



Martha S. Hogerty
Public Counsel

State of Missouri

Roger B. Wilson
Governor

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December 22, 2000

Mr. Dale H. Roberts
Secretary/Chief Regulatory Law Judge
Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

FILED³
DEC 22 2000
Missouri Public
Service Commission


RE: Kansas City Power and Light
Case No. EM-2000-753

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case please find the original and eight copies of **Motion to Compel**. I have on this date mailed, faxed, and/or hand-delivered the appropriate number of copies to all counsel of record. Please "file" stamp the extra enclosed copy and return it to this office.

Thank you for your attention to this matter.

Sincerely,


John B. Coffman
Deputy Public Counsel

JBC:jb

cc: Counsel of Record

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

FILED³
DEC 22 2000
Missouri Public
Service Commission

In the Matter of the Application of Kansas City)
Power & Light Company for an Order Authorizing)
the Transfer of Certain Electric Generation Assets)
Used to Provide Electric Service to Customers)
in Missouri and Other Relief Associated with)
Kansas City Power & Light Company's Plan to)
Restructure Itself into a Holding Company,)
Competitive Generation Company, Regulated)
Utility Company, and Unregulated Subsidiary.)

Case No. EM-2000-753

MOTION TO COMPEL

COMES NOW the Office of the Public Counsel (Public Counsel), pursuant to Commission Rule 4 CSR 240-2.090 and Rule of Civil Procedure 56.01, and for its Motion to Compel states as follows:

1. On October 5, 2000, Public Counsel propounded Data Requests Nos. 516, 520, 526, and 533 upon Kansas City Power and Light Company (Company). These four data requests are the subject of an ongoing discovery dispute and are attached to this motion as Attachment A.

2. Public Counsel and Company have attempted to resolve this dispute through telephone calls, correspondence, and a meeting with the Regulatory Law Judge in compliance with 4 CSR 240-2.090(8)(B), but to no avail. The relevant written correspondence is attached to this motion as Attachment B. A summary of the relevant communications between Public Counsel and Company is listed below.

- ◆ On approximately October 13, 2000, counsel for Company left a voice mail with Public Counsel stating "concerns" regarding data requests numbers 526 and 533.

- ◆ On October 16, 2000, Public Counsel and Company discussed on the telephone data requests 526 and 533. At this time, Company claimed that data request 526 may be overly broad and burdensome and also stated Company's belief that data request 533 "may implicate the attorney/client privilege or work product doctrine."
- ◆ On October 20, 2000, Company sent Public Counsel a letter stating objections to data requests 526 and 533.
- ◆ On October 27, 2000, Public Counsel sent a letter to Company stating how Public Counsel's understanding of agreements made over the telephone differ from the Company's interpretation of those agreements. Public Counsel stated that it would grant Company "an additional week or two" to fully comply with these two (2) data requests.
- ◆ On October 31, 2000, Public Counsel received a Privilege Log, asserting an attorney/client and work product privilege for three documents requested in data request number 516. This was the first attempt Company made to object to this data request.
- ◆ On November 6, 2000, Public Counsel sent Company a letter, asserting that the requirement in Commission Rule 4 CSR 240-2.090(2) to make a written objection within ten (10) days of receipt had not been followed, and accordingly, any objections had been waived.
- ◆ On November 16, 2000, Company sent Public Counsel a letter stating that KCPL's Law Department was not able to determine if requested documents were covered by a privilege within the Commission's ten-day time limit.

- ♦ On December 4, 2000, Company and Public Counsel met to discuss the discovery dispute described herein in the office of Regulatory Law Judge Morris Woodruff.

3. Company failed to provide Public Counsel with any timely written objection with regard to Data Requests Nos. 516, 520, 526, and 533, as required by Commission Rule 4 CSR 240-2.090(2).

With regard to the failure to serve a written objection within the ten-day time limit, the Commission has recently ruled on this matter in its "Order Denying Motion To Expedite And Order Granting In Part The Motion To Compel" in Case No. EM-96-149, issued on October 31, 2000. On page 3 of that order, the Commission states that failure to object within ten (10) days is a waiver. This order is contained within Attachment B to this Motion.

4. The Commission recently reviewed its discovery rule in the rulemaking case, docketed as Case No. AX-2000-118, and a new rule was promulgated on March 1, 2000, which retained the ten-day time limit for data request objections. Several regulated utilities commented on the proposed rule, but Public Counsel is not aware of any Company comment in Case No. AX-2000-118 suggesting that this time limit, which has worked for so many years, is inadequate.

In fact, only rarely has Public Counsel heard any concern that the ten-day time limit is inadequate from any other regulated utility to which it sends data requests.

5. It is particularly difficult to understand why the legal department of a regulated utility would not be able to ascertain within ten (10) days of receipt whether it believed that a privilege applied to requested documents. It is even more difficult to understand why Company's legal department believes that it is unable to make timely objections when the objections involve legal matters (i.e. "attorney/client privilege" or "work product doctrine").

6. The attorney/client and work product privileges can be waived under common law and are deemed to be waived frequently in litigated matters. See Gipson v. Target Stores, Inc., 630 S.W2d 107 (Mo. App. 1981), which states:


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).

Ibid. at 109.

