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January 9, 2002

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FILED³

JAN 09 2002

Missouri Public
Service Commission

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

**RE: Case No. EC-2002-1 – Staff of the Missouri Public Service Commission,
Complainant, vs. Union Electric Company, d/b/a/ AmerenUE, Respondent.**

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and eight (8) conformed copies of the **STAFF RESPONSE TO COMMISSION'S JANUARY 8, 2002 ORDER DIRECTING FILING RESPONSE REGARDING DISCOVERY.**

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,

Steven Dottheim
Chief Deputy General Counsel
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Enclosure
cc: Counsel of Record



BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED³

JAN 09 2002

Staff of the Missouri Public Service Commission)

Missouri Public
Service Commission

v.)

Case No. EC-2002-1

Union Electric Company, d/b/a AmerenUE,)

**STAFF RESPONSE TO COMMISSION'S JANUARY 8, 2002 ORDER
DIRECTING FILING RESPONSE REGARDING DISCOVERY**

Comes now the Staff of the Missouri Public Service Commission (Staff) in response to the Missouri Public Service Commission's (Commission) January 8, 2002 Order Directing Filing Response Regarding Discovery concerning a discovery dispute between the Office of the Public Counsel (Public Counsel) and Union Electric Company (UE), d/b/a AmerenUE. The Commission stated in its January 8, 2002 Order that "[t]he Commission is especially interested in any circumstance under which it has previously used a special master to resolve a discovery dispute. . . . [T]he General Counsel is invited, but not ordered, to provide any such information at its disposal." In response to the Commission's January 8, 2002 Order, the Staff states as follows:

1. The only proceeding that the undersigned counsel is aware of for which the Commission used a special master was the rate proceeding wherein Kansas City Power & Light Company (KCPL) sought to put in rate base the Wolf Creek nuclear generating unit. The Commission utilized as a special master one of its own Hearing Examiners who was not

otherwise assigned to the KCPL rate case pending before the Commission. Attached hereto are pleadings of the Staff and KCPL and Orders of the Commission relating to this matter.


2. Undersigned counsel has been advised by other members of the Staff that the Commission itself as a party in a Federal Energy Regulatory Commission (FERC) Williams Natural Gas Company (Williams) pipeline rate proceeding, Docket No. RP94-365-000, pursued in 1995 the utilization of the FERC Administrative Law Judge to rule on claims of Williams Natural Gas Company that certain documents sought in discovery by this Commission were protected under the attorney-client privilege and/or the attorney work product doctrine. Counsel has not had time to do anything other than identify that this event occurred. There are open public transcripts and in camera transcripts of how the Administrative Law Judge in that FERC proceeding handled this discovery dispute.

Unless the Commission indicates otherwise, the Staff will have the open public transcripts from this FERC proceeding reproduced for filing with the Commission and sent by electronic mail, overnight courier service or hand-delivered to UE, Public Counsel and all other parties. The Staff anticipates that this can be accomplished by 4:00 p.m., Thursday, January 10, 2002.

Wherefore the Staff submits this pleading and attachments in response to the Commission's January 8, 2002 Order Directing Filing Response Regarding Discovery.

Respectfully submitted,

DANA K. JOYCE
General Counsel

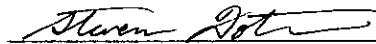

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Certificate of Service

I hereby certify that copies of the foregoing have been sent by overnight courier service, mailed by first-class mail or hand-delivered to all counsel of record as shown on the attached service list this 9th day of January, 2002.



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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of Kansas City Power & Light Company of Kansas City, Missouri, for authority to file tariffs) Case No. ER-85-128
increasing rates for electric service)
provided to customers in the Missouri)
service area of the Company.)

In the matter of the determination of in-service criteria for the Kansas City Power & Light Company's Wolf Creek Generating Station and Wolf Creek rate base and related issues.) Case No. EO-85-185

MOTION TO COMPEL PRODUCTION OF DOCUMENTS
AND REQUEST FOR APPOINTMENT OF SPECIAL MASTER

Comes now the Staff of the Missouri Public Service Commission (Staff) and for its Motion To Compel Production Of Documents states as follows:

1. Kansas City Power & Light Company (KCPL or Company) has refused to provide certain documents requested by the Staff during the course of its audit in the above-referenced cases claiming a right to withhold those documents based on either the attorney-client privilege or the attorney work product doctrine. Staff is aware of at least 700 such documents. However, this is not a complete number because the Company has not provided full lists of all documents that it has withheld from Staff nor has it provided any lists of documents being withheld by Kansas Gas & Electric Company (KGE) under these claims.

2. KCPL has alleged immunity for these documents in a blanket fashion by a statement in a cover document attached to lists of documents Company refuses to provide. This procedure utilized by Company does not meet the burden of showing that each communication sought to be withheld is work product or a privileged attorney-client communication and that the immunity or privilege has not been waived.

3. On March 26, 1985, Staff filed its First Set of Interrogatories to KCPL in which it sought information in an attempt to determine whether Company was withholding documents which should be

released because: (1) they do not meet the criteria for work product immunity (2) work product immunity has been waived, or (3) the immunity has terminated due to testimonial use of the document.

4. By letter dated April 15, 1985, (a copy of which is attached hereto as Attachment A) KCPL provided its "formal response" to Staff's First Set of Interrogatories. In essence, KCPL refused to respond to the interrogatories. In lieu of compliance with the interrogatories, KCPL offered to undertake review of withheld documents and provide certain documents which had been previously withheld. KCPL offered to attempt to complete this procedure by mid-May.

5. Staff does not consider Company's letter of April 15, to be in compliance with or responsive to Staff's First Interrogatories.

6. In its letter dated April 15, KCPL also stated that it no longer believes it would be helpful to involve a Special Master in the disclosure process and offered to disclose the non-privileged and non-immunized portions of only certain documents withheld by KCPL.

7. Staff is concerned that KCPL has applied an improper interpretation of the scope of the attorney-client privilege and the work product doctrine in withholding documents from the Staff. Also, Staff believes KCPL is applying an incorrect standard to determine the time at which documents which have been withheld during discovery must be made available to an opposing party for use at hearing.

8. The attorney-client privilege and the attorney work product doctrine are analyzed in detail in the attached Suggestions In Support Of Motion. Following is a brief discussion of the elements and applicability of the attorney-client privilege and work product doctrine. Because the following is intended to be a quick, easy-to-read summary, it is presented without citation. Please refer to the attached Suggestions for citations and references.

9. The Attorney-Client Privilege

- (a) Elements of the attorney-client privilege
 - (1) A communication
 - (2) Made in confidence
 - (3) To an attorney
 - (4) By a client
 - (5) For the purpose of seeking or obtaining legal advice
- (b) Waiver of the attorney-client privilege occurs when material which otherwise meets the elements of the privilege is disclosed to third persons. There is also precedent for finding that the privilege is waived if a privileged document is shown to a witness during his testimony to refresh his recollection or if a document is utilized to prepare for testifying.
- (c) If the attorney-client privilege only applies to a portion of a document, the remainder of the document which does not qualify as a privileged attorney-client communication must be made available. In some cases, the Courts have held that if the two types of communication are so tightly interwoven that the non-privileged communications are not severable, the entire document must be released.
- (d) The attorney-client privilege should be strictly construed because it is an exception to the general rule of full disclosure of facts relevant to the issue.
- (e) The proponent of the attorney-client privilege must prove that each element of the privilege is met with respect to each communication sought to be protected.

10. Attorney Work Product (work product immunity).

- (a) The elements of work product immunity are:
 - (1) document or tangible thing, otherwise discoverable
 - (2) prepared in anticipation of litigation or for trial
 - (3) by or for another party or by or for that other party's representative
- (b) The rationale for the work product immunity is to promote the adversary system by protecting documents that would reveal the attorney's work in preparation for a case. This is a "qualified privilege" or immunity from discovery, and is not an evidentiary privilege.
- (c) Attorney work product immunity is strictly construed because it is contrary to the general rule of full discovery of facts relevant to the issue.
- (d) Protected documents may be severable. If a document contains both information which is covered by the immunity and information which is not, the "non-immune" portion of the document must be provided.

- (e) There is a mixed burden of proof in instances where applicability of the doctrine is at issue. The party relying on the work product doctrine to immunize documents from discovery must demonstrate the applicability of the doctrine in the same manner as a proponent of the attorney-client privilege. The immunity must be specifically raised and demonstrated for each communication, and not asserted in a blanket fashion. Once the proponent shows that the material sought is work product, the burden of proof shifts to the party seeking discovery. That party must show a substantial need for the material and the inability to obtain the equivalent without undue hardship.
- (f) There are different standards of protection for "opinion" work product and "ordinary" work product.

11. Staff believes that the appropriate interpretation of the applicability of the attorney-client privilege and work product immunity would require KCPL to provide the following documents upon request or upon filing of prepared testimony:

- (a) All documents which were relied upon by the witness in preparation of prefiled testimony.
- (b) All documents reviewed by the witness during the preparation of prefiled testimony.
- (c) All documents which may include statements of the witness inconsistent with statements made by that witness in prefiled testimony.
- (d) All documents for which the attorney-client privilege has been waived by disclosure to third persons.
- (e) All documents which have previously been withheld which were not prepared for purposes of trial or anticipation of litigation.
- (f) Those portions of all documents to which the privilege or immunity do not apply.
- (g) Those documents which are required for the Company to carry its burden of proof on any issue in the above-referenced cases.

12. Staff requests the Commission order KCPL to produce all documents which fit the description set out in paragraph 10 above by May 15.

13. Staff requests the Commission order KCPL to respond fully to Staff's First Interrogatories by May 15.

14. Staff also requests the Commission to require KCPL to provide full lists of all documents currently withheld by both KCPL and Kansas Gas & Electric Company by May 15.

15. In addition, for those documents which KCPL continues to assert are protected by attorney-client privilege or work product immunity, Staff requests appointment of a Special Master to conduct in-camera proceedings to determine which documents being withheld by KCPL do qualify for immunity from discovery due to the attorney-client privilege or the work product doctrine. The Master should also determine which portions of documents being withheld should be released if the immunity or privilege only applies to a portion of an individual document.

16. Staff would suggest that the Special Master should be instructed to apply the criteria listed above as the appropriate scope of the work product and attorney-client rationales for withholding of documents and that the decisions of the Master should be final and binding on the parties.

17. Staff asserts that the most appropriate person to fulfill the role of a master would be one of the Commission's hearing examiners. Staff requests the Commission immediately issue an order soliciting the parties' recommendations of an appropriate Special Master.

18. Staff requests that utilization of a Master be instituted on an expedited basis so that any documents found to have been improperly withheld can be made available in time for the Staff to make meaningful use of them in the course of the hearings of this case.

19. Staff regrets making this request at this point in the proceedings, but wishes to advise the Commission that the reason for the delay has been the extent of Staff's efforts to attempt to resolve this matter informally with KCPL (see attached Suggestions). However, Staff feels that KCPL's failure to cooperate in this matter and its continued insistence on relying on an improper interpretation of its

right to withhold documents from Staff has precluded an informal resolution of this issue. Because of the volume of documents involved (over 700), Staff asserts that its audit of the Company is incomplete until these documents are provided or the question of their availability is settled.

WHEREFORE, Staff requests that the Commission issue its Order granting the relief sought hereinabove.

Respectfully submitted,

Mary Ann Young
Mary Ann Young
Deputy General Counsel

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Commission of Missouri
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CERTIFICATE OF SERVICE

I hereby certify that
copies of the foregoing
have been mailed or hand-
delivered to all parties of
record on this 3rd day of

May 1985
Mary Ann Young

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of Kansas City Power &)
Light Company of Kansas City,)
Missouri, for authority to file tariffs))
increasing rates for electric service)
provided to customers in the Missouri)
service area of the Company.)

Case No. ER-85-128

In the matter of the determination of)
in-service criteria for the Kansas City))
Power & Light Company's Wolf Creek)
Generating Station and Wolf Creek rate)
base and related issues.)

Case No. EO-85-185

SUGGESTIONS IN SUPPORT OF MOTION TO COMPEL

Comes now the Staff of the Missouri Public Service Commission (Staff) and for its Suggestions In Support Of Motion To Compel states as follows:

In the attached Motion, the Staff seeks the Commission's intervention in resolving a serious discovery dispute between Staff and Kansas City Power & Light Company (hereafter KCPL or Company). The purpose of these Suggestions in Support of that Motion is to apprise the Commission of the factual history behind that dispute and advise the Commission of the law in this area in the hope of assisting the Commission to resolve this difficult question.

The Staff regrets the length of these Suggestions but feels detailed analysis of the subject is essential to full consideration of its Motion to Compel. There are many aspects of the attorney-client privilege and work product doctrine that are not discussed herein. Some were deemed irrelevant to the instant facts. Others did not merit initial attention, but may require discussion in subsequent pleadings prior to resolution of this issue. Because of the complexity of this question, Staff does not anticipate the issue will be fully resolved immediately. However, because many of the withheld documents presumably relate to Wolf Creek issues, Staff would request expedited treatment of this Motion so that all or some of the disputed

documents can be reviewed and/or released in time for meaningful use prior to Staff's Phase IV filing deadline on June 21, 1985.

Due to the length of these Suggestions, a table of contents of the remainder of the document follows for ease of reference.

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INTRODUCTION

It is "the general rule of the Anglo-Saxon law of evidence that any witness with knowledge of the facts at issue may be called to testify about what he knows. This general principle of full disclosure leads to a reluctance to suppress the truth, even under a claim of . . . privilege." American Bar Association, The Attorney-Client Privilege and the Work Product Doctrine, 8-9. (1983)

In Bethell v. Porter, 595 S.W.2d 369, 377 (Mo. App. 1980), the court observed that "the rules of discovery are designed and interpreted to aid the court and litigants in determining the facts in issue prior to trial. . ." It is axiomatic that "discovery should provide a party with access to anything relevant to the proceedings and subject-matter of the case not protected by privilege." State ex rel. Houser v. Goodman, 406 S.W.2d 121, 124 (Mo. App. 1966).

The Public Service Commission's authorizing statute at Section 386.410 RSMo 1978, provides that:

[A]ll hearings before the commission or a commissioner shall be governed by rules to be adopted and prescribed by the commission. And in all investigations, inquiries or hearings the commission or commissioner shall not be bound by the technical rules of evidence.

The Commission has promulgated regulations, pursuant to said enabling authority, to govern proceedings before it. Commission Rule 4 CSR 240-2.090(1) gives parties the right to propound interrogatories to opposing parties on the same conditions as in civil actions. The appropriate civil rules are established by the Missouri Supreme Court in Supreme Court Rules 56.01, 57.01 and 61.01.

The scope of permissible discovery is delineated in Rule 56.01(b)(1) as follows:

(1) In General. 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 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 grounds 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. (emphasis added)

Rule 57.01(a) sets out the availability and procedures for using interrogatories in civil actions:

Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and petition upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in detail in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve copy of the answers and objections, if any, within 20 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and petition upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatory may move for an order under Rule 61.01(b) with respect to any objection to or other failure to answer an interrogatory.

