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 Certain Changes in its Charges for Electric Service to Continue the Implementation of Its Regulatory Plan	)))))	**File No. ER-2010-0355**
In the Matter of the Application of KCP&L Greater Missouri Operations Company for Approval to Make Certain Changes in its Charges for Electric Service	)))))	**File No. ER-2010-0356**

RESPONSE IN OPPOSITION
TO MOTION TO COMPEL DISCOVERY

COMES NOW Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company (collectively, "KCP&L"), pursuant to the Missouri Public Service Commission's ("Commission") *Order Directing Filing* issued October 15, 2010, and Commission Rule 4 CSR 240-2.080(15), and for its Response in Opposition to Motion To Compel Discovery, respectfully states as follows:

1. In his Applications to Intervene ("Applications") in these proceedings, Robert Wagner represented to the Commission and to KCP&L that he "would proceed *pro se*, acting as an individual."[1] Both Applications expressly stated that they were limited to outdoor lighting matters (identifying specific tariff sheet pages for each respective company). (Applications, p. 1). *See also*:

[1] "Application to Intervene by Robert Wagner," pp. 1, 3. In his applications to intervene, Mr. Wagner states that he is President of the Board of Directors of the International Dark Sky Association (IDA), a non-profit organization incorporated in the State of Arizona. He also notes that "IDA is also currently an Intervenor in the KCP&L rate case in Kansas," (in which IDA is represented by counsel). Applications, p. 2.

6. Limitation and Scope.
This Petition to Intervene is limited to addressing the public interest in requiring KCP&L to develop a new rate for Part Night street and area lighting under Sheets 33, 35, 35A-C, 36, 36A-B, 45 and 45A and to incorporate, within these schedules, rates for lower wattage High Pressure Sodium lamps used in typical street lighting applications in other parts of the country. (Application, ER-2010-0355, p. 3).

6. Limitation and Scope.
This Petition to Intervene is limited to addressing the public interest in requiring OGM [sic] to develop a new rate for Part Night street and area lighting under Sheets 41, 43, 88 and 89 and to incorporate, within these schedules, rates for lower wattage High Pressure Sodium lamps used in typical street lighting applications in other parts of the country. Application, ER-2010-0356, p. 3).

2. Furthermore, in Paragraph 10 of both Applications, Mr. Wagner states:

10. If granted this Application to Intervene, Robert Wagner will limit his intervention to written interrogatories pre-filed testimony and written briefs related to the outdoor lighting issues referenced above. Robert Wagner will conform to all rules of practice and Missouri Public Service Commission's Rules of Practice and Procedures as part of his intervention. (Applications, p. 4, emphasis added).

Based on Mr. Wagner's representation that his intervention was limited to outdoor lighting issues, KCP&L did not oppose his application. Had KCP&L known that Mr. Wagner would be seeking confidential information not related to lighting issues, it would have opposed Mr. Wagner's intervention. By Orders issued July 13, 2010 and July 15, 2010, the Commission allowed his intervention in File Nos. ER-2010-0355 and ER-2010-0356, respectively.

3. On October 14, 2010, Mr. Wagner filed a Motion to Compel Discovery ("Motion"). In his Motion, Mr. Wagner addresses a response to interrogatories in which KCP&L notes that a publication is available, but considered confidential and therefore can only be provided to counsel. Thereafter, Mr. Wagner conferred with KCP&L regarding this issue and, as stated in the Motion, the requisite telephone conference with

the presiding officer was held in accordance with Commission Rule 4 CSR 240-2.090(8)(B).

4. KCP&L agrees with Mr. Wagner's assertion on p.2 of his Motion that ". . . access to the particular data marked as confidential in response to Question number 6 is a surmountable issue." Mr. Wagner indicated in the 10/14/2010 teleconference with the Regulatory Law Judge that he could order the document marked as confidential from the same vendor that supplied it to KCP&L. However, the sweeping relief requested in Mr. Wagner's Motion goes far beyond the scope of his announced involvement in these matters and is in direct contravention of the Commission's Rules and past practice. He requests the Commission issue an order to:

> 1) compel the disclosure of <u>all</u> proprietary information in the above mentioned cases to Robert Wagner; 2) compel the disclosure of <u>all highly confidential information</u> in the above mentioned cases to Robert Wagner; and 3) <u>issue a ruling that a pro se intervener is by definition their own attorney of record</u> and may receive proprietary and highly confidential information when a Non-Disclosure agreement has been filed. (Motion, p. 1, emphasis added).

5. Commission Rule 4 CSR 240-2.135 prescribes the procedures for handling confidential information in cases before the commission, and Paragraph (4) provides, in part, that "Highly confidential information may be disclosed <u>only</u> to the attorneys of record, or to outside experts that have been retained for the purpose of the case." (emphasis supplied). Disclosure of such information to a *pro se* litigant violates the plain language and the overall purpose of the rule.