WHEREFORE, Public Counsel respectfully requests that the Commission compel Company to produce all documents within the scope of Data Request Nos. 516, 520, 526, and 533 because no timely written objections have been made to these data requests.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

By: 
John B. Coffman (#36591)
Deputy Public Counsel
P. O. Box 7800
Jefferson City, MO 65102
(573) 751-5565
(573) 751-5562 FAX

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed or hand-delivered to the following this 22nd day of December 2000:

James M. Fischer, Esq./Larry Dority, Esq.
Fischer & Dority, P.C.
101 West McCarty Street, Suite 215
Jefferson City, MO 65101

General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

William G. Riggins/Gerald A. Reynolds
Kansas City Power & Light Company
1201 Walnut Street
P. O. Box 418679
Kansas City, MO 64141-9679

James J. Cook
AmerenUE
One Ameren Plaza
1901 Chouteau Avenue
P. O. Box 66149
St. Louis, MO 63166-6149

Jeffrey Keevil
Stewart & Keevil
1001 Cherry Street, Suite 302
Columbia, MO 65201

Robert J. Hack
Missouri Gas Energy
3420 Broadway
Kansas City, MO 64111

Martin J. Bregman, Executive Director
Western Resources, Inc.
818 South Kansas Avenue
Topeka, KS 66612

Paul S. DeFord
Lathrop & Gage, L.C.
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Kansas City, MO 64108

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P. O. Box 537
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Lathrop & Gage, L.C.
326 E. Capitol Avenue
Jefferson City, MO 65101

James W. Brew
Brickfield, Burchette & Ritts, P.C.
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Eighth Floor, West Tower
Washington, DC 20007

Duncan Kincheloe
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Brydon, Swearingen & England, P.C.
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Diana M. Vuylsteke
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Robert C. Johnson
720 Olive Street, 24th Floor
St. Louis, MO 63101

Michael C. Pendergast
Laclede Gas Company
720 Olive Street, Room 1520
St. Louis, MO 63101

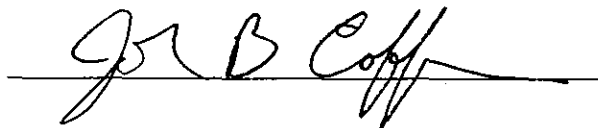
Ray Marvin
IBEW Local Union No. 412
6200 Connecticut, Suite 105
Kansas City, MO 64120

Timothy Rush
St. Joseph Light & Power Company
520 Francis Street, P. O. Box 998
St. Joseph, MO 64502

James R. Waers
Blake & Uhlig, P.A.
2500 Holmes
Kansas City, MO 64108

Robert B. Fancher
The Empire District Electric Co.
602 Joplin
P. O. Box 127
Joplin, MO 64801

John McKinney
UtiliCorp United Inc.
10700 East 350 Highway
Kansas City, MO 64138

A handwritten signature in black ink, appearing to read "J B Coffey", is written over a horizontal line.

Attachment

A

KANSAS CITY POWER & LIGHT
CASE NO. EM-2000-753

REQUESTED BY: RYAN KIND

REQUESTED FROM: CHRIS GILES

DATE OF REQUEST: OCTOBER 5, 2000

INFORMATION REQUESTED: On page 2 of Schedule ADJ-1 to Drue Jennings' testimony, KCPL states that "KCPL, in 1999, studied the feasibility and value of transforming a vertically integrated electric utility company into functionally disaggregated companies." On this same page, KCPL stated that "the ultimate goal was to determine whether, in a competitive environment, the aggregate value to the shareholder of the separate business units would be greater than the vertically integrated model, and whether customers would be better served by more management focus on each of the business segments." Please provide a copy of all documents created by or for KCPL or its affiliates as part of "the process of studying the feasibility and value of transforming a vertically integrated electric utility company into functionally disaggregated companies." If no documents exist within the scope of those requested in this data request, please provide a statement to that effect. Please do not provide additional copies of those documents that have already been provided as part of KCPL's response to OPC DR Nos. 512, 513, 514, and 515.

THIS RESPONSE INCLUDES:

☐ Printed Materials _____ Total Pages ☐ Magnetic Media _____ Number of disks or tapes
Please number each section of multiple pages as: File formats for data: _____
of Total

LIST PRINTED MATERIALS AND/OR FILES INCLUDED:

The information provided to the Office of the Public Counsel in response to the above information request is accurate and complete, and contains no material misrepresentations or omissions based upon present known facts to the undersigned. The undersigned agrees to immediately inform the Office of the Public Counsel if any matters are discovered which would materially affect the accuracy or completeness of the information provided in response to the above information.

DATE RECEIVED: _____

SIGNED BY: _____

TITLE: _____

KANSAS CITY POWER & LIGHT
CASE NO. EM-2000-753

REQUESTED BY: RYAN KIND
REQUESTED FROM: CHRIS GILES
DATE OF REQUEST: OCTOBER 5, 2000

INFORMATION REQUESTED: On page 3 of Schedule ADJ-1 to Drue Jennings' testimony, KCPL states that "in early 2000, KCPL announced its intent to restructure the company to meet future challenges associated with retail competition." Please provide a copy of all documents (including but not limited to reports, meeting agendas and meeting minutes or summaries) related to the KCPL restructuring initiative announced in early 2000 that have been created by or for, or circulated to, the Finance Group that is referenced on page 3 of Schedule ADJ-1. If no documents exist within the scope of those requested in this data request, please provide a statement to that effect.