Rule 61.01(a) and (b) establish the sanctions available against a party for failure to answer interrogatories:

(a) Failure to Act -- Evasive or Incomplete Answers. Any failure to act described in this Rule may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has filed timely objections to the discovery request or has applied for a protective order as provided by Rule 56.01(c).

For the purpose of this Rule, an evasive or incomplete answer is to be treated as a failure to answer.

(b) Failure to Answer Interrogatories
If a party fails to answer interrogatories or file objections thereto within the time provided by law, or if objections are filed thereto which are thereafter overruled and the interrogatories are not timely answered, the court may, upon motion and reasonable notice to other parties, make such orders in regard to the failure as are just and among others the following:

(1) An order striking pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or render a judgment by default against the disobedient party.

(2) Upon the showing of reasonable excuse, the court may grant the party failing to answer the interrogatories additional time to file answers but such order shall provide that if the party fails to answer the interrogatories within the additional time allowed, the pleadings of such party shall be stricken or the action be dismissed or that a default judgment shall be rendered against the disobedient party.

As indicated above in Rule 56.01(b)(1), certain information may be withheld from discovery if it is privileged. Staff believes there are strong policy arguments that the Commission (and its Staff) should have unrestricted access to the books and records of utility companies it regulates. However, the Staff will not pursue such an argument herein because the Commission has specifically adopted the evidentiary rules of "privilege" in its proceedings in 4 CSR 240-2.130(5) which states in part that:

[T]he rules of privilege shall be effective to the same extent that they are now or may hereafter be in civil actions.

Recognizing that the "rules of privilege" do apply and that KCPL has invoked such "rules" as a basis for withholding documents from the Staff, the following questions arise:

- 1) What is scope of KCPL's ability to withhold documents from the Staff?
- 2) What actions must the Company take to invoke and carry its initial burden of proof of the "privileges"?
- 3) What constitutes termination of or waiver of the "privileges"?
- 4) Who should determine which documents can properly be withheld?

In refusing to provide certain documents to the Staff, the Company has relied on both the attorney-client privilege and the attorney work product doctrine. The attorney-client privilege is clearly an evidentiary privilege. The work product doctrine, on the other hand, provides immunity from discovery. ABA Attorney Client

Privilege, supra. It is, however, also referred to as a privilege or a qualified privilege. One clear common aspect of the two is that they are exceptions to the general rule of full disclosure of facts relevant to the issue. A particularly instructive statement of the rationales for and distinction between the attorney-client privilege and the work-product privilege is found in the U.S. v. American Telephone and Telegraph Co. decision:

The attorney-client privilege exists to protect confidential communications, to assure the client that any statements he makes in seeking legal advice will be kept strictly confidential between him and his attorney; in effect, to protect the attorney-client relationship. . . .

By contrast, the work product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent. The purpose of the work product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential relationship, in order to encourage effective trial preparation. In the leading case on the work product privilege, the Supreme Court stated: "Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." (emphasis added) 642 F.2d 1285, 1299 (D.C. Cir. 1980).

Because of the fact that Courts often refer to the work product doctrine as providing a privilege, Staff assumes for purposes of this document that 4 CSR 240-2.130(5) cited above applies to both attorney-client privilege and attorney work product.

The discussion following will analyze each rationale and its elements separately. Work Product will be addressed first because it is the "privilege" cited for the vast majority of documents being withheld by KCPL.

WORK PRODUCT

1. Elements of Work Product Immunity

The Missouri Supreme Court Rule of Civil Procedure 56.01(b)(1) and (3) is a concise statement of the black letter law concerning the immunity of "work product." It states:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.

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.

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

(Emphasis added) Thus, work product immunity applies where there is:

- 1) A document or tangible thing, otherwise discoverable;
- 2) Prepared in anticipation of litigation or for trial;
- 3) By or for another party or by or for that other parties' representative.

Work product immunity is only a qualified privilege, and provides limited immunity from discovery which can be overcome by a showing that the party seeking discovery has a substantial need for the materials and no available substitute for them.

Element No. 2) listed above may come into play in the instant facts. A distinction should be made in regard to this element as to whether a particular document was prepared in anticipation of litigation or in the ordinary course of business. If a report or document was prepared in the ordinary course of business, it has no work product protection.

The second sentence of Missouri Rule 56.01(b)(3) indicates that Missouri follows the general rule that there are two types of

work product. The first category is "ordinary" work product which refers to factual information obtained by or under the direction of an attorney. Ordinary work product immunity can be overcome by showing substantial need and undue hardship in obtaining an equivalent. The second class of work product is referred to as "opinion" work product: "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation". Mo.R.C. 56.01(b)(3). The Rule requires the Court to protect against disclosure of opinion work product, which generally provides absolute immunity and complete privilege from disclosure. Spear v. Davis, 596 S.W.2d 499 (Mo. App. 1980).

2. Burden of Proof

The burden of proof is initially upon the party relying on the work product doctrine to withhold documents from discovery. That party must prove that the document or tangible sought constitutes work product. A blanket statement is not sufficient to claim the privilege. State ex rel. Friedman v. Provaznik, 680 S.W.2d 76, 80 (Mo. banc. 1984).

However, a blanket statement is the only way to describe the method by which KCPL has asserted its intent to withhold certain documents to the Staff, under argument of privilege. The privilege is raised in a cover statement containing the following language attached to lists identifying documents withheld:

"The following document from the files of (name of Company employee) are considered by KCPL to be privileged in that (1) they are attorney-client communications, or (2) they constitute documents prepared in anticipation of litigation of adversarial proceedings by or for KCPL's representatives (including its attorneys, consultants, agents or employees), or such persons with whom KCPL will jointly participate in litigation or adversarial proceedings, and include the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of KCPL, or its joint participants, concerning the litigation or adversarial proceedings. KCPL therefore exercises its privilege with regard to those documents and declines to produce them in response to this data request."

The Staff's position is that if KCPL asserts work product immunity, KCPL must provide certain information to support its assertion. Thus, the Staff has asked that KCPL provide a list of each document it seeks to protect, identify the document without disclosing any of the material asserted to be covered by the attorney-client privilege or work product immunity, and indicate on what basis the document is being withheld from the Staff.

Once Company has made a showing that the documents being withheld are work product, the burden shifts to the Staff to show that it has a substantial need for the documents and that there is no substitute for those documents available to Staff without undue hardship.

A. Substantial need

Staff believes it can clearly meet the substantial need requirement. There is a strong public policy argument for broad Commission authority to obtain information and production of records and documents of regulated utilities.

Section 386.040 RSMo 1978 provides that the Public Service Commission

shall be vested with and possessed of the powers and duties in this chapter specified and also all powers necessary or proper to enable it to carry out fully and effectually all the purposes of this chapter.

The courts have long held that the policy underlying the Public Service Commission Law is the protection of the public. State ex rel. Electric Co. of Missouri v. Atkinson, 204 S.W. 897, 899 (Mo. 1918). In order to effectuate this policy, the act establishes a scheme of regulation which confers upon the Commission the duty to closely scrutinize every aspect and feature of a utility's operation. As the Missouri Supreme Court noted in State on info. Barker ex rel. Kansas City v. Kansas City Gas Co., 163 S.W. 854, 857-58 (Mo. 1913), the Missouri Public Service Commission Act

. . . is an elaborate law bottomed on the police power. It evidences a public policy hammered out on the anvil of public discussion. It apparently recognizes. . . that state regulation takes the

place of and stands for competition; that such regulation, to command respect from patron or utility owner, must be in the name of the overlord, the state, and to be effective, must possess the power of intelligent visitation and the plenary supervision of every business feature to be finally (however invisible) (sic) reflected in rates and quality of service. It recognizes that every expenditure, every dereliction, every share of stock, or bond, or note issued as surely is finally reflected in rates and quality of service to the public, as does the moisture which arises in the atmosphere finally descend in rain upon the just and unjust willy nilly. (emphasis supplied).

The Commission's ability to perform this regulatory function in the exacting manner envisioned by the Court in Barker necessarily assumes that the Commission will have broad access to any information relevant to the quality and price of a utility's services. The legislature has ensured such access through the enactment of a number of statutory provisions.

In the course of exercising general supervision over public utilities, Section 386.320.3 RSMo 1978 provides that:

The commission and each commissioner shall have power to examine all books, contracts, records, documents and papers of any person or corporation subject to its supervision, and by subpoena duces tecum to compel production thereof. In lieu of requiring production of originals by subpoena duces tecum, the commission or any commissioner may require sworn copies of any such books, records, documents, contracts and papers or parts thereof to be filed with it.

Similar grants of authority to examine the books, records, documents and papers of a public utility are also conferred upon the Commission by those statutory provisions governing the Commission's power over specific types of utilities. See Sections 387.310.2 (common carriers), 392.210.2 (telephone and telegraph companies), 393.140.8 and .9 (gas, water, electric and sewer companies).

A noteworthy feature of these statutory grants of authority is their complete lack of any restrictions regarding the type of information which the Commission may examine or require a corporation to produce.

The extent to which the legislature intended to provide the Commission with plenary access to utility documents is further

indicated by those specific statutory provisions which have been established for the purpose of encouraging the production of information relevant to Commission proceedings. In addition to its power to issue subpoenas duces tecum under Section 386.320.3 and related statutes, the Commission and other parties may also:

. . . cause the deposition of witnesses residing within or without the state to be taken in the same manner prescribed by law for like depositions in civil actions in the circuit courts of this state and to that end may compel the attendance of witnesses and the production of books, weigh bills, documents, papers, memoranda and accounts. Section 386.420.2 (emphasis supplied).

In order to facilitate the Commission's access to information, the legislature has also prescribed penalties in those instances where a person, without reasonable cause, fails to provide information sought under the procedures described above. Thus, under Section 386.460, any person who unreasonably refuses to obey a subpoena, or produce a book or paper when ordered to do so by the Commission or a Commissioner, is deemed guilty of a misdemeanor, punishable by a fine of \$100 to \$1,000, imprisonment up to one year in the county jail, or both. Id.

Finally, the statutes encourage the production of relevant information by providing persons who produce such information in Commission proceedings with a limited immunity from prosecution. Section 386.470.

When read together, the statutory provisions delineated above evidence a strong legislative intent to provide the Commission with broad access to any information relevant to the performance of its statutory duties. In enacting these statutes, the legislature has merely recognized that as an administrative agency charged with protecting the public interest, the Commission has a special need to obtain relevant information; a need which fully justifies the broad discovery powers conferred upon it; and a need which fully justifies the Staff's access to documents which otherwise qualify as work product which are being withheld by the Company.

Missouri courts have also issued several decisions which evidence an underlying preference for facilitating the production or disclosure of relevant information in Commission proceedings. For example, in State ex rel. Missouri Public Service Commission v. Southwestern Bell Telephone Co., 645 S.W.2d 44 (Mo. App. 1982), the Western District Court of Appeals upheld a Commission regulation which authorized the use of written interrogatories in Commission proceedings. The Court noted that the Commission possessed the authority to permit the use of written interrogatories under Section 386.410.1 to adopt its own rules of procedure. The Court noted that this authority was "a rather uncommon grant to an administrative agency." Id. at 50.

The Courts have also implicitly recognized that special policy considerations may dictate disclosure of relevant information in Commission proceedings even though such information might otherwise be protected from disclosure in another type of proceeding. Thus, in State ex rel. Utility Consumers Council v. Public Service Commission, 562 S.W.2d 688, 694 (Mo. App. 1978), the Eastern District Court of Appeals rejected a utility company's argument that it need not furnish certain information during the course of a Commission hearing on the grounds that the data was entitled to protection as being proprietary. The Court stated as follows:

The Company proffered testimony and exhibits based on proprietary information to carry its burden of proof and, thereby, benefit from the use of such information, then it may not protect that information from scrutiny by claiming it need not disclose. Furthermore, when the subject matter under consideration is of such importance to the public welfare, we believe that the public interest requires full disclosure of relevant information on cross-examination. 562 S.W.2d at 694.

Staff acknowledges that proprietary information is not a discovery or evidentiary privilege. However, it does indicate the Missouri Court's recognition of the exceptional importance to the public welfare of the Commission's function.

Because of the Staff's need to review documents relevant to the Company's rate increase request, Staff believes that it does have a substantial need for access to the documents being withheld by Company under argument of work product.

B. Undue Hardship In Obtaining Substantial Equivalent

Initially, Staff would point out that there is no substantial equivalent to the documents being sought, because they are all internal correspondence within KCPL.

An alternative which might be otherwise usable would not be of benefit in this situation is the taking of depositions of the persons in whose files these documents are contained or who are the authors or recipients of the documents. However, at this stage of the proceedings, Staff does not have adequate resources to depose those persons, and in addition, Staff cannot seek access to documents otherwise protected by the work product immunity through an alternative discovery method including the taking of depositions. State ex rel. Missouri Public Service Company v. Elliott, 434 S.W.2d 532, 536 (Mo. banc. 1968).

3. Waiver or Termination of Privilege

Work product immunity is solely a limitation on pretrial discovery and is not an evidentiary privilege. Halford v. Yandell, 558 S.W.2d 400 (Mo. App. 1977), Hickman v. Taylor, 67 S.Ct. 385 (1947) and United States v. Nobles, 95 S.Ct. 2160, 2172 (1975).

Documents used in testimony must be made available to an opposing party who seeks them. The only statutory limitation on the right of a litigant to require the production of documentary evidence at trial is contained in the second paragraph of Section 491.100. State v. Scott, 407 S.W.2d 79 (Mo. App. 1966).

The Halford v. Yandell case is the leading Missouri case on this subject. In Halford, plaintiff sought protection of a written statement given by plaintiff's employee to an employee of a claims adjuster investigating a collision of two trucks on behalf of plaintiff's collision insurer. The statement was utilized by

defendant for purposes of impeaching the plaintiff's employee. The Halford court quoted at length from the U.S. v. Nobles case, which is the leading federal case on this subject. Stating that Nobles, the Supreme Court held "that where a party makes testimonial use of work product material, the work product doctrine is waived with respect to matters covered in the testimony." 558 S.W.2d 400, 406. The Halford opinion includes the following quote from Nobles, with emphasis added by the Missouri court:

The reasons for largely confining the work-product rule to its role as a limitation on pretrial discovery are compelling. First of all, the injury to the fact-finding process is far greater where a rule keeps evidence from the fact-finder than when it simply keeps advance disclosure of evidence from a party or keeps from him leads to evidence developed by his adversary in which he is just as well able to find by himself. In the main, where a party seeks to discover a statement made to an opposing party in order to prepare for trial, he can obtain the "substantial equivalent . . . by other means," Fed. Rule Civ. Proc. 26(b)(3), i.e., by interviewing the witness himself. A prior inconsistent statement in the possession of his adversary, however, when sought for evidentiary purposes - i.e., to impeach the witness after he testifies - is for that purpose unique. By the same token, the danger perceived in Hickman that each party to a case will decline to prepare in the hopes of eventually using his adversary's preparation is absent when disclosure will take place only at trial. Indeed, it is very difficult to articulate a reason why statements on this same subject matter as a witness' testimony should not be turned over to an adversary after the witness has testified. The statement will either be consistent with the witness' testimony, in which case it will be useless and disclosure will be harmless; or it will be inconsistent and of unquestioned value to the jury. Any claim that disclosure of such a statement would lead the trial into collateral and confusing issues was rejected by this court in Jencks v. United States, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957), and by Congress in the legislation which followed." At pages 2174-2175 cf 95 S.Ct. (emphasis added) cited in Halford at 408.

