSR 240-2.135 published in the Missouri Register on January 3, 2017.

I. INTRODUCTION

On January 3, 2017, the Commission caused to be published in the *Missouri Register* an amendment to 4 CSR 240-2.135 regarding the procedures for handling confidential information in cases before the Commission. The proposed rule provides for the filing of written comments by February 2, 2017. KCP&L appreciates the opportunity to present the Company's comments related to the proposed amendment.

These comments will first provide the Commission with KCP&L's view of some overarching concerns that KCP&L believe should be taken into account as the Commission considers amending 4 CSR 240-2.135. Additionally, KCP&L will address specific provisions of the rule that may result in a more burdensome process for handling confidential information before the Commission.

II. OVERARCHING CONCERNS

The original rules that addressed the handling of confidential information were developed in the 1980s when there was a widespread concern that competitors (particularly in the telecommunications industry) should not have access to the most sensitive information of telecommunications companies or other public utilities. As a result, a two-tiered designation procedure was developed that allowed parties to designate certain sensitive information as "highly confidential" (including employee-sensitive personnel information, marketing analysis, and strategies employed in contract negotiations), so that only attorneys and outside consultants for the requesting parties would have access to the most sensitive information. Employees, officers, and directors of the requesting party did not have access to such information, even if they signed nondisclosure agreements. Other confidential information (designated as "proprietary information") relating to trade secrets, private technical, financial, and business information was more widely available to employees, officers, or directors of the requesting party upon the signing of nondisclosure agreements.

KCP&L is concerned that this process which has been in place for many years and has generally worked well may be replaced by a more cumbersome system which may not provide the same level of protection for the most sensitive information. In particular, KCP&L believes that employees, officers and/or directors of parties to KCP&L proceedings should not have access to the Company's most sensitive information. One reason information is labeled as confidential is due to it being "market-specific information relating to services offered in competition with others." Employees, officers and/or directors of parties to KCP&L proceedings may find such information to be very helpful as they develop strategies for their own companies in the energy markets. Such information should be restricted to attorneys or

outside consultants participating in the case. Otherwise, the sensitive information will be available to decision makers who may be developing strategies for participating in the energy markets in KCP&L's service areas.

A second overarching concern relates to the logistics of the provision of highly confidential information. KCP&L believes that it should continue to have the option of requiring requesting parties to review the most sensitive information on its premises or other premises that are controlled by KCP&L or its counsel. Copying of such sensitive information should be restricted since the existence of additional copies may be more likely to result in the inadvertent disclosure of such information.

III. SPECIFIC PROVISIONS OF THE PROPOSED RULE

Under the proposed rule, the following provision would be deleted:

[(5) Highly confidential information may be disclosed only to the attorneys of record, or to outside experts that have been retained for the purpose of the case.

(A) Employees, officers, or directors of any of the parties in a proceeding, or any affiliate of any party, may not be outside experts for purposes of this rule.

(B) The party disclosing highly confidential information may, at its option, make such information available only on the furnishing party's premises, unless the discovering party can show good cause for the disclosure of the information off-premises.

(C) The person reviewing highly confidential information may not make copies of the documents containing the information and may make only limited notes about the information. Any such notes must also be treated as highly confidential.

(D) If a party wants an outside expert to review highly confidential information, the party must identify that person to the disclosing party before disclosure. Furthermore, the outside expert to whom the information is to be disclosed must comply with the certification requirements of section (7) of this rule.

(E) Subject to subsection (5)(B), the party disclosing information designated as highly confidential shall serve the information on the attorney for the requesting party.

(F) A customer of a utility may view his or her own customer-specific information, even if that information is otherwise designated as highly confidential.]

As explained above, KCP&L believes that employees, officers and/or directors of parties to KCP&L proceedings should not have access to the Company's confidential information. By deleting Section (5) of the rule, competitors must only intervene in a proceeding and ask for data pertaining to "market-specific information." The individuals who create strategy and make decisions as to how they intend to compete with a party in both a marketplace and for resources would have access to the sensitive information and would thereby obtain an unfair advantage by accessing this information in a Commission proceeding. Under the proposed rule, such individuals would only need to express the "intent" to file testimony and sign a non-disclosure agreement, but such a flexible standard for obtaining access to such sensitive information would not serve as a workable protection for KCP&L's most sensitive information from being used by decision makers in the energy markets served by KCP&L.

Under the proposed rule, Section (5)(B) would be deleted. As explained above, keeping highly confidential documents at KCP&L's premises is the best control mechanism for confidential documents. Board of Director meeting minutes and fuel contracts are two groups of

documents that have traditionally required on-site review. This practice should continue, and parties should not be given access to this information outside the control of the public utility.