THIS RESPONSE INCLUDES:

☐ Printed Materials _____ Total Pages ☐ Magnetic Media _____ Number of disks or tapes
Please number each section of multiple pages as: File formats for data: _____
of Total

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DATE RECEIVED: _____ SIGNED BY: _____
TITLE: _____

KANSAS CITY POWER & LIGHT
CASE NO. EM-2000-753

REQUESTED BY: RYAN KIND
REQUESTED FROM: CHRIS GILES
DATE OF REQUEST: OCTOBER 5, 2000

INFORMATION REQUESTED: On page 3 of Schedule ADJ-1 to Drue Jennings' testimony, KCPL states that "in early 2000, KCPL announced its intent to restructure the company to meet future challenges associated with retail competition." Later, on the same page, KCPL states that "these [restructuring] teams were charged with the responsibility of organizing and implementing the reorganization." Please provide a copy of all documents created by or for KCPL or its affiliates related to organizing and implementing the reorganization. If no documents exist within the scope of those requested in this data request, please provide a statement to that effect. Please do not provide additional copies of documents that KCPL has already provided in response to OPC data requests 518 through 525 in this case.

THIS RESPONSE INCLUDES:

☐ Printed Materials _____ Total Pages ☐ Magnetic Media _____ Number of disks or tapes
Please number each section of multiple pages as: File formats for data: _____
of Total

LIST PRINTED MATERIALS AND/OR FILES INCLUDED:

The information provided to the Office of the Public Counsel in response to the above information request is accurate and complete, and contains no material misrepresentations or omissions based upon present known facts to the undersigned. The undersigned agrees to immediately inform the Office of the Public Counsel if any matters are discovered which would materially affect the accuracy or completeness of the information provided in response to the above information.

DATE RECEIVED: _____

SIGNED BY: _____

TITLE: _____

KANSAS CITY POWER & LIGHT
CASE NO. EM-2000-753

REQUESTED BY: RYAN KIND
REQUESTED FROM: CHRIS GILES
DATE OF REQUEST: OCTOBER 5, 2000

INFORMATION REQUESTED: On page 3 of Schedule ADJ-1 to Drue Jennings' testimony, KCPL states that "in early 2000, KCPL announced its intent to restructure the company to meet future challenges associated with retail competition." Later, on the same page, KCPL states that "a project coordinator was named to lead the restructuring project." Please identify the project coordinator and provide a copy of all documents created by or on behalf of the project coordinator that are related to the restructuring initiative that KCPL announced in early 2000. If no documents exist within the scope of those requested in this data request, please provide a statement to that effect. Please do not provide additional copies of documents that KCPL has already provided in response to other OPC data requests in this case unless the provision of duplicate documents makes it easier for KCPL to respond to OPC's data requests in this case.

THIS RESPONSE INCLUDES:

☐ Printed Materials _____ Total Pages ☐ Magnetic Media _____ Number of disks or tapes
Please number each section of multiple pages as: File formats for data: _____

of Total

LIST PRINTED MATERIALS AND/OR FILES INCLUDED:

The information provided to the Office of the Public Counsel in response to the above information request is accurate and complete, and contains no material misrepresentations or omissions based upon present known facts to the undersigned. The undersigned agrees to immediately inform the Office of the Public Counsel if any matters are discovered which would materially affect the accuracy or completeness of the information provided in response to the above information.

DATE RECEIVED: _____ SIGNED BY: _____
TITLE: _____

Attachment B



FILE COPY

Gerald A. Reynolds

(816) 556-2138
(816) 556-2787 (Facsimile)

October 20, 2000

Mr. John B. Coffman
Deputy Public Counsel
Office of the Public Counsel
200 Madison, Suite 650
Jefferson City, MO 65102

RE: Case No. EM-2000-753

Dear Mr. Coffman:

The purpose of this letter is to memorialize portions of our recent interactions regarding Data Request Nos. 526 and 533. On October 13, 2000, I left you a voice mail message in which I voiced some concerns regarding Data Request Nos. 526 and 533. Specifically, I stated that I would file objections to these requests unless we could reach a compromise. On October 16, 2000, during a teleconference, I discussed my concerns that Data Request Nos. 526 and 533 are overly broad and burdensome, and that Data Request No. 533 may implicate the attorney/client privilege or work product doctrine.

I stated that a literal interpretation of the data requests could result in KCPL having to provide Public Counsel with numerous documents that do not have a direct bearing on the case. The example I provided was the time sheets of KCPL employees that have worked on the restructuring project. The resolution reached was that:

- 1) KCPL would provide documents that had a direct bearing on the case, and
- 2) Public Counsel reserved the right to request documents that have an indirect bearing on the case, such as time sheets.

With respect to Data Request No. 533, I stated that the project coordinator of the restructuring project is an attorney and KCPL might assert a legal protection if it turns out that some of the

OCT 24 2000



Kansas City Power & Light Company
Page Two

responsive documents are protected from disclosure by the attorney/client privilege and/or work product doctrine. More importantly, I stated that KCPL would be unable to review all responsive documents prior to October 16, 2000 and that KCPL reserves the right to make a claim of privilege or assert another legal protection.

Please contact me if your recollection of our discussion of these issues differs from mine.