The Halford Court also quoted a Wisconsin Supreme Court case, Shaw v. Wuttke, 137 N.W.2d 649, 653 (Wis. 1965) as follows:

We hold the immunity of the attorney's work product in respect to a written statement ceases to exist when the person making the statement is placed on the stand as a witness at the trial. By becoming a witness the person subjects himself to the risks of impeachment and the attorney has had the benefit of his work product.

This raises the question of when the "trial" commences in Commission proceedings. Staff asserts that once a witness prefiles testimony, it is the equivalent of taking the stand for live testimony in a civil proceeding. In Attachment A, Company has attempted to characterize prefiling of testimony as part of the discovery proceeding. Staff cannot agree with this characterization, and would urge the Commission to the opposite finding. In support of this position, Staff would refer the Commission to the following facts.

1) Prepared Direct Testimony which is prefiled with the Commission is precisely that: prefiled testimony.

2) When a witness who has prefiled testimony actually takes the stand and is sworn in, his initial "live" testimony is generally to adopt his prefiled testimony as though it were given "live" on the stand.

3) The swearing in and adoption of prefiled testimony is basically a duplication of the affidavit and testimony prefiled with the Commission.

4) On occasion, the prefiled testimony of witnesses is accepted into evidence without the necessity of the witness actually taking the stand.

Clearly, the prefiling of testimony with the Commission goes far beyond mere discovery and should be characterized as the equivalent of "taking the stand" in civil trials. Staff could find no cases specifically addressing the issue of when a "trial" commences in administrative proceedings such as those held before the Commission. Staff would, however, point out the following distinctions between civil and criminal trials and rate case proceedings before the Commission. The statutory operation-of-law date places certain time constraints upon the Commission which do not confront a civil or criminal court. Therefore, whereas a court could (and most likely would) grant a continuance or suspend proceedings in a trial to permit a party to review documents for which work product immunity is waived because of testimony given on the stand in reliance on previously protected documents, the eleven month statutory operation-of-law

period contained in Sections 393.140(11) and 393.150 RSMo 1978 would not be conducive to such an approach.

Staff would also suggest that the Commission give a broad interpretation to the criteria that requires disclosure of documents relied on by witnesses in their testimony. Staff would suggest that any document actually relied upon or reviewed by a witness in preparation of testimony should be provided to Staff upon the prefiling of that testimony. Staff believes that documents reviewed, even though they are not directly relied on in testimony arguably color the testimony of the witnesses in this case.]

Another rationale for requiring disclosure of documents at the time of prefiling of testimony is that it could be said that any documents reviewed by witnesses in that process were utilized to "refresh the witnesses memory". Staff would suggest the Commission look to and utilize the provisions of Federal Rule of Evidence 612 which provides that

"if a witness uses a writing to refresh his memory for the purpose of testifying, either -

- 1) While testifying, or
- 2) Before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in-camera, excise any portions not so related and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this Rule, the court shall make any order justice requires, . . ."

Staff submits that it is indeed "in the interest of justice" for the Commission to require the Company to provide any documents reviewed by witnesses for purposes of preparing prefiled testimony.

Prior statements of a witness are also discoverable for purposes of impeachment. Apparently, this rule has been brought home

to the Company, as they have agreed to provide all documents for which work product was previously claimed which were authored by witnesses who have prefiled testimony.

4. Severability of Documents

If a document contains both information which is covered by the immunity and information which is not, the portion of the document must be divulged which is not privileged. Some of KCPL's listings of documents being withheld indicate specifically that the privilege is invoked only as to a portion of the particular document.

5. Who Should Decide Which Documents are "Immune"?

Staff submits that because of the unwillingness of Company to release documents to Staff, Company's unreasonable application of the work product doctrine, and public policy discussed above in paragraph 2.A. (pages 7-11 infra), at this point in the proceedings, the Company is not the appropriate party to determine which documents should be withheld from Staff because of the work product doctrine. Staff suggests that the Commission should appoint a Special Master to conduct in-camera proceedings to review documents being withheld from Staff by the Company at the time of those proceedings to determine whether those documents should in full or in part be released to the Staff either because they do not meet the requirements for work product immunity or because the Staff has met its burden of proof of necessity and undue hardship in obtaining a substitute. The subject of a Special Master is further discussed in a heading so entitled later in these suggestions.

THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is the oldest of the privileged communications, and its common law roots can be traced back to the 1500's. Wigmore, A Treatise on the Anglo-American System of Evidence (1940) Section 2290. According to Wigmore, the purpose of the privilege is to promote freedom of consultation of legal advisors

by clients. Id. Section 2291. Wigmore has defined the common law privilege as follows:

1. Where legal advice of any kind is sought
2. from a professional legal advisor in his capacity as such
3. the communications relating to the purpose
4. made in confidence
5. by the client
6. are at his instance permanently protected
7. from disclosure by himself or by the legal advisor
8. except the protection be waived. Id.

In Missouri, this common law privilege has been codified at Section 491.050 which provides:

The following persons shall be incompetent to testify:

(3) An attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the consent of such client.

This section is declaratory of the common law and was not intended to limit or diminish the common law attorney-client privilege. State ex rel. Great American Insurance Co. v. Smith, 574 S.W.2d 379 (Mo. 1978).

1. Elements of the Attorney-Client Privilege

A. An Attorney-Client Relationship

Obviously, for the attorney-client privilege to apply, the attorney must be consulted in his capacity as an attorney. See Canada v. United States, 354 F.2d 849 (8th Cir. 1975). Communications between attorneys and non-attorneys are not protected when an attorney-client relationship never existed (see In Re Huffman's Estate, 111 S.W. 848, 132 Mo. App. 44 (1908)) and they are not protected when the attorney-client relationship arises after the communication has been made. State ex rel. Great American Insurance Co. v. Smith, supra.

The Staff does not question the fact that an attorney-client relationship exists between KCPL and the attorneys in its General Counsel's office. However, since KCPL is a corporation and can only act through its employees, there may be questions about whether the attorney-client privilege applies to specific communications between

certain KCPL employees and the legal Staff (see paragraph 3, pp. 17-18 *infra*).

B. Communication

The privilege protects both communications from the client to the attorney, and from the attorney to the client. McCaffrey v. Estate of Brennan, 533 S.W.2d 264 (Mo. App. 1976), State ex rel. Great American Insurance Company v. Smith, *supra*. (But modern authority indicates that communications from the attorney to the client are only privileged to the extent that they relate to legal opinions on privileged facts disclosed by the client - see Brinton v. Department of State, 636 F.2d 600 (D.C. Cir. 1980)). It covers oral, written, and other communications, (State v. Fingers, 564 S.W.2d 579 (Mo. App. 1978), State ex rel. Terminal R. Ass'n. of St. Louis v. Flynn, 257 S.W.2d 69, 363 Mo. 1065 (1953), State v. Hardin, 558 S.W.2d 864 (Mo. App. 1977)), and it applies to the authorized representatives of attorneys and their clients where these representatives are employed as "media of communications". State v. Panter, 536 S.W.2d 481 (Mo. App. 1976) State ex rel. Cain v. Barker, 540 S.W.2d 50 (Mo. 1976).

However, the privilege does not extend to third parties when they are not so employed. For example, it was held that the privilege did not extend to communications between a client and a psychiatrist employed by his attorney for purposes of obtaining an opinion to support the client's defense. State v. Carter, 641 S.W.2d 54, (Mo. 1982), certiorari denied 103 S.Ct. 2096 (1982). Similarly, the privilege did not protect information which an attorney obtained from a witness, while acting on behalf of his client. State ex rel. Mueller v. Dickson, 456 S.W.2d 594 (Mo. App. 1970).

For purposes of this discussion, what this means is that any communication between a KCPL employee and a non-attorney is not privileged, unless the recipient of the communication constituted a "media" of communicating with the attorney. Also, communications generated by the KCPL legal staff are not privileged unless they are being ultimately communicated to the client, KCPL.

C. Type of Communications Protected

The privilege is designed to protect only those communications dealing with attorney-client business. Thus, a communication between a KCPL attorney and another KCPL employee is not privileged unless it deals with a subject on which legal advice has been sought or is being given. Also, any extraneous matters mentioned in the course of an otherwise privileged communication are not privileged. State v. Fingers, supra. See paragraph 5 below regarding severability.

2. Exceptions, Waivers, Etc.

A. Express Waiver by Client or Failure to Assert

The attorney-client privilege is clearly the client's alone to claim. State v. Carter, supra. Therefore, if the client expressly waives the privilege, or declines to exercise it, it ceases to exist. Although Staff does not argue that KCPL has expressly waived the privilege, KCPL has clearly not effectively asserted it as to any of the documents currently withheld.

B. Implicit Waiver by Client

The purpose of the attorney-client privilege is to preserve the confidentiality of communications between an attorney and client. Once the confidentiality of a communication is destroyed, the privilege serves no purpose, and is therefore implicitly waived. As a result, if a communication is made in the presence of a third party, who is not essential to the transmission of the information or necessary for the protection of the client, the privilege does not apply. State v. Fingers, supra, Kratzer v. Kratzer, 595 S.W.2d 453 (Mo. App. 1980).

If KCPL has shared information with any outside person or organization, the information will not be protected by the attorney-client privilege. This could apply to consultants, government agencies, or even some of KCPL's own employees.

C. Underlying Facts Discoverable

The attorney-client privilege protects communications and nothing more; the facts underlying a communication are not at all protected by the privilege. State v. Cloyd, 394 S.W.2d 408 (Mo. banc 1965), Upjohn v. United States, 449 U.S. 383, 1101 S.Ct. 677, 66 L.Ed.2d 584 (1981) 395-96. This means that KCPL cannot immunize information from discovery merely by communicating it to an attorney. Though all or part of the communication itself may still be privileged, the communicator can be deposed or cross-examined about any relevant information, otherwise discoverable, that was contained in the communication. Also, documents which were not part of the communication remain discoverable.

D. Issue Injected by Privileged Party

Where an issue relating to the privileged communication has been injected into the proceeding by the party claiming the privilege, the privilege may be waived. For example, in Underwood v. State, 553 S.W.2d 869 (Mo. App. 1977), the appellant claimed that the trial court erred by admitting his trial counsel's testimony regarding the appellant's mental status before and at the time of his guilty plea. The Court held that the privilege, even if otherwise applicable, had been waived when the appellant raised the issue of his mental incompetency. The State ex rel. Utility Consumer's Council v. Public Service Commission (discussed above at pages 7-11) provides support for applying this same test to find waiver in this instance.

E. Waiver by Partial Disclosure

Similarly, when a party voluntarily discloses some privileged communications to gain an advantage in litigation, he waives the privilege with regard to any other privileged communications related to the issue. This is because "the privilege of secret consultation is intended only as an incidental means of defense and not as an independent means of attack, and to use it in the latter character is to abandon it in the former." In Re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982) at 818.

3. The Attorney-Client Privilege in the Corporate Setting

Obviously, special problems arise when a corporation seeks to invoke the attorney-client privilege. A corporation can only communicate through its agents, and it is usually difficult to determine when communications from which agents will be protected. In fact, it is only in the recent past that federal courts have firmly established that the privilege applies to corporations at all. Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir. 1963) cert. denied, 375 U.S. 929, (1963).

In grappling with this problem, the federal courts developed several different tests for applying the privilege to corporations. (See United States v. United States Machinery Corp., 89 F. Supp. 357 (Mass. Dist. Ct. 1950), City of Philadelphia v. Westinghouse Electric Corp., 210 F.Supp. 483 (E.D. Pa. 1962), mandamus and prohibition denied sub nom., General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d. Cir. 1962) cert. denied, 372 U.S. 943 (1963), and Harper & Row Publishers Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970) aff'd mem. by an equally divided court, 400 U.S. 348 (1971).)

In Upjohn v. United States, 449 U.S. 383 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), the Supreme Court attempted to resolve, once and for all, the confusing state of affairs regarding the attorney-client privilege in a corporate setting. In that case, the IRS was investigating some questionable payments allegedly made by Upjohn employees to foreign government officials in order to secure government business. The IRS sought to discover the answers to a questionnaire sent by Upjohn's General Counsel to all of the Company's foreign managers in the course of an internal investigation of the payments, and the General Counsel's notes and memoranda resulting from interviews with employees taken during the investigation.

In holding that the privilege applied to these communications, the Court rejected the test employed by the lower court and instead insisted that the applicability of the privilege should be resolved on a case-by-case, nonformulistic basis.

Nonetheless, the Court enunciated a set of "operative facts" which may give rise to a valid assertion of the privilege.

Specifically, the Court implied that corporations could be reasonably certain communications would be protected where:

1. The communications were made by employees to counsel;
2. Communications were made in order to secure legal advice;
3. Communications were made at the direction of corporate superiors;
4. The information communicated was not available from upper-echelon management;
5. Communications concerned matters within the scope of the employees' corporate duties;
6. Employees were sufficiently aware that they were being questioned so that the corporation could secure legal advice; and
7. Communications were made and kept in confidence. Id. at 395.

4. Burden of Proof

Where the privilege is claimed, "the party invoking the privilege has the burden of establishing the existence of the attorney-client relationship and the confidential nature of the communication." In re Grand Jury Proceedings in Matter of Freeman, 708 F.2d 1571, 1575 (11th Cir. 1983); United States v. Ponder, 475 S.W.2d 37, 39 (5th Cir. 1973). Assertion of the privilege cannot be invoked through a blanket refusal to provide information; "rather, the privilege must be established with respect to each question sought to be avoided." Marshall v. J. P. Stevens Emp. Ed. Committee, 495 F. Supp. 553, 559 (E.D.N.C. 1980).

"It is the essence of the (attorney-client) privilege that it is limited to those communications which the client either expressly made confidential or which he could reasonably assume under the circumstances would be understood by the attorney as so intended." McCormick, Evidence, Section 91, p. 187 (Cleary ed. 1972). The mere relationship of attorney-client does not warrant a presumption of confidentiality. In re Grand Jury Proceedings, 727 F.2d 1352, 1356 (4th Cir. 1984). "The proponent (of the privilege) must establish not only that an attorney-client relationship existed, but also that the particular communications at issue are privileged and that the privilege was not waived." United States v. Jones, 696 F.2d 1069,

1072 (4th Cir. 1982). See also United States v. Bump, 605 F.2d 548, 551 (10th Cir. 1979); United States v. United Shoe Machinery Corp., 89 F.Supp. 357, 358-59 (Mass. 1950).