Under the proposed rule, Section (5)(C) would also be deleted. If a reviewer is allowed to copy a confidential document, then KCP&L may lose control of that document. As a practical matter, copying of such documents and notes should be limited.

Under the proposed rule, the following section 13 would be deleted:

> *[(13) If a response to a discovery request requires the duplication of material that is so voluminous, or of such a nature that copying would be unduly burdensome, the furnishing party may require that the material be reviewed on its own premises, or at some other location, within the state of Missouri.]*

The deletion of this section could introduce the possibility of parties having to spend significant time on producing information that may already be contained in other filings or does not have a practical way of being displayed. In the past, KCP&L has responded to data requests which, under the proposed rule, would have required a copy of the entirety of the MIDAS input database being provided. Such an undertaking cannot be accomplished and would not be useful to the requestor.

Under the proposed rule, there would be new sections 3 and 4:

> *(3)(A) In addition to information that may be designated as confidential as set out in this rule, any person may seek a protective order from the commission designating specific information confidential. If a protective order is granted, the protected information shall be considered confidential information.*
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> * * *

(*4) The commission may order greater protection than that provided by a confidential designation upon a motion explaining what information must be protected, the harm to the disclosing entity or the public that might result from disclosure of the information, and an explanation of how the information shall be disclosed to the parties that require the information while protecting the interests of the disclosing entity and the public.*

While these sections on their face would appear to be helpful and allow parties to seek protective orders and/or greater protection than provided by the rule, this provision would be a step backward since it would revert to the days when parties had to routinely file motions for protective orders to obtain protection for the confidential information. Often, such motions resulted in several rounds of pleadings addressing the specific provisions of the protective order and extended disputes among the parties about the breadth of the protective order. Given the amount of "highly confidential" information in almost every major public utility case, KCP&L would expect disputes over the terms of such protective orders to take up a substantial amount of time of the Commission and the parties. Under the existing 4 CSR 240-2.135, such disputes have been substantially eliminated.

Under Section (5)(B) of the proposed rule, the "party that designates information confidential shall inform, in writing, the party seeking discovery <u>how each piece of that information</u> qualifies as confidential under subsection 2(A) of this rule." (*emphasis added*). KCP&L is concerned that this provision may add new granularity to the designation of confidential information which will not be helpful to the regulatory process. Under the existing rule, the parties have largely been able to agree upon what documents or portions of documents should be marked as confidential without taking a substantial number to disputes to the

Regulatory Law Judge or Commission for resolution. By adding the requirement that "each piece of that information" [including numerous data request responses] must be justified as being designated as confidential, KCP&L believes that this new requirement will add to the likelihood of many more disputes over the classification of information that will need to be resolved by the Regulatory Law Judge, a special master, or the Commission. This provision will also increase the amount of time needed by Company personnel to provide information to the Staff, Public Counsel, and intervenors in the proceeding since a substantial amount of time will be needed to justify "each piece of that information" as qualifying for a confidential designation. Rather than streamline the regulatory process, this provision is likely to expand the time needed to answer routine data requests.

Section (2)(A)(5) expands the existing rule to add the phrase "…or attorneys, except that total amounts billed by each external auditors, consultants, or attorneys shall always be public."

KCP&L is concerned that the addition of the provision would appear to undermine a legally recognized privilege and information protected thereby from disclosure; it clearly may result in more disputes over the attorney-client and attorney-work product privileges. "Reports, work papers, or other documentation related to work produced by . . . attorneys" that are subject to such privileges should not be subject to disclosure even as "confidential" documents. *See e.g.*, *Discovery Order*, Re Kansas City Power & Light Company, Case No. ER-2012-0174 and ER-2012-0175 (October 16, 2012). However, the new provision in the proposed rule may suggest otherwise. This addition to the proposed rule should be deleted.

In addition, it is unnecessary and inappropriate to include the new provision "total amounts billed by each external auditors, consultants, or attorneys shall always be public." This provision is not in any way limited to work done in rate cases and, in fact, this provision would

arguably cause the total amounts billed for any type of work done by external auditors, consultants or attorneys for the Company to always be made public even though this information would otherwise be classified as "proprietary" or "highly confidential" under the existing 4 CSR 240-2.135. Disclosure of such information could also be interpreted as a violation of the accountant-client privilege. *Id*. at 8-13.

IV. CONCLUSION

KCP&L and GMO respectfully submit the above comments for the Commission's consideration.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was delivered by first class mail, electronic mail or hand delivery, on the 2nd day of February, 2017, to the following:

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