Sincerely yours,

Gerald A. Reynolds



COPY

Martha S. Hogerty
Public Counsel

State of Missouri

Roger Wilson
Governor

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1-800-735-2466 Voice

October 27, 2000

Gerald A. Reynolds
Kansas City Power & Light Company
1201 Walnut
P. O. Box 418679
Kansas City, MO 64141-9679

RE: Case No. EM-2000-753

Dear Gerry:

This letter is in response to your October 20, 2000 letter regarding discovery in this case. You mentioned our teleconference on October 16, 2000 regarding your objection to Public Counsel Data Requests 526 and 533.

With regard to Data Request 526 you did state in our teleconference that KCPL believes certain types of documents contained within the scope of that data request (i.e., time sheets) appeared to be overbroad. I agreed that Public Counsel would not insist upon the production of time sheets at this point in the case. Your letter, however, discusses "numerous documents that do not have a direct bearing on the case." I would remind you that the appropriate standard for discovery is "reasonably calculated to lead to the discovery of relevant evidence." It was my understanding that KCPL would respond fully to Data Request 526 except with regard to certain categories of items that KCPL asserts would be overly burdensome to produce, not just those documents that KCPL believes to have a "direct bearing" on this case. It was also my understanding that KCPL would identify the types or categories of documents that KCPL was not including in its DR response and that OPC may request these types of categories of documents in the future.

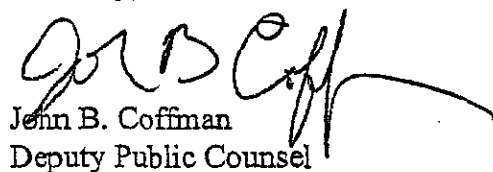
With regard to Data Request 533, you restate your objection regarding attorney/client privilege. It was my understanding that during our teleconference you agreed to provide all of the information within the scope of Data Request 533 except for those documents or portions of documents that you believe were protected by the attorney/client privilege (redacting only those portions of documents to which you believe that the privilege applied). You further agreed to provide a log of all documents or portions of documents to which you believe the attorney/client privilege applied (as you have done in the past).

Gerald A. Reynolds
October 27, 2000
Page Two

I want to make it clear that Public Counsel does not concede that your objections are necessarily proper, but we are certainly interested in cooperating with KCPL to further the discovery process at this time. Essentially, my understanding of our agreement is that you would provide what you believe was within proper scope of these data requests and describe what materials you believe should be withheld.

Although we did not agree to any specific extension for response to these data requests, I stated our office's willingness to grant KCPL another week or two to collect the documents that you do not believe fall within any objection to these two data requests. It is my expectation that KCPL will be able to respond to these data requests with all discoverable material by November 6, 2000. Please feel free to call me if you believe we should discuss this matter further at (573) 751-5565. Also, feel free to contact Ryan Kind directly at (573) 751-5563 to discuss these discovery matters with him.

Sincerely,



John B. Coffman
Deputy Public Counsel

JBC:kh



COPY

Martha S. Hogerty
Public Counsel

State of Missouri

Roger Wilson
Governor

Office of the Public Counsel
Governor Office Bldg. Suite 650
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1-800-735-2466 Voice

November 6, 2000

Gerald A. Reynolds
Kansas City Power & Light Company
1201 Walnut
P. O. Box 418679
Kansas City, MO 64141-9679

RE: Case No. EM-2000-753; Data Request 516

Dear Gerry:

On October 31, 2000, I received from you a "privilege log" that listed three documents for which you presumably are claiming an attorney-client/work product privilege in response to Public Counsel Data Request No. 516. However, Public Counsel did not receive any objection to Data Request 516.

If you intended for this privilege log to serve as an objection pursuant to 4 CSR 24-2.090(2), I am afraid that it is too late under the rule. The Public Service Commission has made very clear that failure to object within the ten-day requirement is a waiver of any objection to providing responses to data requests. I am attaching a copy of a recent Commission order regarding this issue.

If you have any questions about this case please feel free to call me at (573) 751-5565.

Sincerely,



John B. Coffman
Deputy Public Counsel

JBC:jb

Enclosure

COPY

FILE COPY

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, 2000.

In the Matter of the Application of Union)
Electric Company for an Order Authorizing:)
(1) Certain Merger Transactions Involving)
Union Electric Company; (2) The Transfer)
of Certain Assets, Real Estate, Leased) Case No. EM-96-149
Property, Easements and Contractual)
Agreements to Central Illinois Public)
Service Company; and (3) In Connection)
Therewith, Certain Other Related)
Transactions)

ORDER DENYING MOTION TO EXPEDITE
AND ORDER GRANTING IN PART THE MOTION TO COMPEL

On October 25, 2000, the Staff of the Missouri Public Service Commission (Staff) filed a motion to compel discovery and a motion for expedited treatment of its motion to compel. In its request for expedited treatment, Staff requested that the Commission shorten the response time for replies to Staff's motion to compel, requiring filing by Tuesday, October 31, 2000, and shorten the time for Staff's response to those responsive filings, requiring filing by Friday November 3, 2000. Staff requested that the time for responsive pleadings be shortened to avoid delay in Staff's audit of UE for the report that is due under the second Experimental Alternative Regulation Plan (Second EARP) on February 1, 2001. The Commission finds good cause in Staff's need to have sufficient time for Staff to provide comprehensive information upon which the Commission will rely

OCT 31 2000

in evaluating the effectiveness of the Second EARP and to determine whether the recommendations to be filed by Staff, Union Electric Company d/b/a AmerenUE and the Office of the Public Counsel (Public Counsel) are supported by sufficient evidence. Staff's motion for expedited treatment of Staff's motion to compel will be denied because some of the dates requested by Staff are past and therefore, the Commission cannot grant the specific request made by Staff. However, the Commission will expeditiously address Staff's motion to compel. The Commission finds that it is able to rule immediately in part on Staff's motion to compel.