Clearly, KCPL has not met its burden of raising and proving applicability of the privilege. The privilege has been raised by a statement in a cover document attached to lists of documents Company refuses to provide Staff in the following language:

"The following documents from the files of (name of Company employee) are considered by KCPL to be privileged in that (1) they are attorney-client communications, or (2) they constitute documents prepared in anticipation of litigation of adversarial proceedings by or for KCPL's representatives (including its attorneys, consultants, agents or employees), or such persons with whom KCPL will jointly participate in litigation or adversarial proceedings, and include the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of KCPL, or its joint participants, concerning the litigation or adversarial proceedings. KCPL therefore exercises its privilege with regard to those documents and declines to produce them in response to this data request."

Staff submits that KCPL should now be required to properly raise and prove its assertion of privilege if it wishes to continue to withhold documents.

5. Severability of Documents

Some of KCPL's listings of withheld documents indicate that the attorney-client privilege is invoked only as to a portion of a particular document. This is also an area where the Company's interpretation of the privilege may merit intervention by the Commission not so much to determine to which documents the attorney-client privilege applies or for which documents severability is possible but more to determine which document should be revealed despite the attorney-client privilege because of waiver of that privilege. The Staff would recommend that the Commission determine the appropriate scope of the attorney-client privilege, instruct the Company as to that scope, and order provision of documents which do not fall within it. As will be discussed subsequently, the Courts

have not favored in-camera review of documents within the attorney-client privilege.

6. Who Should Decide Which Documents are Privileged?

In the case State ex rel. Great American Insurance Company v. Smith, 574 S.W.2d 379 (Mo. banc 1978), the Missouri Supreme Court refused to adopt a rule allowing the utilization of an in-camera examination by the Court of attorney-client communications for purposes of determining whether documents which had already been determined to be privileged should nonetheless be provided to opposing parties. The Court reasoned that such a rule would do considerable harm to the traditional attorney-client relationship. Thus, if the Commission appoints a Special Master to oversee resolution of the discovery problems outlined herein, the Master should not be given authority to actually review documents proven by the Company to be within the attorney-client privilege.

However, the Special Master could examine evidence brought forth by the Company to determine whether they have met the burden of proof that the document does fall within the attorney-client privilege and to examine any evidence as to whether the privilege has been waived as to any particular document.

DISCOVERY HISTORY

On March 22, 1985, the Commission issued an Order Granting Motion in Case Nos. ER-85-128 and EO-85-185 in which it expressed disappointment that the parties have been unable to resolve many of the procedural disputes in the case among themselves and stated that it hoped that the parties would attempt to work together in a more conciliatory manner in the future. The Staff has attempted throughout Case Nos. EO-84-147, ER-85-43, ER-85-128, and EO-85-185 to work with KCPL and any other party to the proceedings in a conciliatory manner. KCPL states in the last sentence of a letter which it filed with the Commission on April 16, 1985 in Response to the Staff's First Set Of Interrogatories Directed To Kansas City Power & Light Company that "KCPL has been solicitous of the Staff's time and resource

limitations, and we hope that whatever discovery matters remain may be resolved in a conciliatory manner by both of us." (Attachment A) To a degree, this statement mocks the history of discovery disputes between KCPL and the Staff. KCPL only arrived at the procedures that it outlined in said letter as a result of the Staff's filing with the Commission of its First Set Of Interrogatories Directed To Kansas City Power & Light Company. KCPL's statement is ironic in that the great lengths to which the Staff has attempted to work in a conciliatory manner with KCPL since the commencement of the audit in Case No. EO-84-147 in late January, 1984 have resulted in the Staff now seeking the assistance of the Commission. This step is being taken when all other efforts have produced unsatisfactory results and at a time in the proceedings in Case Nos. ER-85-128 and EO-85-185 when KCPL may assert and the Commission may agree that insufficient time remain to address the outstanding matters.

1. Chronology

The discovery disputes between the Staff and KCPL relating to KCPL's assertion of attorney-client privilege and work product immunity have been noted by the Staff in various pleadings filed by the Staff in Case Nos. EO-84-147, ER-85-43, ER-85-128, and EO-85-185. Following is a chronology of the events leading up to the filing of this motion.

January 30, 1984 - Staff submitted Staff Data Request No. 4 in Case No. EO-84-147 seeking all supporting data (studies, notes, memoranda, etc.) concerning the initial decision to build Wolf Creek, and all subsequent modifications to these documents.

April 3, 1984 - Staff submitted Staff Data Request No. 104 in Case No. EO-84-147 requesting review all of the files of the individuals that KCPL had designated as being members of "the Wolf Creek Team." Subsequent to April 3, 1984, KCPL suggested to the Staff that a review of the files of various former and present KCPL employees identified in Staff Data Request No. 104 would serve as KCPL's means of responding to Staff Data Request No. 4. Thus, the

Staff's audit in Case No. EO-84-147 evolved into a review of the files of certain present and former KCPL employees. This form of discovery was actually instituted at KCPL's behest. Although KCPL agreed to provide access to the files of the individuals identified in Staff Data Request No. 104 and any other individuals who likely would have the information requested in Staff Data Request No. 4, KCPL sought to protect from Staff scrutiny documents which it asserted and continues to assert are protected from discovery by attorney-client privilege and/or work product immunity. Regarding files that the Staff has requested to review, KCPL adopted the procedure of providing Staff access to those files after KCPL first removed documents it asserts are covered by attorney-client privilege and/or work product immunity. The list of documents withheld by KCPL have been provided to the Staff well after the Staff has completed its review of the files in question. In fact, the Staff has not yet received a complete listing of all documents being withheld by KCPL.

April 27, 1984 - In a meeting with KCPL wherein the Staff expressed its concern about KCPL's exercise of the privilege and the immunity, KCPL raised the possibility of the use of a Special Master to review the documents it was seeking to protect.

May 30, 1984 - In a meeting with KCPL, Staff expressed its concern about KCPL's exercise of the privilege and the immunity, and requested access to those portions of withheld documents to which the attorney-client privilege and/or work product immunity do not apply. The Staff did not at this time seek the Commission's intervention hoping that further discussions with KCPL on these matters might end in some resolution of the issue, so as to avoid the time and effort required if a Special Master and segregation of portions of documents were utilized. In particular, in discussions with KCPL commencing in May, 1984 and continuing into April, 1985, the Staff cited the holding in Halford v. Yandell, 558 S.W.2d 400 (Mo. App. 1977) regarding the waiver of work product immunity.

June 13, 1984 - A. Drue Jennings, counsel to KCPL, sent a letter to Steven Dottheim, Staff's lead counsel on this case, discussing Company's position regarding applicability of attorney-client privilege and work product immunity. A copy of this letter is attached as Attachment C).

August 13, 1984 - The Staff first advised the Commission of this matter in Case Nos. EO-84-147 and EO-82-88 in the Staff's Response In Opposition to KCPL's July 18, 1984 Motion. In its July 18, 1984 Motion, KCPL requested that the Commission issue an Order directing the Staff to file a report on its audit of the construction of Wolf Creek on or before January 15, 1985. At pages 14 and 31 through 39 of the Staff's Response and in Attachments B and F thereto, the Staff's efforts to resolve the discovery disputes with KCPL which existed at that point and which have persisted to this day were outlined in some, although not full, detail. The Staff's February 1, 1985 Report To The Commission On The Early Prehearing Conference in Case No. ER-85-128 at pages 16 through 18 further outlines the discovery disputes that have continued throughout these proceedings.

August 30, 1984 - The Commission issued its Suspension Order And Notice Of Intervention Deadline And Prehearing Conference in Case No. ER-85-43, the Commission directed that an early prehearing conference be held on September 20, 1984 and that the parties submit to the Commission a report on the early prehearing conference including a recommended schedule of proceedings.

September 20, 1984 through November 1, 1984 - At the early prehearing conference Staff, KCPL, and other parties to Case No. ER-85-43 engaged in discussions and negotiations seeking to resolve the matters raised in KCPL's August 17, 1984 Motion For Waiver Of Certain Minimum Filing Requirements, Approval Of Notice And Test Year, And Setting Of Certain Procedural Dates; the Staff's September 14, 1984 Response to KCPL's Motion; and the State of Missouri's Motion To Dismiss The Wolf Creek case. Central to the Staff's effort in this regard was an attempt to reach agreement with KCPL on a resolution of

the then outstanding discovery disputes regarding KCPL's assertion of attorney-client privilege and work product immunity. No resolution was every reached.

November 26, 1984 - KCPL filed Case No. ER-85-128 including its prepared direct testimony and schedules.

November 27, 1984 - The Staff inquired which documents for which KCPL had asserted work product immunity would now be provided to the Staff as a result of KCPL filing its prepared direct testimony and schedules. Counsel for KCPL stated that the lists of withheld documents would be reviewed and KCPL would determine whether the filing of its prepared direct testimony and schedules terminated applicability of the work product immunity for any of those documents.

December 21, 1984 - Counsel for KCPL stated that there had been a series of meetings at KCPL to address the question of whether KCPL's filing of its direct case would result in the release of documents asserted to be work product, but no decision had been made.

January 12, 1985 - Staff was advised by KCPL that it would be given KCPL's, but not KGE's, copies of drafts of reconciliation packages which KCPL previously had refused to provide on the grounds of attorney-client privilege and work product immunity. KCPL informed the Staff that KGE would continue to assert attorney-client privilege regarding its copies of draft reconciliation packages.

January 21, 1985 - At the early prehearing conference in Case No. ER-85-128, KCPL advised the Staff that KCPL's copies of drafts of reconciliation packages were the only "work product" documents that KCPL provide. As in prior dealings with KCPL, an attempt to resolve outstanding discovery disputes was central to the Staff's discussions and negotiations at the early prehearing conference in Case No. ER-85-128.

March 26, 1985 - Staff filed its First Set of Interrogatories.

April 16, 1985 - In response to the Staff's First Set Of Interrogatories, KCPL recognized the applicability of the Halford case

to its assertion of work product immunity. (See Attachment A) KCPL contends in its letter filed with the Commission on April 16, 1985 that not "until the affected witness takes the stand to adopt his testimony and stand cross-examination thereon" does the work product immunity "cease as to (a) prior inconsistent statements of the witness concerning the subject matter of his testimony, and (b) documents of which the witness made testimonial use." KCPL's letter noted that the Staff has maintained throughout this dispute that in the administrative setting of the Commission, where testimony is prefiled, the work product immunity ceases with respect to certain documents when a witness prefiles testimony.

April 19, 1985 - In compliance with its letter filed on April 16, 1985, KCPL provided to the Staff 92 documents that KCPL's witnesses had authored and which previously had been withheld by KCPL as protected by work product immunity.

2. Discovery of KGE Documents

One area of discovery in particular raised by the Staff during the early prehearing conference in Case No. ER-85-128 was lack of access to Kansas Gas & Electric Company (KGE) documents and files. The Staff had requested this access by Staff Data Requests to KCPL, to which KCPL had responded that the requested materials were not in the custody or control of KCPL, and KCPL had no right of access to the materials. Two of the data requests in question, Staff Data Request No. 185 in Case No. EO-84-147 (submitted to KCPL on April 16, 1984) and Staff Data Request No. 1493 in Case No. EO-82-88 (submitted on April 19, 1984) requested access to the files of 10 named individuals who were present or former employees of KGE. On April 26, 1984, KCPL responded that it did not have custody, control, or right of access to KGE's files of these individuals in Wichita, Kansas. In an attempt to better determine what right KCPL might have to the files of these individuals prior to taking other recourse such as subpoenaing the files, the Staff submitted to KCPL Staff Data Request No. 446 in Case No. EO-84-147 (submitted on September 19, 1984) and Staff Data Request

No. 1876 in Case No. EO-82-88 (submitted on September 9, 1984). These two data requests were intended to determine (1) whether the individuals, whose files KCPL did not believe it had a right to review, had or were charging time to the Wolf Creek project and (2) whether any of the salaries and expenses of these individuals had been or were being recovered by KGE from KCPL.

The Staff received a response to Staff Data Request No. 446 on February 8, 1985, 142 days after it had been submitted to KCPL. The response in part states that since February 1981, 15% of two of the named individuals' time was charged to Wolf Creek construction and that since July 1980, 100% of one of the named individual's time has been charged to Wolf Creek construction. The response did not indicate whether certain other named individuals had or were currently charging salaries and expenses to Wolf Creek construction but stated that the source data was available at KGE for Staff review.

One day prior to the Staff's receipt of this response to Staff Data Request No. 446, a new understanding of the scope of KCPL's right to review KGE material occurred as a result of a meeting that date, February 7, 1985, between Wilson K. Cadman (Chairman of the Board and President of KGE) and Arthur J. Doyle (Chairman of the Board, President, and Chief Executive Officer of KCPL). As a result of said meeting, KGE agreed that KCPL has a right to review Wolf Creek related materials from the Wichita files of the individuals identified in Staff Data Request Nos. 185 and 1493 which are not (1) attorney-client communications, (2) attorney work product, (3) covered by a court order or regulatory requirement precluding disclosure, or (4) related solely to KGE's involvement in the Wolf Creek project. KGE agreed to provide KCPL copies of files and documents not asserted to fall within these categories. KCPL agreed to provide these materials to the Staff for review. The Staff started receiving copies of these KGE documents from KCPL on March 18, 1985. The Staff will review as many of these documents as possible prior to filing its Phase IV prepared direct testimony and exhibits and will

continue to review the KGE documents as time permits throughout the remainder of these proceedings. It should be noted that KGE has not compiled a list of files and documents which are being withheld from KCPL in the four categories above.

Thus, the Staff has obtained access to some KGE documents that the Staff has always believed that it, the Commission, and KCPL have a right to review, and the Staff has obtained that access without utilizing the Commission's subpoena power and the Kansas judicial system. Although the Staff has obtained access to some KGE documents by acting in a conciliatory manner to both KCPL and KGE, the Commission and KCPL's Missouri ratepayers may have been much better served if the Staff had been less conciliatory.

3. Severability of Documents

KCPL's letter filed on April 16, 1985 also refers to KCPL providing the non-privileged portions of documents identified and referenced in the June 13, 1984 letter of A. Drue Jennings. (Attachment C). KCPL in its letter filed on April 16, 1985 states that KCPL declines to adopt this procedure with respect to any documents being withheld by KCPL other than those identified and referenced in Mr. Jennings' June 13, 1984 letter because there is not sufficient remaining time to do otherwise. Disclosure of the non-privileged and non-immunized portions of documents which are asserted by KCPL to be covered by attorney-client privilege and/or work product immunity is a matter that was first discussed with KCPL by the Staff on May 30, 1984. Mr. Jennings' letter of June 13, 1984 resulted from those discussions on May 30, 1984. Staff had provided KCPL a copy of United States v. American Telephone & Telegraph Co., 66 F.R.D. 603 (D.C. 1979) wherein Judge Harold H. Greene accepted the substantive and procedural guidelines of the Special Masters utilized in the Department of Justice's antitrust suit respecting AT&T. Substantive Guideline No. 5 provides that the unprivileged material in a document must be disclosed to the fullest extent possible without disclosing the privileged material. 66 F.R.D. at 610-612; See also

Duplan Corp. v. Nowlinage et Retorderie de Chavanoz, 509 F.2d 730, 736-737 (4th Cir. 1974); cert. denied 420 U.S. 997, 95 S.Ct. 1438, 43 2.Ed.2d 680 (1975). In Xerox Corp. v. International Business Machines, Inc., 64 F.R.D. 367, 381 (S.D.N.Y. 1974) the court noted that if segregation of non-attorney work product portions of documents from attorney work product portions is impossible, then the entire contents of the documents must be produced.