6. Commission Rule 4 CSR 240-2.040(5) states as follows:

> (5) Practice by Nonattorneys. A natural person may represent himself or herself. Such practice is strictly limited to the appearance of a natural

> person on his or her own behalf and shall not be made for any other person or entity.

Commission Rule 4 CSR 240-2.040(3) describes the requirements for the appearance of "attorneys" and Mr. Wagner clearly does not allege, nor does he appear to have complied with, any of the qualifications necessary to appear as an "attorney" before this Commission.

7. Nevertheless, Mr. Wagner would have the Commission issue a "ruling" that a *pro se* intervener is by definition their own attorney of record. Any such determination in this case would be a substantive change in the rule significantly and impermissibly broadening its scope.[2]

8. Mr. Wagner attempts to argue at paragraph 3 of his motion that he has an incentive not to purposely disclose confidential information. However, what recourse does the Company have for inadvertent disclosure by Mr. Wagner? Unlike an attorney, Mr. Wagner is not governed by rules of professional conduct or liability insurance requirements.

9. Mr. Wagner alleges in paragraph 7 of his motion that without access to confidential information he will be subject to a severe handicap and burden. Because Mr. Wagner has access to all documents he requested relating to the lighting issue, KCP&L does not believe that Mr. Wagner's ability to present his issues will be affected by his inability to access confidential information. Moreover, in its interventions in other states, IDA has either retained counsel (Kansas) or if represented by non-attorneys, those individuals have not sought to be designated to receive confidential information (see

[2] KCP&L would note that Mr. Wagner's request to obtain "all proprietary and highly confidential information in these cases" would not be limited to just that information of KCP&L, but would apply to all such information of other parties to these proceedings.

Exhibit A, a service list from Oregon PSC docket UE-215 where IDA's *pro se* representatives (James Benya and Leo Smith) are not designated to receive confidential information.)

10. In a recent proceeding also involving a *pro se* litigant, this Commission recognized the complexity and legal implications inherent in such an *ad hoc* action:

> . . . Commission Rule 4 CSR 240-2.135(4) restricts highly confidential information's disclosure to "only the attorneys of record, or to outside experts that have been retained for the purpose of the case."
>
> A decision on the complex legal issues surrounding the appropriate interpretation and legal implications of "attorney of record" in 4 CSR 240-2.135(4) is not necessary to a resolution of the discovery dispute at issue.[3] (Emphasis added).

11. The proper procedure for considering such an expansion of the scope of the rule is the rulemaking process in Chapter 536 RSMo. – a procedure in which all practitioners and parties would have the opportunity for input. Indeed, in current File No. AX-2011-0094 involving proposed revisions to Chapter 2 Practice and Procedure, the Commission issued its Notice of Finding of Necessity on September 28, 2010 and, according to the Commission's Website, "the revisions are being formatted in preparation for sending them to DED for review."[4]

12. In accordance with his previous representations to the Commission, Mr. Wagner's limited participation in this proceeding, and any discovery in support thereof, should be "related to the outdoor lighting issues referenced above." (*Supra*, Par. 1 and 2).

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[3] Order Regarding Motion for Protective Order, *In the Matter of an Application of Union Electric Company, d/b/a AmerenUE, for an Order Authorizing the Sale and Transfer of Certain Assets of AmerenUE to St. James Municipal Utilities and Rolla Municipal Utilities*, File No. EO-2010-0263, page 4.

[4] Rules Tracking At A Glance, Updated: October 19, 2010, pp. 2-3.

13. Finally, the Motion to Compel Discovery is premature regarding the specific relief requested in said Motion, as the only discovery at issue and in compliance with the prerequisites of 4 CSR 240-2.090 is in regards to Interrogatory Question Number 6 referenced above. The Company believes that there is no pending discovery issue with regard to question 6 as Mr. Wagner has indicated that he can obtain the confidential document from the vendor. Should Mr. Wagner not be able to obtain the document, KCP&L will work with the vendor so that the document can be released to Mr. Wagner.

WHEREFORE, for the above-stated reasons, KCP&L respectfully requests that the Commission deny Intervenor Robert Wagner's Motion to Compel Discovery and the relief requested therein.

Respectfully submitted,

/s/ James M. Fischer

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand delivered, emailed or mailed, postage prepaid, this 25th day of October, 2010, to all parties of record.

/s/ James M. Fischer
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Summary Report

UE 215 PORTLAND GENERAL ELECTRIC COMPANY

Category: Electric Rate Case
Filed By: PORTLAND GENERAL ELECTRIC
This filing requests a general rate revision.

Filing Date: 2/16/2010 **Advice No:** 10-04
Effective Date: 12/18/2010 **Expiration Date:** 12/17/2010 **Status:** SUSPENDED

Final Order: **Signed:** 2/16/2010

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EXHIBIT A

Summary Report

UE 215 PORTLAND GENERAL ELECTRIC COMPANY

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EXHIBIT A