Commission Rule 4 CSR 240-2.090(2) states

Parties may use data requests as a means for discovery. The party to whom data requests are presented shall answer the requests within twenty (20) days after receipt unless otherwise agreed by the parties to the data requests. If the recipient objects to data requests or is unable to answer within twenty (20) days, the recipient shall serve all of the objections or reasons for its inability to answer in writing upon the requesting party within ten (10) days after receipt of the data requests, unless otherwise ordered by the commission.

In its motion to compel, Staff stated that it submitted Data Requests (DRs) numbered 13, 16-21, 23, 25, 26, 29, 35 and 40 to AmerenUE on August 17, 2000. Staff also stated that it submitted DRs number 50 and 55 to AmerenUE on September 12, 2000. Staff's DR 4114, included in Attachment A, was issued on August 28, 2000. Staff stated that on October 4, 2000, it received objections to these DRs in a letter from AmerenUE dated October 3, 2000.

AmerenUE failed to serve its objections in writing upon the requesting party within ten days after receipt of the data requests for DRs 13, 16-21, 23, 25, 26, 29, 35, 40, 50, 55, and 4114. AmerenUE, by its failure to timely respond, has waived its objection as to those DRs. Therefore, the Commission shall order AmerenUE to answer DRs 13, 16-21, 23, 25, 26, 29, 35, 40, 50, 55, and 4114 without further delay.

Staff stated that it had received objections to some 41 DRs by October 25, 2000, when it filed its motion to compel. In that motion, Staff also identified DRs 59, 61-72, 74-78, 80, and 82-87, to which AmerenUE filed timely objections. Staff's motion stated that Staff received a second letter from AmerenUE respecting the indicated data requests, but Staff did not provide the Commission with a copy of AmerenUE's letter containing the written objections. On October 27, 2000, the Commission issued an order directing Staff to provide the Commission with a copy of the letters containing AmerenUE's written objections by 12 p.m. on October 30, 2000.

Staff filed its response on October 30, 2000, complying with the Commission's request and adding DRs 88R-107R to its motion to compel. Staff stated that it received AmerenUE's objection to DRs 88R-107R on October 27, 2000, in a letter dated October 26, 2000. Because AmerenUE's objection pertaining to DRs 88R-107R is the same objection as the previously timely filed objection, the Commission will consider DRs 88R-107R as part of Staff's motion to compel. The Commission will also shorten the time for response to the remaining portion of Staff's motion to compel.

IT IS THEREFORE ORDERED:

1. That the Motion for Expedited Treatment of Staff's Motion to Compel filed by the Staff of the Missouri Public Service Commission on October 25, 2000, is denied.

2. That the motion to compel filed by the Staff of the Missouri Public Service Commission on October 25, 2000, is granted in part in that the Commission directs Union Electric Company d/b/a AmerenUE to answer Data Request numbers 13, 16-21, 23, 25, 26, 29, 35, 40, 50, 55, and 4114 as soon as possible, but in no event later than November 10, 2000.

3. That Union Electric Company d/b/a AmerenUE may file, no later than November 3, 2000, a response to the remaining portion of Staff's motion to compel filed October 25, 2000, and amended October 30, 2000.

4. That this order shall become effective on November 3, 2000.

BY THE COMMISSION



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Drainer, Murray, and Schemenauer, CC., concur
Simmons, C., absent

Register, Regulatory Law Judge

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
JEFFERSON CITY
October 31, 2000

CASE NO: EM-96-149

General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

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James J. Cook/Williams J. Neihoff
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Charles Brent Stewart
Stewart & Keevil L.L.C.
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Ronald Molteni
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Jefferson City, MO 65101

Marilyn S. Teitelbaum
Schuchat, Cook & Werner
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St. Louis, MO 63103

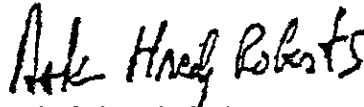
Robin E. Fulton
Schnapp, Fulton, Fall, McNamara & Silvey
135 E. Main St., PO Box 151
Fredericktown, MO 63645

Paul H. Gardner
Goller, Gardner & Feather
131 East High Street
Jefferson City, MO 65101

Diana M. Vulysteke
Bryan Cave LLP
One Metropolitan Square
211 North Broadway, Suite 3600
St. Louis, MO 63102

Enclosed find certified copy of an ORDER in the above-numbered case(s).

Sincerely,

A handwritten signature in dark ink, appearing to read "Dale Hardy Roberts". The signature is written in a cursive, slightly slanted style.