In the instance of both the question of the Special Master and the provision of non-privileged and non-immunized portions of documents which are asserted by KCPL to be protected by attorney-client privilege and work product immunity, the Staff has repeatedly sought agreement from KCPL to proceed on such a course. The Staff noted in its August 13, 1984 Response in Case No. EO-84-147 the possible use of a Special Master and some questions that would have to be addressed if a Special Master were utilized. At the early prehearing conference in Case No. ER-85-128 the week of January 21, 1985, the Staff raised the question of KCPL providing the non-attorney-client and non-work product portions of documents which KCPL has withheld. At various times in the next two months on the subject of providing non-privileged and non-immunized portions of withheld documents KCPL indicated that it wanted to talk with the Staff about this matter, that it would consider the matter, or that such a procedure was a function of time and KCPL's resources. It was not until receipt of KCPL's letter filed on April 16, 1985 that KCPL provided a definitive response on this matter.

KCPL has been more definitive in its responses regarding the use of a Special Master. In March, 1985 KCPL indicated that it declined to agree to the use of a Special Master because KCPL assumed that the Staff would challenge any determination by the Special Master which did not adopt the Staff's position. The Staff then inquired whether KCPL would agree to the use of a Special Master whose determinations the parties would agree to accept as final. KCPL once again rejected the use of a Special Master. When after the filing of

the Staff's First Set Of Interrogatories Directed To Kansas City Power & Light Company KCPL recognized the applicability of the Halford case to the documents which it was withholding, the Staff inquired whether KCPL would reconsider its rejection of the use of a Special Master. KCPL's response in its letter filed April 16, 1985 was no.

4. Outstanding Data Requests

The Staff's attempts to resolve discovery disputes in a conciliatory manner is further evidenced by the manner in which the Staff has attempted to resolve the matter of outstanding data requests (i.e. data requests for which no answers have been received or data requests which the Staff considers to still be open because non-responsive answers have been received or only partial answers have been received). Although (1) the Staff on March 6, 1985 filed a Motion For Extension Of Time for the filing of its prepared direct testimony and schedules on Rate of Return and Allocations due to untimely responses to Staff Data Requests by KCPL, (2) the Chairman suggested in a dissenting opinion to a March 13, 1985 Order of the Commission that the appropriate response to dilatoriness in responding to discovery is sanctions, and (3) the Staff has sought a Commission Order directing KCPL to respond within five days of receipt of a Staff Data Request whether KCPL can or will respond to said data request, the Staff filed no pleading with the Commission in March, 1985 when the number of outstanding data requests reached approximately 600 in number by the Staff's count or approximately 500 in number by KCPL's count. Instead the Staff provided KCPL with a list of the outstanding Staff Data Requests and asked KCPL to provide the Staff with a proposal regarding when the Staff would receive responses to these outstanding data requests.

STAFF'S INTERROGATORIES

Interrogatories may properly inquire into any matter relevant to the subject matter involved in the pending action, and it is not grounds for objection that the facts sought would not be

admissible evidence if it appears reasonably calculated to lead to the discovery of admissible evidence. State ex rel. Litton Bus Sys., Inc. v. Bondurant, 523 S.W.2d 587, 591 (Mo. App. 1975).

Because Staff's interrogatories requested information on an ongoing basis, Staff did not anticipate that the Company could provide a full answer to the interrogatories within the 20-day period provided in Rule 57.01(a). However, Company's "answer" as provided in a letter dated April 15, 1985 to Steven Dottheim from Mark G. English (Attachment A) neither answered the interrogatories nor raised proper objections thereto. It did however, make it clear to the Staff that Company has adopted a definition of the scope of work product immunity from discovery which is unacceptable and that there is no hope of resolving this matter without Commission intervention.

Because Company's "answer" does raise certain "privileges", Staff does not believe it is appropriate for the Commission to impose sanctions on the Company which are otherwise permitted by Rule 61.01(a) and (b). (See page 3, *infra*). However, Staff does believe that it would be appropriate for the Commission to order KCPL to fully answer Staff's First Set of Interrogatories, and to provide continuing updates to those answers.

SPECIAL MASTER

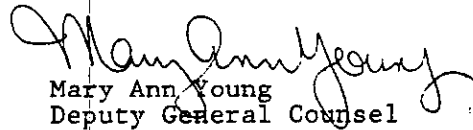
The Staff would agree with KCPL's letter filed on April 16, 1985 that (1) the review by KCPL's witnesses and their assistants of the lists of withheld documents, (2) statements regarding which of the withheld documents were made testimonial use of, and (3) the provision to the Staff of said documents will accomplish some of the benefit of involving a Special Master. KCPL's release on April 19, 1985 of those documents authored by KCPL witnesses which previously had been withheld as protected by work product immunity also will accomplish some of the benefit that would otherwise accrue from involving a Special Master. Nonetheless, the procedures that KCPL has committed itself to in its letter filed on April 16, 1985 do not eliminate the entire benefit of involving a Special Master who would determine

whether KCPL has properly classified documents covered by work product immunity which KCPL intends to continue to withhold.

Staff requests the Commission appoint a Special Master to conduct in-camera proceedings to review documents being withheld by KCPL from Staff. Staff would suggest that the Commission take comments from the parties as to the parameters of authority of the Special Master, finality of decisions of the Special Master, definition of the scope, applicability, and criteria for waiver of the work product doctrine, etc. For the reasons stated above, Staff would not suggest that attorney-client documents be subjected to in-camera review.

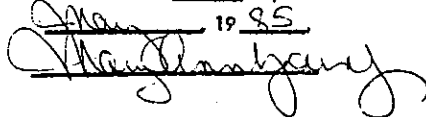
WHEREFORE, for all the reasons stated above, Staff requests the Commission grant the relief sought in the attached Motion To Compel.

Respectfully submitted,


Mary Ann Young
Deputy General Counsel

Attorney for the Public Service
Commission of Missouri
P.O. Box 360
Jefferson City, Missouri 65102
(314)751-7485

CERTIFICATE OF SERVICE
I hereby certify that
copies of the foregoing
have been mailed or hand-
delivered to all parties of
record on this 3rd day of

May 19 85


KANSAS CITY POWER & LIGHT COMPANY

1330 BALTIMORE AVENUE

P. O. BOX 679

KANSAS CITY, MISSOURI 64141

LAW DEPARTMENT

April 15, 1985

RECEIVED

APR 16 1985

COMMISSION COUNSEL
PUBLIC SERVICE COMMISSION

Mr. Steven Dottheim
Deputy General Counsel
Missouri Public Service Commission
P. O. Box 360
Jefferson City, Missouri 65102

Re: Case Nos. ER-85-128 and EO-85-185;
Staff's First Set of Interrogatories

Dear Mr. Dottheim:

On or about March 26, 1985, the Staff served its First Set of Interrogatories on Kansas City Power & Light Company, asking that thirty-nine (39) persons respond to various Interrogatories. Although this First Set comprises eighteen questions, KCPL calculates that if the thirty-nine requested persons provided answers to all the myriad subparts of the question, KCPL would have to provide, depending on the responses of the first series of questions, between 300,000 and 2,000,000 separate written answers in response to the First Set. This is manifestly an unreasonable demand on KCPL.

During the Phase I Prehearing Conference, you and I discussed various discovery issues between KCPL and Staff, including this First Set. It is regrettable that you have not been able to respond to my proposal which sought agreement on the information to be provided in response to the First Set, and on other issues as well. This letter will thus serve as a formal response to both your March 29, 1985, letter and your First Set of Interrogatories.

KCPL has continuously maintained that its attorney work product in these proceedings is immune from discovery until the affected witness takes the stand to adopt his testimony and stand cross-examination thereon. At that time, the immunity may be said to cease as to (a) prior inconsistent statements of the witness concerning the subject matter of his testimony, and (b) documents of which the witness made testimonial use.

There is an important distinction between calling for a statement at a deposition and calling for a statement at a trial during cross-examination. After an adverse witness has testified in the trial, opposing counsel, in order to effectively cross-examine, may be entitled to see and use previous statements of the witness. . . . Halford v. Yandell, 558 S.W.2d 400, 409 (Mo.App. 1977), quoting from Pacific N.W. Bell Tel. Co. v. Century Home Comp., Inc., 261 Or. 33, 491 P.2d 1023, 1026 (1971).

April 15, 1985

... "by electing to present the investigator as a witness, [defendant] waived the [work product] privilege with respect to matters covered in his testimony" under the circumstances there present.. Halford, supra, at 406, quoting from U.S. v. Nobles, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975).

The Staff has maintained that work product immunity ceases with respect to a witness when that witness prefiles his testimony. I disagree. Prefiling of testimony has always been perceived by this Commission, and by other parties, as a form of pretrial discovery. Compare this statement of the Commission from the October 14, 1980, Order issued in Case No. TR-80-256:

The practice of prefiling testimony is designed to give parties notice, at the earliest possible opportunity, of the claims, contentions, and evidence in issue and to avoid unnecessary objections and delays in the proceedings caused by allegations of "unfair surprise" at the hearing. (Id. at 1-2)

with:

... the purpose of our rules of discovery is to minimize concealment and surprise in litigation. Hilmer v. Hazel, 492 S.W.2d 395, 396 (Mo.App. 1973)

The rules of discovery are designed and interpreted to aid the Court and litigants in determining the facts in issue prior to trial . . . Bethell v. Porter, 595 S.W.2d 369, 377 (Mo.App. 1980).

Be that as it may, in an attempt to resolve the work product immunity issues existing between us, KCPL will now undertake to review the documents withheld as attorney work product and will waive its work product privilege and disclose as soon as reasonably possible (a) prior written statements of a witness to these proceedings (except privileged attorney-client communications), and (b) those documents of which testimonial use was made. To the extent that testimonial use was made of attorney-client communications, the immunity afforded such communication is, of course, waived. Such disclosure will be commenced now as to those persons who have to date filed testimony on behalf of KCPL, and will be extended to those persons who may hereafter file testimony on behalf of KCPL, at the time such testimony is filed.

The commitment of KCPL to disclose as soon as possible documents withheld as work product which were authored by a witness is manifestly broader than the requirement to disclose at trial prior inconsistent statements relating to the subject matter of the testimony; KCPL does so simply out of a desire to avoid potential arguments as to whether a statement does or does not relate to the subject matter of testimony, or is or is not "inconsistent." Since no analysis of the contents of these documents is required prior to disclosure, those documents should be forthcoming shortly.

KCPL does not consider notes, drafts of documents or critiques of opposing parties' testimony or positions to be subject to this voluntary

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disclosure. First, such documents cannot be generally thought of as admissions; statements or conclusions of fact can be admissions, but recitations of contingencies, uncertainties or predictions of possible consequences aren't admissions. Marshfield Comm. Bank v. State Banking Bd., 496 S.W.2d 17 (Mo.App. 1973).

An admission, in general, is a conscious or voluntary acknowledgment by a party of the existence of certain facts relevant to the cause of the party's adversary, a statement against interest, unfavorable or inconsistent with the facts now claimed by the party making the statement. Albertson v. Wabash R. Co., 253 S.W.2d 184, 189 (Mo. 1952)

Drafts of documents are outward manifestations of the ongoing and unconcluded thought processes of the author. Until the document is in final form, it cannot be thought of as a statement which is admissible into evidence. And the disclosure of the final document does not in and of itself waive the work product immunity attaching to the drafts of the document. See, e.g., Gilhuly v. Johns-Manville Corp., 100 F.R.D. 752 (D.Conn. 1982). Notes and critiques obviously contain the "mental impressions, conclusions, opinions or legal theories" of the author, and such are absolutely protected from discovery. Notes lack the conscious or voluntary review and acknowledgment found in formal documents or statements, and KCPL declines to waive its privilege with respect thereto. Critiques of testimony disclose areas of weakness in opposing testimony, the disclosure of the contents of these prior to presentation of testimony and cross-examination would greatly prejudice KCPL. KCPL therefore declines to waive its work product privilege on these documents at any time. The Staff may, of course, attempt to subpoena these documents at the time of trial on each issue and attempt to make evidentiary use thereof, pursuant to Halford.

You have asked KCPL to commit to a time frame for such disclosure. We are unable to do so; we reiterate our commitment to proceed as quickly as reasonably possible, and will make disclosure of the affected documents on an ongoing basis, rather than on a periodic basis. A primary reason why no completion date can be given is the Staff's continuing audit of KCPL. Obviously, the time we have to review withheld documents is dependent on, among other things, the number and scope of Staff data requests. Further, if the Commission grants the Staff's Motion and compels KCPL to identify within five days of receipt, each data request that it cannot or will not answer, KCPL will be compelled, by Commission Order, to give first priority to such an endeavor. The actions of the Staff have a great deal of impact on the amount of resources KCPL can devote to this disclosure process.

Although no specific time frame can be committed to, I will make every effort to provide all testimonial use documents to Staff no later than mid-May. In order to accomplish this, each of the witnesses, and the person(s) who assisted him/her in the preparation of the testimony, will review the lists of withheld documents, and will make whatever examination of the documents they deem necessary, and will identify which, if any, of the withheld documents testimonial use was made. These identified documents will

April 15, 1985

then be turned over to the Staff, along with written representations of the witness (and assistants) concerning the procedure and results of their review of the lists of the withheld documents and the documents themselves.

It is apparent that such a review cannot be completed in time for purposes of Staff cross-examination of witnesses in the Phase I hearings. There may also be some timing difficulties with subsequent phases, although I fully expect that all documents to which the Staff is entitled under the principles discussed in Halford will be provided well in advance of the hearings in Phases III and IV. As I stated at the Phase I prehearing conference, KCPL will not object to a Staff attempt (good faith is, of course, implied) to introduce a previously withheld document relating to an issue tried in a prior phase, but alleged to have been disclosed by KCPL too late to have been utilized by Staff for purposes of cross-examination (impeachment) in that prior phase. Indeed, KCPL will not, under those circumstances object to the witness being recalled to the stand for Staff cross-examination in the previously withheld document.

I would also like to stress that, although the Staff is not entitled under Halford to KCPL's attorney work product prior to hearing as a particular issue (since that case makes exception to the work product immunity for purposes of testimonial impeachment only), KCPL will not object to any additional discovery attempted by the Staff on the basis of any document that is provided in advance of the hearing day scheduled for a particular issue. Because I fully expect the disclosure process I described above to be completed prior to the time Staff is required to file its direct testimony in Phase IV (June 21), it may very well be that the Staff will not only be given the opportunity of using the disclosed documents for cross-examination at hearing in Phase IV (to which it is entitled under Halford), but it will also have the opportunity of conducting additional discovery on those documents and incorporating them as part of its own case (to which it is not entitled under Halford). In other words, as I noted above, KCPL's commitment described in this letter will provide Staff with access to certain of KCPL's work product long before it is entitled to under Halford.