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge



FILE COPY

Gerald A. Reynolds

(816) 556-2138

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November 16, 2000

VIA U.S. MAIL & FACSIMILE (573) 751-5562

Mr. John B. Coffman
Deputy Public Counsel
Office of the Public Counsel
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P.O. Box 7800
Jefferson City, MO 65102

RE: Case No. EM-2000-753

Dear Mr. Coffman:

I am in receipt of your letter dated November 6, 2000 in which you state your belief that by failing to file an objection within ten days of receiving Data Request 516, KCPL waived its right to assert legal protections afforded by the attorney-client privilege and/or the work product doctrine. While it agrees with much of your analysis with respect to objections based on relevance, broadness, etc., KCPL does not believe that it waived its right to claim privilege and/or the work product doctrine protections for documents unearthed after the ten-day period elapsed.

On October 5, 2000, KCPL received 33 data requests from the Office of Public Counsel, including Data Request 516. The Law Department immediately reviewed the data requests to determine if there were any grounds for filing an objection. During this initial review period, the Law Department has the ability to determine whether a data request is burdensome, overbroad or irrelevant. None of the data requests fell into any of these three categories.

The Law Department, however, cannot determine whether any document is protected by the attorney-client privilege or work product doctrine until the actual documents are collected and reviewed. Due to the wide-ranging nature of the data requests, it was not possible to complete the document search within ten days of receiving the data requests. Consequently, the Law Department could not file an objection on the basis of the attorney-client privilege or work product doctrine until responsive, yet legally protected, documents were identified.

K A N S A S C I T Y P O W E R & L I G H T C O M P A N Y

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NOV 21 2000

Kansas City Power & Light Company
Page Two

In the past, KCPL has attempted to address your legitimate concern by filing a generic objection, within ten-day period, in which KCPL would state that it objects to each of the data requests "to the extent the party seeks information protected by the attorney-client privilege and/or work product doctrine." The purpose of this generic objection is to protect any document that may be identified after the ten-day period has elapsed. The Commission, however, has rejected this approach. The Commission stated that "[c]ourts generally will not consider abstract objections such as ... privileged, or work product with no further specificity as to why a particular interrogatory is objectionable." (Order Regarding GST Steel Company's First Motion to Compel Discovery and Amending the Procedural Schedule (July 29, 1999), quoting, S. Katz, 16 Missouri practice – Civil Rules Practice 43 (2d ed. 1998)).

To respond to Public Counsel's data requests, KCPL had to review reams of documents. As soon as privileged documents were identified, KCPL alerted Public Counsel by providing a privilege log. Accordingly, KCPL does not believe that it waived its right to assert the attorney-client privilege or work product doctrine.

Please do not hesitate to contact me if you have any questions or concerns.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Gerald A. Reynolds". The signature is fluid and cursive, with a long horizontal stroke at the end.

Gerald A. Reynolds

Enclosure

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

GST Steel Company,)	
)	
Complainant,)	
)	
v.)	<u>Case No. EC-99-553</u>
)	
Kansas City Power & Light Company,)	
)	
Respondent.)	

ORDER REGARDING GST STEEL COMPANY'S
FIRST MOTION TO COMPEL DISCOVERY AND
AMENDING THE PROCEDURAL SCHEDULE

Introduction:

On May 11, 1999, GST Steel Company (GST) filed a complaint with the Missouri Public Service Commission against Kansas City Power & Light Company (KCPL). In its Complaint, GST sought immediate relief, a request denied by the Commission in its order of June 1, 1999. The Commission did, however, direct that KCPL file its Answer on a shortened schedule and set an early prehearing conference. Thereafter, on June 11, 1999, the prehearing conference was held. The parties filed their joint proposed procedural schedule and preliminary statement of issues on June 18, 1999. The Commission adopted the procedural schedule proposed by the parties by its order issued on June 22, 1999.

On June 18, 1999, GST moved for interim relief and an expedited hearing. KCPL responded in opposition on June 28, 1999; the Staff of

the Missouri Public Service Commission (Staff) responded on June 28, 1999, as well. The Commission denied GST's motion on July 9, 1999.

Discussion:

On July 2, 1999, GST filed its Motion to Compel, asserting that KCPL has refused to respond to GST's First Set of Interrogatories and First Request for Production of Documents, served on KCPL on June 18, 1999. Attached as an exhibit to GST's motion is a copy of a one-page letter which, GST alleges, is the only response ever provided by KCPL to GST's discovery requests. In its response to GST's motion, KCPL admits that the letter in question is the only response that it made to GST's discovery requests.¹

KCPL's letter of June 28 stated:

We are in receipt of the First Set of Interrogatories and Requests for Production of Documents submitted by GST Steel Company ("GST") on or about June 18, 1999 ("Requests"). Kansas City Power & Light Company ("KCPL") objects to each of the Requests to the extent GST seeks information or documents protected by the attorney client privilege and/or the work product doctrine. In addition, KCPL objects to each of the Requests to the extent GST attempts to impose obligations that exceed those imposed by Missouri law.

Finally, the sole issue involved in this matter is whether the pricing mechanism contained in the special contract between KCPL and GST is just and reasonable. Accordingly, KCPL objects to each of the Requests because they are irrelevant, beyond the scope of these proceedings, and not reasonably calculated to lead to admissible evidence.

¹The letter in question is dated July 28, 1999. In its response, KCPL refers to the "letter dated June 28, 1999." The letters are the same, as it is not yet July 28, 1999, as these words are written.

GST, in its motion filed July 2, 1999, argues that KCPL's response to its discovery requests was inadequate as a matter of law. GST further contends that KCPL has failed to effectively raise the attorney-client privilege and the work product doctrine. GST asserts that its discovery requests were indeed relevant, within the scope of these proceedings, and were reasonably calculated to lead to admissible evidence. GST prays that the Commission compel KCPL to respond to its discovery requests and "grant such further relief as deemed just and proper."

The Commission is specifically authorized by statute to "adopt and prescribe" rules of procedure. Section 386.410.1, RSMo Supp. 1998. Pursuant to this authority, the Commission has promulgated its Rule 4 CSR 240-2.090.1, relating to discovery and prehearings:

Any party, in any proceeding before the commission, may obtain discovery by one (1) or more of the following methods: depositions upon oral examination or written questions, written interrogatories, requests for production of documents or things and requests for admission upon and under the same conditions as in civil actions in the circuit court. Sanctions for abuse of the discovery process or failure to comply with commission orders regarding discovery will be the same as those provided for in the rules of civil procedure.

KCPL's response was timely.

KCPL objected to GST's discovery "to the extent GST attempts to impose obligations that exceed those imposed by Missouri law." GST's discovery instrument is labeled as a request for production of documents and purports to direct KCPL to provide copies of documents to GST. See GST's First Set of Interrogatories and Requests for Production of

Documents, pp. 3-5, Instruction Paragraphs Nos. 10-12, 15, and 22; see also e.g. Interrogatory 1.1(d), "provide a copy of all identified policies." Rule 58.01(b), Mo. R. Civ. Pro., however, envisions a rather different procedure than that evidently contemplated by GST. Under the rule, the inquiring party specifies a time, place and location for the inspection of documents and things; the opposing party in its response either agrees or objects. The Supreme Court Rule adopted by the Commission does not authorize an inquiring party to demand copies of documents and, were this action in circuit court, KCPL's objection would be sustained. See State ex rel. State Farm Mut. Auto. Ins. Co. v. Rickhoff, 509 S.W.2d 485, 487-88 (Mo. App., E.D. 1974).

However, the Commission's rules include a discovery device unknown to the circuit courts: Commission Rule 4 CSR 240-2.090(2) provides for "data requests." A data request is "an informal written request for documents or information[.]" Data requests need not take any particular form and it is no objection that GST labeled its data requests as requests for production of documents. Thus, this objection is found to be without merit.

GST's first discovery instrument contains five interrogatories which, with subparts, pose some 15 questions. KCPL answered none of them.

GST complains that KCPL's reliance on the attorney-client privilege and attorney work product doctrines is misplaced. GST is correct. The former is a statutory privilege that protects confidential communications between lawyer and client; the latter, set out at

Rule 56.01(b)(3), protects trial preparation materials from discovery except on a showing of "substantial need" and "undue hardship." The party raising these defenses has the burden of establishing them. Hutchinson v. Steinke, 353 S.W.2d 137, 144 (Mo. App. 1962).

As GST correctly observes, none of the materials covered by its first set of discovery appears at first glance to be covered by either defense. For example, an insurance policy is hardly a confidential communication between lawyer and client and was not prepared in anticipation of litigation or for trial. The same observation applies to KCPL's accounting records; to the notes and work papers upon which a press release was based; and to insurance claims made by KCPL. KCPL's assertion of these defenses in this circumstance appears to be without merit. In any event, KCPL has failed to show that either of these defenses applies. "Courts generally will not consider abstract objections such as burdensome, overbroad, irrelevant, privileged, or work product with no further specificity as to why a particular interrogatory is objectionable." S. Katz, 16 Missouri Practice--Civil Rules Practice 43 (2d ed. 1998).

KCPL also objects to each request contained in GST's first set of discovery on the grounds that it is "irrelevant, beyond the scope of these proceedings, and not reasonably calculated to lead to admissible evidence." The scope of discovery is set by Rule 56.01(b)(1), which provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to

the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

"Relevant" evidence, in turn, is that which tends to prove or disprove a fact of consequence to the pending matter. W. Schroeder, 22 Missouri Practice-Missouri Evidence, § 401.1(a) (1992). Relevance must be determined by reference to the pleadings. See St. ex rel. Anheuser v. Nolan, 692 S.W.2d 325, 327-28 (Mo. App., E.D. 1985).

The pleadings herein concern the adequacy of the service provided to GST by KCPL and whether or not KCPL's charges to GST are just and reasonable. The Commission is authorized, at Section 393.130.1, RSMo 1994, to consider such matters and GST is authorized to make complaint. Section 386.390.1, RSMo 1994. As GST points out, KCPL has burden of establishing that the discovery sought is irrelevant and KCPL has not met that burden.

On July 14, 1999, KCPL filed its reply to GST's motion to compel. That reply was not timely and KCPL has not addressed its untimeliness in any pleading. See Commission Rule 4 CSR 240-2.080(12). However, the Commission will consider KCPL's untimely reply in the interest of allowing the parties a full opportunity to present their positions.

In its reply, KCPL again argues that GST's first set of discovery is irrelevant and thus outside of the scope of permissible discovery:

Requests 1.1, 1.2, 1.4, and 1.5 relate to insurance policies, claims and benefits in connection with the boiler explosion on February 17, 1999 at the Hawthorn Generating Station's Unit No. 5. Request 1.3 [relates to] . . . the preparation of KCPL's March 2, 1999 press release entitled 'KCPL estimates financial impact of plant explosion; plans for the future.' None of these requests are relevant to the core issue in this dispute: Whether GST has been exposed to unjust and unreasonable charges for electric service.