I wish to turn now to the issues in your March 29, 1985, letter which have not been addressed so far in this letter. KCPL declines to amend, supplement or otherwise revise the descriptions of the withheld documents. To the extent that such documents are subsequently disclosed, no revision is necessary. Each witness (and assistant) will be reviewing the lists of withheld documents and, to the extent necessary, the documents themselves, to ascertain which of the documents was made testimonial use of, so a revision in description will not be necessary. Further, the description of the documents would in no case be dispositive of the question of testimonial use. In the context of our waiver and disclosure commitments, no benefit would be derived from the substantial amount of effort needed to ascertain which documents the Staff wishes another description of, and then to supply it.

You have also raised the question of the applicability of Halford to correspondence between KCPL and its consultants. We have committed to providing statements authored by witnesses (consultant or KCPL employee), or of

April 15, 1985

which testimonial use was made. Further, we have disclosed all documentation that is not work product. We have also disclosed the contracts or other agreements between KCPL and consultants. In essence we have identified the consultants and the general nature of the subject matter of their engagement--see Rule 56(b)(4)(a). We have done so to avoid any claim of "surprise" if and when these consultants file testimony.


Pursuant to Mr. Jennings' June 13, 1984, letter to you, we will disclose the non-privileged portions of those documents identified and referenced in that letter. We decline to do so with respect to any other withheld document, as there is not sufficient time remaining to do so.

And, as I stated on April 1, KCPL no longer believes it would be helpful to involve a Special Master in the disclosure process. The proceedings have progressed to the point where this procedure simply cannot be implemented in the time available for such a procedure. In addition, the review by KCPL's witnesses of the lists of withheld documents, and their statements regarding which of the withheld documents they made testimonial use of, will accomplish much of the benefit of involving a Special Master.

The issue of notification, within five days of receipt of every data request, as to whether KCPL cannot or will not respond to such data request, is being addressed by KCPL's response to your motion on that subject.

I trust that this letter is a satisfactory reply to your First Set of Interrogatories and various letters on discovery matters. It is perhaps difficult for the Staff to comprehend the amount of time and effort needed to analyze and list all withheld documents, and then to execute the waiver and disclosure program I have outlined, because the Staff has not provided a listing of its withheld documents to KCPL, and we have not insisted on the providing of such a list to this time. KCPL has been solicitous of the Staff's time and resource limitations, and we hope that whatever discovery matters may remain after this letter may be resolved in a conciliatory manner by both of us.

Very truly yours,


Mark G. English

MGE:ca

cc: Mr. Harvey G. Hubbs

KANSAS CITY POWER & LIGHT COMPANY

1330 BALTIMORE AVENUE

P.O. BOX 679

KANSAS CITY, MISSOURI 64141

A. DRUE JENNINGS

VICE PRESIDENT
AND

GENERAL COUNSEL

June 13, 1984

Mr. Steven Dottheim
Missouri Public Service Commission
P. O. box 360
Jefferson City, Missouri 65102

Dear Steve:

As promised, this letter will address questions posed concerning KCPL's assertion of attorney-client privilege and the attorney work product doctrine with respect to certain documents requested by the Staff as it conducts its discovery activities. I promised to review the subject documents and recite (i) whether the privilege or doctrine will continue to be invoked, (ii) if continued, whether there may be some point in time when we will waive either or both, and (iii) any documents that will be subject to our assertions of protection irrespective of the passage of time or the occurrence of some event, such as prefiling evidence, conducting hearings, etc.

In conducting my review, I have examined only those documents in hand as of June 12, 1984. I might add that my review, and my observations herein, are guided by my reading of the 1981 Upjohn decision (49 Law Week 4093), which I feel to be one of the better discussions of both attorney-client privilege and the work product doctrine. I also feel the facts and circumstances there to be quite analogous to ours. In addition, State ex rel Terminal Railway Association of St. Louis v. Flynn, 257 S.W.2d 69 (Mo 1953), and United States v. AT&T Co., 86 FRD 603 (1979), have proven very helpful.

These cases have reinforced my opinions concerning attorney-client privilege and attorney work product. As the cases emphasize, the attorney-client privilege protects the communications between attorney and client (a) made primarily for the purpose of obtaining legal advice or assistance, (b) reasonably believed by the client to be necessary for that purpose, and (c) intended to be confidential. The attorney work product doctrine applies to "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible"

Mr. Steven Dottheim
June 13, 1984
Page Two

items. See 86 FRD at 626, Guideline No. 14. That case makes clear that such items of the attorney and his agents and employees, prepared in anticipation of litigation, are to be protected by the doctrine. The Terminal Railway case draws a distinction between such items prepared or kept in the usual or ordinary course of business, and those specifically prepared in anticipation of litigation. We have characterized this as the "but-for" rule: But for the imminence or existence of litigation, the documents would not have been created as "work product." I am sure you will agree with me that contested rate case proceedings meet the definition of "litigation."

KCPL has been specifically preparing for the "Wolf Creek rate cases" for over a year; in some aspects it has been anticipating these cases for several years. An ad hoc rate case committee has traditionally taken on specific rate case responsibilities in the past, and will continue to do so in the upcoming cases. The Wolf Creek Team, however, is unique and was essentially structured around legal strategy and legal requirements anticipated for the contested cases themselves. With rare exception, work assignments and materials prepared by Team members were specifically "in anticipation of litigation." But for the expected cases, the vast majority of work and work product would not have been undertaken and produced.

In all cases, the identity of individuals, and the existence and location of "facts" accessible to them, have been and will be revealed. It is only their privileged communications of, or with respect to, facts, and their work product--their thoughts, impressions, composition, articulation and creativity--that have been withheld as work product. Beyond prepared testimony and filed or referenced reports and studies, the materials are and will continue to be "work product" and the doctrine (or privilege) asserted. The Staff is put in no worse position by non-disclosure of our work product than if the work product did not exist. The Upjohn court quoted (49 L.W. at 4096) approvingly from Hickman v. Taylor: "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary."

I have examined all materials for which work product or attorney-client privilege have been asserted, and they are identified in the attachments. I find none of those to have been inappropriately withheld, and presently feel that they will be thus protected on a continuing basis. Portions of some of the documents are neither attorney-client privileged nor creative work product, and those portions will be supplied. I have identified those in the attachment by check-marks in the margins, and will be pleased to discuss with you the mechanics of their disclosure.

Mr. Steven Dottheim
June 13, 1984
Page Three

KCPL's rate case strategies will become apparent when the cases are prosecuted, but even then, the evolution of those strategies through the iterative processes of drafts, memos, notes, memoranda and the like remain our work product, and as such, privileged from discovery. And, unlike the attorney-client privilege which can be waived in its entirety, even accidentally, by partial disclosure, I believe the law clearly supports the attorney's selective protection and/or disclosure of "work product." Thus, for example, a submission of prefiled testimony does not waive the doctrine with respect to unpublished rough drafts of that testimony.

Please feel free to contact me in the event you require anything additional.

Sincerely,

A. Drue Jennings
A. Drue Jennings

ADJ:bb
Enclosure

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a Session of the Public Service
Commission held at its office
in Jefferson City on the 7th
day of May, 1985.

CASE NO. ER-85-128

In the matter of Kansas City Power & Light
Company of Kansas City, Missouri, for
authority to file tariffs increasing rates
for electric service provided to customers
in the Missouri service area of the Company.

CASE NO. EO-85-185

In the matter of the determination of
in-service criteria for Kansas City Power &
Light Company's Wolf Creek Generating
Station and Wolf Creek rate base and related
issues.

ORDER DIRECTING COMPANY RESPONSE

On May 3, 1985, the Staff of the Missouri Public Service Commission (Staff) filed a Motion to Compel Production of Documents and Request for Appointment of Special Master and suggestions in support thereof. On May 6, 1985, the Office of Public Counsel (Public Counsel) filed a Motion to Compel Answers to Discovery and for Extension of Time to File Testimony and Exhibits.

The Commission wishes to expedite this matter and is, therefore, directing Kansas City Power & Light Company (KCP&L) to file a response with the Commission to Staff's Motion to Compel Production of Documents and Request for Appointment of Special Master on or before May 14, 1985. The Commission is directing KCP&L to answer Staff's first set of data requests and to provide a complete list of documents currently withheld from Staff by KCP&L and Kansas Gas and Electric Company on or before May 14, 1985. KCP&L is further directed to answer or specifically object to the outstanding data requests, attached as Exhibit 1 to Public Counsel's motion, on or before May 14, 1985.

It has come to the Commission's attention that the standard definitions for "direct", "rebuttal" and "surrebuttal" testimony were inadvertently left out of the Commission's second suspension order. The Commission recognizes that counsel for all of the parties involved in this matter have previously participated in Commission cases and are aware of these definitions. As a matter of procedure, the Commission wishes to have them set out in their entirety.

Each party's "direct" testimony and schedules must include all testimony and schedules asserting and explaining that party's proposed adjustments to the Company's book figures, as well as all testimony and schedules asserting and supporting that party's proposed rate base, proposed rate of return, proposed rate design, and any other proposed changes in or additions to the Company's tariffs. The "direct" testimony and schedules must also include all testimony and schedules regarding issues concerning the quality of service being provided by the Company. Each party shall file its entire "direct" case in accordance with the deadlines established by the Commission, and all "direct" testimony and schedules shall be prefiled. Witnesses will not be permitted to supplement the prefiled direct case at the hearing.

"Rebuttal" testimony and schedules include testimony and schedules which explain why a party rejects or disagrees with adjustments to book figures proposed by another party, and testimony and schedules which explain why a party rejects or disagrees with the rate base, rate of return, rate design or any other changes in or additions to the Company's tariffs proposed by another party. "Rebuttal" testimony and schedules also include testimony and schedules which are responsive to the testimony and schedules contained in any other party's direct case regarding the quality of service being provided by the Company. "Rebuttal" testimony and schedules on any issue in this case must be prefiled and served on all parties as ordered by the Commission. Witnesses will not be permitted to supplement prefiled "rebuttal" evidence. The Commission will not countenance any effort to present a party's entire case as "rebuttal".

"Surrebuttal" testimony and schedules on any issue in this case must also be prefiled. "Surrebuttal" testimony and schedules must be limited to material which is responsive to matters raised in another party's "rebuttal" testimony and schedules, and are not to merely bolster or reiterate matters previously presented by "direct" or "rebuttal" testimony and schedules. Some "surrebuttal" testimony may be generated by the cross-examination of a witness in the hearing, and thus cannot be prefiled. However, parties will not be permitted to present "surrebuttal" evidence which was not prefiled if it could and should reasonably have been prefiled under the policy reiterated herein.

Nothing herein shall preclude a party from addressing, or having a reasonable opportunity to address, matters not previously disclosed and arising at the hearing. The Commission, in its discretion and for good cause shown, may waive strict application of these requirements.

Any request for a true-up should be made during the prehearing conference and reflected in the hearing memorandum submitted for the involved issues. The requests should include a proposed date to which the Company's financial data is to be brought forward as well as a proposed time for a true-up hearing. The proposal should also specify a complete list of accounts or items of expense, revenues and rate base designed to prevent any improper mismatch in those areas. The Commission will not consider isolated adjustments, but will examine only a "package" of adjustments designed to maintain the proper revenue-expense-rate base match at a proper point in time. Re: Kansas City Power & Light Company, Case No. ER-83-49 at page 8 (issued July 8, 1983).

The Commission Staff, the Public Counsel and all intervenors shall respond by either concurring in the Company's proposal or setting forth alternatives to the Company's true-up suggestion in the hearing memorandum.

In light of the decision of the Missouri Court of Appeals in State ex rel. Fischer v. Public Service Commission, 645 S.W.2d 39 (Mo. App. 1982), the Commission advises the parties that any stipulation and agreement which may be entered into by

fewer than all parties in this case will be handled in the following manner, unless otherwise ordered by the Commission.

1. Such a stipulation and agreement will be considered as the joint recommendation of those parties who are signatories thereto.
2. The case will go to hearing as with any other contested proceeding before the Commission, and an opportunity will be afforded to all parties to call witnesses, subpoena witnesses, cross-examine witnesses, and provide documentary evidence and other information in accordance with Commission procedures, custom and practice. A Commission determination as to the desirability of oral argument or briefing will be made at the close of the evidence, after the receipt of recommendations of the parties.
3. The Commission will then consider the case as fully submitted, and will reach its final decision in the case subject only to the usual motions for rehearing, other posthearing motions, and the appeal process. In the event all or a portion of the joint recommendation is not accepted by the Commission, there will be no additional hearing as was the case under prior Commission procedures, custom and practice in connection with stipulations and agreements.

It is, therefore,

ORDERED: 1. That Kansas City Power & Light Company be, and is, directed to file with the Commission a response to the Staff's Motion to Compel Production of Documents and Request for Appointment of Special Master on or before May 14, 1985.

ORDERED: 2. That Kansas City Power & Light Company be, and is, directed to answer Staff's first set of data requests on or before May 14, 1985.

ORDERED: 3. That Kansas City Power & Light Company be, and is, directed to provide a complete list of all documents currently withheld from Staff by Kansas City Power & Light Company and/or Kansas Gas and Electric Company on or before May 14, 1985.

ORDERED: 4. That Kansas City Power & Light Company be, and is, directed to answer or specifically object to the outstanding data requests attached as Exhibit 1 to Public Counsel's Motion to Compel Answers to Discovery and for Extension of Time to File Testimony and Exhibits.

ORDERED: 5. That a witness' testimony shall be designated as an "exhibit", and any attachments to a witness' testimony shall be designated as "schedules".

ORDERED: 6. That all direct, rebuttal and surrebuttal testimony and other exhibits and schedules shall contain the following information, in the following format, in the upper right hand corner of a cover sheet:

Exhibit No.: (To be marked by hearing reporter)
Issue and Phase No.: (If known at the time of filing)
Witness/Type of Exhibits: (Specify witness' last name only and
whether direct, rebuttal or other
type of exhibit)
Sponsoring Party:
Company:
Case No.:

ORDERED: 7. That the parties shall file a hearing memorandum setting out the issues to be heard, definitions of terms used in describing those issues, each party's position on those issues and quantification of the amount on each issue in dispute on the dates previously set forth in the Commission's second suspension order. As an appendix to the hearing memorandum the parties shall include a reconciliation setting forth the total amount or values of each party's case as well as the individual contested amounts or values associated with each party's total recommendation for expenses, revenues and rate base. If necessary, the reconciliation may be amended or replaced during the proceedings to reflect any change in the issues or amounts in controversy.

ORDERED: 8. That all counsel and parties to this proceeding shall review and comply with 4 CSR 240-4.020 pertaining to conduct during proceedings and shall communicate the meaning and importance of that rule to all personnel whom counsel believes or reasonably should believe ought to be made aware of same, including the party they represent.

ORDERED: 9. That any stipulation and agreement submitted in this case shall conform to the requirements stated herein, unless otherwise ordered by the Commission.

ORDERED: 10. That a party may be dismissed from this proceeding for failure of the party's attorney to appear and participate at any prehearing conference, unless excused in accordance with 4 CSR 240-2.090(4).

ORDERED: 11. That all hearings previously scheduled by the Commission's second suspension order shall be held in the Commission's hearing room on the fifth floor of the Harry S. Truman State Office Building, 301 West High Street, Jefferson City, Missouri.

ORDERED: 12. That this order shall become effective on the date hereof.

BY THE COMMISSION

Harvey G. Hubbs
-T

Harvey G. Hubbs
Secretary

(S E A L)

Steinmeier, Chm., Musgrave, Mueller
and Fischer, CC., Concur.
Hendren, C., Absent.

FILED

MAY 14 1985

PUBLIC SERVICE COMMISSION

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of Kansas City)
Power & Light Company of Kansas)
City, Missouri, for authority to)
file tariffs increasing rates for)
electric service provided to)
customers in the Missouri service)
area of the Company.)

Case No. ER-85-128

In the matter of the determination)
of in-service criteria for Kansas)
City Power & Light Company's Wolf)
Creek Generating Station and Wolf)
Creek rate base and related issues.)

Case No. EO-85-185

RESPONSE OF KANSAS CITY POWER & LIGHT COMPANY
TO STAFF MOTION TO COMPEL AND REQUEST FOR
APPOINTMENT OF SPECIAL MASTER

Comes now Kansas City Power & Light Company (KCPL) in response to the Staff's Motion of May 3, 1985, and the Commission's Order of May 7, 1985, in the above-referenced cases, and respectfully states as follows:

Introduction

The Commission has before it a controversy in the discovery process and the Staff has filed a motion to force a resolution of the issue. The Staff characterizes its position in its motion as being one of last resort and frustration due to the position KCPL has taken regarding disclosure of certain documents. KCPL takes exception to the Staff's characterization of this matter.

This dispute must be viewed from the perspective of the Staff's Wolf Creek and rate case audits. Staff commenced its audit of Wolf Creek construction costs over five years ago, and started its audit field work for this rate case in January 1984. The Staff has issued over 1800 data requests at the Wolf Creek site, and over 1700 data requests in their rate case audit. Staff has issued more data requests to KCPL to date that it did in the entire course of Union Electric's Callaway rate case. Staff has been provided access to many hundreds of thousands of

documents, and has not been denied access to any KCPL or site source documents. Staff has been provided full access to confidential documents. It was not until April 1984, when Staff made the unprecedented demand to see all files, both personal and business, of the people on KCPL's Wolf Creek rate case team (Request 104) that KCPL started to decline to produce certain documents which are privileged from discovery under the principles of attorney-client communication or attorney work product. Staff also demanded access to all Law Department files relating to Wolf Creek--something it did not demand of Union Electric. To KCPL's knowledge, no other utility regulated by this Commission has ever had its law department files subjected to the level of scrutiny the Staff seeks in this proceeding. Because KCPL's Law Department files contain much material protected by the attorney-client privilege and the attorney work product immunity, it is not surprising that KCPL has withheld a large number of documents from Staff review, lists of which have and are being provided to Staff. KCPL wishes to stress that it has provided Staff access to all documents in the demanded files which are not privileged, and has provided to Staff all of its rate case workpapers. Staff has unfettered access to all facts underlying KCPL's rate filing.

This controversy exists solely because the Staff has taken the unprecedented step of demanding access to material which the law recognizes is privileged or immune from discovery. The law on attorney-client privilege in this state predates the existence of the Public Service Commission. The law on attorney work product dates from a U.S. Supreme Court case in the 1940's. Both privileges apply to proceedings before this Commission.

A few examples of the Staff Data Requests may give enlightenment as to the reasons why KCPL was required to assert its rightful privileges to protect its attorney work product and attorney-client communications:

Please provide all notes, letters, memos and any correspondence between KCPL and the outside consultants after they were hired. Also, include in response all drafts of reports, letters, memos, or other correspondence between the above two parties. (Data Request 9)

Please provide for review all (both privileged and general) files (including but not limited to correspondence) of each of the following individuals. . .[such individuals included General Counsel A. D. Jennings and Senior Attorney W.B. Wood and encompassed all of the Law Department files] (Data Request 104)

Please provide all "interview sheets", notes, memos, etc. generated by the following meetings between Staff and owners of Wolf Creek. . . (Data Request 475)

Staff is not seeking facts relevant to KCPL's cost of service; rather, it is attempting to explore privileged attorney-client communications and rate case strategy deliberations and discover the opinions, mental impressions, conclusions or legal theories of KCPL and KG&E's lawyers and employees working under their direction in preparing their strategies for the issues to be raised in these cases. It is the Staff's dogged insistence that attorney-client communications and attorney work product documents (as opposed to Company books and records, workpapers supporting KCPL's filing and all other source documents needed for an audit which have been provided to Staff) must be turned over that brings this matter now before the Commission.

Discovery History

On March 26, 1985, Staff served its First Set of Interrogatories on KCPL. By letter dated April 15, 1985, attached as Attachment A to the Staff's Motion, counsel for KCPL objected to the interrogatories. As KCPL explained in its letter it is literally impossible for KCPL to answer the Staff's First Set of Interrogatories. The interrogatories requested individual responses from thirty-nine persons concerning each of approximately seven hundred withheld documents to each of eighteen numbered questions (each containing subparts). Depending upon the answers to the first set of questions, the Staff has asked KCPL to provide between 300,000 and 2,000,000

separate written answers in response to those interrogatories. In addition to being literally impossible to comply with, the Staff's interrogatories seek information concerning a list of documents which KCPL has identified as protected from discovery under the doctrines of attorney-client privilege and attorney work product.

Notwithstanding these possible objections, and without conceding the correctness of Staff's interpretation of those doctrines, KCPL attempted to address the Staff's complaints and agreed in its April 15 letter to Staff to provide to the Staff, as soon as reasonably possible, (a) previously withheld prior written statements of all Company witnesses to these proceedings whether or not such statements were on the subject of the witness' testimony (except privileged attorney-client communications) and (b) those withheld documents of which testimonial use was made. As KCPL explained in its letter, KCPL would thereby be providing to Staff documents to which they were arguably entitled under the law reviewed in that letter, but at a significantly earlier point in time in these proceedings than when they would be so entitled.

KCPL told the Staff that disclosure would begin on April 15 as to those persons who have filed testimony on behalf of KCPL, and will be extended to those who may file testimony on behalf of KCPL at a later date. This voluntary disclosure has commenced. All previously withheld prior written statements of witnesses have been provided to Staff. Many of KCPL's witnesses have reviewed the lists of withheld documents and to the extent necessary the documents themselves and have executed certificates as to this review and disclosed whether they have made testimonial use of any of the withheld documents. As a result of this effort KCPL is in the process of providing the Staff the information actually sought by the 300,000 - 2,000,000 interrogatories contained in the Staff's First Set of

Interrogatories. KCPL is not exhibiting the intransigence the Staff attempts to portray; rather, KCPL has been and will continue to be providing Staff in advance of the time it is entitled to receive it, all of the previously withheld material which would be properly used at the trial of these cases for impeachment purposes.

On or about May 3, 1985, Staff filed a "Motion to Compel Production of Documents and Request for Appointment of a Special Master." As a matter of procedural interest, KCPL notes that the essence of Staff's motion is both to compel answers to its First Set of Interrogatories and to produce the underlying documents which have been withheld under a claim of privilege or immunity.

The production of documents and the use of interrogatories are two separate discovery methods. Commission rule 4 CSR 240-2.090(1) allows the use of written interrogatories "upon and under the same conditions as in civil actions in the circuit court." It does not address the discovery method of production of documents. Missouri Civil Rule 57.01 governs interrogatories to parties and Rule 58.01 governs production of documents. Rule 57.01 says interrogatories may relate to any matters which can be inquired into under Rule 56.01. Rule 56.01(b) says parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. Rule 58.01 provides for inspection and copying of requested documents within the scope of Rule 56.01(b) (i.e. not privileged) which are in the possession or control of the party.

The Staff and KCPL share differing opinions on the scope of those privileges. Staff filed a 40-page memorandum on its interpretation. KCPL is providing herewith a much shorter memorandum (because of the seven working day period the Commission gave KCPL in which to respond) which supports its position. Commission resolution of those legal questions can be avoided, however, because KCPL is agreeing to the use of a

special master to resolve those very issues. The procedure contemplated by KCPL would obviate the necessity for the Commission to resolve the legal questions existing between KCPL and Staff.

The Commission's order of May 7 for KCPL to answer Staff's interrogatories and to furnish lists of all documents withheld by KCPL is unnecessary (as well as being impossible to comply with), if a special master is appointed as requested. Staff states in its motion that the purpose of its interrogatories was to determine if KCPL were properly withholding privileged or testimonial use documents. KCPL believes this determination can be made from the lists of withheld documents it has provided and will provide Staff; indeed, that is why those lists were prepared. However, if a special master is to be appointed, there would be no reason for compelling KCPL to answer the interrogatories, even if possible to do. The special master will, as well, provide the procedures for advance listing, identification and disclosure of any future withheld documents or the listing which continues of documents already withheld.

Special Master

The Staff's motion requests the appointment of a special master to conduct in-camera proceedings to resolve the differing interpretations of the attorney-client privilege and the attorney work product immunity doctrines. (Staff motion, ¶15) Staff suggests that the Commission apply the criteria it developed and set forth in its 40 pages of suggestions. Staff suggests use of a hearing examiner for a special master and that the process be expedited.

KCPL could assert various grounds for objecting to use of a procedure such as this in an administrative proceeding, not the least of which is that there is no statutory authority for it. However, examination by this Commission of the substantial volume of privileged material will be very time-consuming and in view of

the procedural deadlines for the other aspects of this case, a special master may be the only practical solution available to this Staff-created dilemma.

For those practical reasons, for the purpose of conciliation and compromise in these cases only, KCPL will agree to the appointment of a special master to expeditiously resolve this controversy subject to the following minimum conditions:

a) That the special master be retired Supreme Court Chief Justice James A. Finch, Jr. Justice Finch has been contacted and he has agreed to serve in that capacity and is available at this time.

b) That the master shall convene a prehearing conference of counsel as soon as possible at which time the master shall inform counsel of the procedure which the master intends to follow and a timetable to accomplish such. Such procedure shall be binding upon the parties.

c) That the proceedings shall be in camera and the master shall apply Missouri law to the questions presented.

d) That the master shall have the powers specified in Missouri Civil Rule 68.01(e) with regard to regulation of the proceedings, production of evidence, admissibility of evidence, examination of witnesses, and making a record.

e) That the master shall announce a rate of compensation at the prehearing conference and if no party objects, that rate shall be allowed, shall be paid by KCPL at the conclusion of the procedure involving the master, and shall be considered by the Commission in determining an appropriate level of rate case expense in this proceeding.

f) That the master shall prepare a report on the proceedings to which shall be attached a list describing the documents or portions of documents which the master has determined are discoverable and, if applicable, when they may be required to be provided to Staff. The report shall be served

upon counsel for all parties but shall not be filed with the Commission.

g) That a party may, but is not required to, file exceptions to the report to be ruled on by the master. The master may thereafter revise the report. Exceptions shall not be permitted to any revised report of the master. The exceptions shall be filed not later than 10 days after the filing of the report of the master, and if not filed, the report becomes final on the eleventh day after the day of filing.

h) That either party, within five business days after the master's report becomes final, shall be entitled to apply to the Circuit Court of Cole County for appropriate relief. If no such action is filed within that time, the report of the master shall be deemed binding upon the parties and disclosure, if any, shall be made as soon as practical but in no event later than ten business days after the master's report becomes final.

i) That, all proceedings of the special master shall be held in Jefferson City, Missouri. To the extent Commission facilities are not available for the master's use, KCPL will make other appropriate office facilities available.

WHEREFORE, KCPL respectfully requests the Order of the Commission:

1. Withdrawing that part of its May 7, 1985, Order requiring KCPL to answer the Staff's interrogatories and providing a complete list of all withheld documents by May 14, 1985.

2. Appointing the Honorable James A. Finch, Jr. as special master to pass upon the privileged nature of the documents withheld by KCPL, pursuant to the above minimum conditions.

3. For such other and further relief as to the Commission appears just and reasonable.

Respectfully submitted,

MGE by GWT

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Attorneys for
Kansas City Power & Light Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document has been either mailed or hand-delivered to counsel for all parties of record to this proceeding this 14th day of May, 1985.

Gary W. Duffy

Gary W. Duffy

FILED

MAY 14 1985

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

PUBLIC SERVICE COMMISSION

In the matter of Kansas City)
Power & Light Company of Kansas)
City, Missouri, for authority to)
file tariffs increasing rates for)
electric service provided to)
customers in the Missouri service)
area of the Company.)

Case No. ER-85-128

In the matter of the determination)
of in-service criteria for Kansas)
City Power & Light Company's Wolf)
Creek Generating Station and Wolf)
Creek rate base and related issues.)

Case No. EO-85-185

MEMORANDUM IN RESPONSE
TO STAFF SUGGESTIONS

Staff has represented its regret about the length of its suggestions which are in excess of 40 pages. The Commission should not consider the length of those suggestions as proportionate to the complexity of the issues discussed. Despite Staff's characterization that this is a "difficult question" and complex, the issue is simply this: Should the Staff be allowed to sift through the memoranda, handwritten notes, and other writings evidencing the mental impressions and conclusions of KCPL's legal staff? The answer is decidedly "no". If Staff were to be given unfettered discretion to inspect the documents it has attempted to identify, KCPL submits that the strategy of its legal advisors would be at risk. Staff would likely be able to indirectly learn of tactics or conclusions which have been considered to be within a zone of privacy by the courts and administrative agencies alike.

KCPL repeats that it has disclosed each and every fact forming the foundation of its minimum filing requirements and case in chief. Further disclosure of the documents identified in Staff's data requests has no relevancy to the case.

KCPL provides this response to Staff's suggestions in order to clarify certain misstatements made therein. The response is

intentionally brief since KCPL has not been afforded time to respond equal to that which obviously went in to the creation of Staff's suggestions.

Comments on Staff's Introduction

The first two paragraphs of Staff's introduction appear to be accurate statements of the law. KCPL has disclosed the facts supporting its case and has complied with the spirit of the rules that Staff describes in those two paragraphs. After those paragraphs, Staff's statements of the law are colored to support their position.

At page five of the suggestions, Staff states that the Commission has "right to unrestricted access to the books and records of utility companies it regulates." Throughout the suggestions, there appears a subtle presumption that this Commission is empowered to ignore the "work product" and "attorney-client" privileges, which the courts of this state must regularly apply without question. This is not a correct statement of the law. The Commission must remember that it is a creature of statute and that it has only those powers conferred upon it by the General Assembly. State ex rel. Kansas City Transit, Inc. v. Public Service Commission, 406 S.W.2d 5, 8 (Mo. banc 1966). The attorney-client privilege is a matter of statute in this state (§491.060(3) RSMo 1978) and nothing in the enabling legislation of the Commission indicates an abrogation of that privilege for matters before the Commission. The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Upjohn v. U.S., 449 U.S. 383, 389; 101 S.Ct. 677, 682; 66 L.Ed.2d 584 (1981). The work product immunity doctrine evolves from the United States Supreme Court case of Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed 451 (1947) and the Commission is bound to follow that precedent in its proceedings.