Contrary to KCPL's position, the Commission reads the pleadings to include an issue of service adequacy. The Hawthorn incident is relevant to that issue. Moreover, GST has specifically pleaded that "KCPL has informed GST that as a result of the Hawthorn outage, GST should expect a multi-million dollar price increase for 1999. GST's Complaint at 11, paragraph 22. KCPL admitted as much. KCPL's Answer at 4, paragraph 22. KCPL can hardly argue that the Hawthorn incident is not also directly relevant to the issue of KCPL's charges to GST. GST has prayed that the Commission require KCPL to use the proceeds of any insurance received with respect to the Hawthorn incident to protect it and other ratepayers "from harm as a result of the outage[.]" GST's Complaint at 13-14, paragraph 27(ii). Thus, the nature and extent of KCPL's insurance coverage is also necessarily relevant to this matter. KCPL must answer GST's interrogatories and provide the requested documents.

KCPL will serve full and complete answers to GST's interrogatories, as well as copies of all requested documents, on counsel for GST on or before the fifteenth day after the date of this order. The

Commission notes that KCPL has waived any other objections that could have been raised to GST's first set of discovery.

The Procedural Schedule:

The discovery dispute resolved herein has seriously compromised the procedural schedule adopted by the Commission. Therefore, that schedule must now be revised. The Commission will revise the procedural schedule by resetting the due date for GST's direct testimony from August 12, 1999, to September 15, 1999.

The Commission cautions the parties that further abuse of the discovery process will lead to consideration of the imposition of appropriate sanctions on the offending party.

IT IS THEREFORE ORDERED:

1. That the objection of Kansas City Power & Light Company to the requests for production of documents contained in GST Steel Company's first set of discovery is overruled in that the requests are permissible data requests under Commission Rule 4 CSR 240-2.090(2).

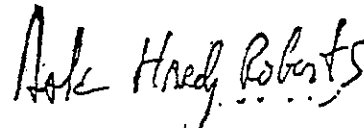
2. That the objection of Kansas City Power & Light Company to the data requests and interrogatories contained in GST Steel Company's first set of discovery is overruled in that the requests are within the permissible scope of discovery, are not irrelevant, and are not barred by the attorney-client privilege or the attorney work product doctrine.

3. That Kansas City Power & Light Company shall serve answers to the interrogatories contained in GST Steel Company's first set of

discovery, and copies of documents therein requested, on counsel for GST Steel Company on or before August 13, 1999.

4. That this order shall become effective on August 10, 1999.

BY THE COMMISSION



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Kevin A. Thompson, Deputy Chief
Regulatory Law Judge, by delegation
of authority pursuant to 4 CSR
240-2.120(1), (November 30, 1995)
and Section 386.240, RSMo 1994.

Dated at Jefferson City, Missouri,
on this 29th day of July, 1999.

STATE OF MISSOURI
OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and
I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson
City,

Missouri, this 29TH day of JULY, 1999.

Dale Hardy Roberts

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
JEFFERSON CITY
July 29, 1999

CASE NO: EC-99-553

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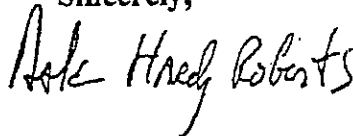
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William G. Riggins
Kansas City Power & Light Company
P.O. Box 418679
Kansas City, MO 64141

Enclosed find certified copy of an ORDER in the above-numbered case(s).

Sincerely,



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

Uncertified Copy:



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Public Counsel

State of Missouri

Roger Wilson
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November 27, 2000

Gerald A. Reynolds
Kansas City Power & Light Company
1201 Walnut
P. O. Box 418679
Kansas City, MO 64141-9679

RE: Case No. EM-2000-753
Outstanding Public Counsel Data Requests

Dear Gerry Reynolds:

This letter should serve to update you regarding the current status of outstanding and overdue data requests that Public Counsel has propounded to Kansas City Power & Light Company in this case.

- **#516** After I read your letter of November 16, 2000, it seems that we will be unable to resolve this dispute about whether your late objection is valid under the Commission rules. However, let's discuss it a little further and then, set a date to have a teleconference with the regulatory law judge.
- **#520** Kansas City Power & Light has filed no timely objection and has not yet provided any responsive documents.
- **#526** Kansas City Power & Light has not produced any documents in response even within the limited scope to which you said Kansas City Power & Light would respond in your letter of October 20, 2000.
- **#533** Kansas City Power & Light has not yet produced either a privilege log or any responsive documents (or even redacted documents).

It is now over a month past the due date for all four of these data requests. We were willing to give you an extra week to comply but we cannot simply neglect these discovery matters much longer. Unless significant progress is made very soon in obtaining responses to all four these data requests. I suggest that it is time to talk to the regulatory law judge and schedule a teleconference pursuant to Subsection (8)(B) of the Commission's discovery rule 4 CSR 240-2.090.

Please call me at your earliest convenience at (573) 751-5565.

Sincerely,

A handwritten signature in black ink, appearing to read "John B. Coffman", with a long horizontal flourish extending to the right.

John B. Coffman
Deputy Public Counsel

JBC:jb

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Case No. EM-2000-753
December 1, 2000

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