Comments on Work Product Section

Staff's multiple citations to case authorities on the subject of discovery, joined with the liberal interpretation of the rules of discovery, and debates upon the breadth of the work product doctrine do not in any way erode the strong maxim that "discovery, like all matters of procedure, has ultimate and necessary boundaries." State ex rel. Hoffman v. Campbell, 428 S.W.2d 904, 906 (Mo.App. St. L. 1968). The boundaries of permitted discovery in this case are as follows:

1. Notwithstanding the trends of liberal discovery, a general "fishing expedition" by the government into the files of a law firm are excursions which the work product privilege forbids. In Re Grand Jury Subpoena, 622 F.2d 933, 936 (6th Cir. 1980)
2. Documents containing the mental impressions and thought processes of counsel shown to expert witnesses are protected by the work product privilege. Bogosian v. Gulf Oil Corporation, 738 F.2d 587, 593-594 (3rd Cir. 1984)
3. No showing of relevance, substantial need, or undue hardship will justify the compelled disclosure of an attorney's mental impressions, conclusions, opinions, or legal theories. In Re Grand Jury Proceedings, 473 F.2d 840, 848 (8th Cir. 1973)

To the extent Staff's expression of the law conflicts with the directives and guidelines above, it should be disregarded. Every instance in which Staff deviates from the modern statement of the law of discovery will not be discussed herein but the following are highlighted.

A. KCPL Has Not Waived the Privilege

Ostensibly, Staff accuses KCPL of hiding behind a blanket

statement of the privileges attending the requested documents, and argues that KCPL has waived those privileges by making the blanket statement. The privileges were asserted for over 700 documents in a statement applicable to all. Staff seems to say that KCPL should have asserted the same statement of privilege 700 times or more. KCPL submits that this procedure would not serve any useful purpose. It is very clear that KCPL asserted the evidentiary privileges for these documents in an understandable and timely manner.

B. Staff Has Shown No Need Or Unde Hardship

Staff argues that it has a substantial need for the information it requests because of the statutory powers of the Commission and the judicial interpretation of those statutes. If the powers of the Commission, as Staff has set them out, are closely scrutinized, it is evident that the Commission has no greater evidence-gathering power than does a party to a civil lawsuit. In other words, what the common law confers on parties to civil lawsuits, the General Assembly has conferred on the Commission.

On page 10, Staff states: "A noteworthy feature of the statutory grants of authority is their complete lack of any restrictions regarding the type of information which the Commission may examine or require a corporation to produce." This quoted statement is in direct opposition to one made earlier by the Staff on the same page where it is argued that case authority "assumes that the Commission will have broad access to any information relevant to the quality and price of a utility's services." (emphasis added) Relevancy to quality and price is a restriction that Staff has thoroughly ignored.

KCPL submits that Staff has not shown a "need" for the documents. There has not been a showing of any relevance. An attorney's impressions and mental processes and the advice he gives to those seeking his counsel concerning this case can have

no relevance or materiality to Staff's development of its factual presentation. As stated before, "fishing expeditions" are prohibited explorations and other utility commissions have so determined. In City of Miami v. Public Service Commission, 226 So.2d 217, 80 PUR3d 156 (Fla. 1969) the Florida Supreme Court upheld the refusal by the Florida Commission to permit such an expedition where there was no showing of good cause and relevancy. The Court agreed with the interpretation of the Commission that its rule (which was substantially equivalent to Federal Rule 34) puts the burden on the party desiring to utilize the rule to show that those documents and papers he wishes produced for inspection are relevant to the proceeding and not merely for the purpose of a 'fishing expedition'; that good cause for producing is shown. The Commission determined that the main ground of the city's motion was that the city might be able to find error in the records of the company. The Staff in this proceeding has made no showing greater than that in the Florida case.

Staff contends it will suffer undue hardship toward the acquisition of the substantial equivalent of the documents it seeks. Staff recites accurately that the sought-after documents are "internal correspondence" of the company. Again, there has not been a showing of any need for these documents sufficient to overcome the privilege and no showing of or how anything in the correspondence and notes would be probative of an issue in the ratemaking process. Staff's arguments are the product of a misunderstanding of the discovery rules and the work product doctrine. The reason for the doctrine in civil cases can best be explained by the use of an example. If an attorney photographs an accident scene as a part of his investigation for a client, which scene is later materially altered in some way so that the opposing party may not obtain the substantial equivalent by taking its own photograph, the photographs would probably be

deemed to be discoverable because even though made as a part of the investigation, there is no substantial equivalent available. However, the photograph contains no mental impressions of the attorney or his comments on the sufficiency of his client's case. Here, the Staff seeks material such as drafts of testimony which contain an attorney's handwritten comments, handwritten notes of telephone conferences, and confidential legal memoranda on various topics. So it is extremely difficult to analogize broad statements contained in cases in the civil area to the very specialized area of the law in which the Commission operates.

At page 12, Staff cites State ex rel. Missouri Public Service Commission v. Southwestern Bell Telephone Company, 645 S.W.2d 44 (Mo. App. 1982) and State ex rel. Utility Consumers Council v. Public Service Commission, 562 S.W.2d 688, 694 (Mo. App. 1978) in support of its argument for disclosure in Commission proceedings. Neither of these cases have a bearing on the instant issues. Southwestern Bell merely held that the Commission had the statutory authority to authorize, by rule, the use of interrogatories in Commission proceedings. The Court in that case made no representations that the scope of discovery under those interrogatories would be greater than that afforded any other litigants. The UCCM case, as Staff notes, dealt with items sought to be withheld on the grounds of proprietary matters. Since the Company offered testimony and exhibits utilizing the proprietary information, it is not difficult to see why the court held that it should make the material available for use in cross examination. That situation does not exist in this proceeding.

Missouri Civil Rule 56.01(b)(3) provides that trial preparation documents are discoverable

only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against

disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

This language clearly envisions a situation such as the photograph taken by the investigating attorney mentioned earlier, or perhaps the results of a test made on some product which has resulted in the destruction of the product. In requiring a showing of substantial need and undue hardship, the rule assumes that the inquiring party knows of the existence of material which would assist him in preparing his case for trial and that he cannot produce a substantial equivalent. That is, the attorney has asked the other side if it has in its possession any photographs or whether it performed any tests on the product. The substantial need and undue hardship tests come into play only at that point. The Staff's approach is much more broad and basically constitutes a search through files on the chance it might find something interesting. That is the classic definition of a "fishing expedition" which the courts uniformly prohibit.

C. The Holding in Halford v. Yandell

Staff cites Halford v. Yandell, 558 S.W.2d 400 (Mo.App. S.D. 1977) for its argument that documents reviewed by witnesses who have prefiled testimony are no longer protected by work product immunity. Halford involved an auto accident in which one participant stated to his attorney's investigator that "he did not blow his horn" while overtaking the other vehicle involved in the accident. At trial, this same participant said he "blowed his horn". The rule in Halford involving disclosures of inconsistent statements for purposes of cross examination may not be susceptible to perfect application at the Commission because the inconsistencies may not be as straightforward as whether a horn was blown or not. The ratemaking issues in this case are more complex; there will be no testimony about whether the traffic light was red or green at the intersection or whether the overtaking vehicle blew his horn. Instead, expert witnesses will

give their opinions on whether certain costs should be reflected in rates and inconsistencies in those opinions may exist only in the minds of some.

Staff also cites Halford in support of its argument that documents relied upon or reviewed by a witness in preparation of his or her prefiled testimony should be provided to Staff upon the pre-filing of that testimony. The apparent motive for this request is to ferret out supposed prior inconsistent statements of the witness. Staff also believes that a document reviewed by a witness, even though it is not used in that witness' testimony, should be provided because review of the document may "color" the testimony of the witness. Halford is no support for these arguments.

Halford deals with a specific situation at trial, not prior to trial or at any time during the discovery process. The Halford court stated that the work product rule has no application to an attorney's request at trial for evidentiary and impeachment material that is in the form of a witness' prior written statement. Id. at 408. Within the Commission's procedure, "at trial" logically means "at hearing." It is not until after a witness takes the stand at the Commission, is sworn, and adopts his prefiled testimony that there is the equivalent of the "trial" mentioned in Halford. The reason is that it is possible the witness who prefiles the testimony will not take the stand for any of a number of reasons, including death or absence due to other employment. This has occurred before at the Commission. Someone else may adopt the testimony as submitted and then any prior inconsistent statements of the dead person would be irrelevant since they would not be prior inconsistent statements of the witness at trial. Therefore, prior inconsistent written statements (certainly not statements that "color" the testimony of a witness), if any exist, regarding the facts testified to by the witness who prefiles testimony are

properly discoverable only (1) at hearing and (2) after request. It should be noted that KCPL has already disclosed the prior written statements of its witnesses who prefiled testimony in spite of the fact that it was not obligated to do so.

Federal Rule of Evidence 612

In a related argument, Staff states that it is entitled to documents reviewed by witnesses while preparing their prefiled testimony on grounds that the documents qualify as "writings used to refresh memory or recollection." The rule cited by Staff, Federal Rule of Evidence 612, first refers to writings used to refresh the witness' memory "while testifying." After looking at the testimony that has been prefiled in this case, there is no instance in which a witness has indicated in a pre-filed answer that he cannot recall something which has required another question asking if a certain document refreshes the witness' memory to the point where he is now able, in a pre-filed answer, to recall what he previously forgot. The Staff has tortured the meaning of F.R.E. 612 since it only applies where the testimony is being given live in oral examination.

F.R.E. 612 additionally provides that a "refreshing" document used by the witness before he testified can be produced at hearing if the court in its discretion determines production is necessary in the interests of justice. Like the disclosure of inconsistent work product statements of a witness, the writings used to refresh a witness' recollection before he or she testifies are discoverable only "at hearing." Even if the interests of justice are served by disclosure, that disclosure occurs only at hearing. There is no other way to read the rule, notwithstanding Staff's interpretation.

Comments on Attorney-Client Privilege

The substance of the attorney-client privilege and the protection it affords communication between attorney and client is discussed in State ex rel. Great American Insurance Company v.

Smith, 574 S.W.2d 379 (Mo banc 1978). That case, cited by the Staff, represents the best statement of the law in Missouri. Extended discussion of federal cases from other jurisdictions is unnecessary in view of the completeness of that case decided by the highest court in this jurisdiction. Although Great American, supra, discusses intracorporate communications with and to attorneys, another case discussing the breadth of the common law privilege is Upjohn v. U.S., supra.

Staff discusses the Upjohn case at page 23 of its suggestions and lists seven elements of protected communication. It should be added that "[the attorney client] privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." Id., 449 U.S. 390, 101 S.Ct. 683.

Whether any waivers, as discussed by Staff, apply in this case will be determined by the special master, so it is pointless to engage in an academic discussion now.

Conclusion

KCPL realizes that if a special master is appointed that the matters discussed herein will probably be determined by a forum other than the Commission itself. However, these comments should provide some balance to the assertions made by the Staff and demonstrate to the Commission that KCPL has taken a well-reasoned position. KCPL does not intend to impede, nor has it in fact impeded, the Staff from discovery of any factual material relevant to the determination of rates. It seeks to protect only that material which the law recognizes is protected.

Respectfully submitted,

MGE by GWA

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Attorneys for
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document has been either mailed or hand-delivered to counsel for all parties of record to this proceeding this 14th day of May, 1985.

Gary W. Duffy

Gary W. Duffy

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of Kansas City)	
Power & Light Company of Kansas)	
City, Missouri, for authority to)	
file tariffs increasing rates)	Case No. ER-85-128
for electric service provided to)	
customers in the Missouri)	
service area of the Company.)	

In the matter of the determination)	
of in-service criteria for Kansas)	
City Power & Light Company's Wolf)	Case No. EO-85-185
Creek Generating Station and Wolf)	
Creek rate base and related issues.))	

STAFF'S REPLY TO RESPONSE OF
KANSAS CITY POWER & LIGHT COMPANY TO MOTION TO COMPEL

Comes now the Staff of the Missouri Public Service Commission (Staff) in reply to Kansas City Power & Light Company's (KCPL) Response to the Staff's Motion of May 3, 1985 and respectfully states as follows:

Staff appreciates KCPL's agreement to use of a Special Master to resolve the discovery dispute that was the subject of Staff's May 3, 1985 Motion To Compel. In general, Staff agrees to the conditions outlined by Company on pages 7-8, paragraphs (a) through (i) of its Response. However, Staff would point out the following to the Commission:

1. Because of the volume of documents in question and the length of time that might be involved in the Special Master's review thereof, Staff would suggest that rather than a single complete report at the conclusion of such review, the Special Master should prepare a series of periodic reports. Staff is concerned that a single report might not be available until a time when any documents ordered to be produced would be of little or no value to Staff's audit in these dockets.

2. Staff interprets paragraph (e) regarding inclusion in rates of compensation for the Special Master as a matter to be determined by the Commission based on positions taken by the parties

as to the "appropriate" level of these expenses to be included in the Company's cost of service in this proceeding.

3. Staff certainly agrees that Justice Finch can more than adequately fill the role of Special Master in this matter. As a former Supreme Court Chief Justice and author of the Court's decision in the definitive Missouri case on the subject of attorney-client privilege (State ex rel. Great American Insurance Company v. Smith, 574 S.W.2d 379), Justice Finch is a good choice for that role. Staff would, however, point out that use of a Commission Hearing Examiner as Special Master would avoid any additional cost for in-camera review of documents and would also avoid legal questions as to the authority of the Commission to implement this procedure and thus the availability of the appeal remedy. Section 386.240 RSMo 1978 allows the Commission to

"authorize any person employed by it to do or perform any act, matter or thing which the Commission is authorized . . . 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."

Thus, the Commission could appoint a Hearing Examiner to serve as the Special Master and the Commission could issue an Order approving the findings of the Master, avoiding any problem with appealability of the Master's decision to the Circuit Court.

4. Staff would point out that KCPL has not addressed in its Response the question of Kansas Gas & Electric Company (KG&E) documents which have been withheld from the Staff and for which no lists have been nor will be provided. Certainly, Staff would insist that the in-camera review by the Special Master should apply to those documents.

5. On page 8 of its Response, KCPL has requested that the Commission withdraw that part of its May 7, 1985 Order which required KCPL to provide a complete list of all withheld documents by May 14, 1985. The rationale for this request is that KCPL believes the list is no longer necessary if the documents themselves are to be reviewed by the Special Master. Staff opposes this request and disagrees with

the Company's rationale because it believes the provision of a list is still necessary and would serve the following purposes:

- a) It would provide an inventory checklist to assure that all documents withheld are delivered to the Special Master for in-camera review; and
- b) With a complete list in hand, Staff may be able to make a determination that it will not pursue review by the Special Master of certain documents or classes of documents withheld. At various times during negotiations regarding this dispute, Staff has indicated to KCPL that certain documents or classes of documents would not be sought if an agreement regarding this matter could be reached. Also, Staff could prioritize documents withheld which it believes are more significant than others to the Staff's audit for earliest review by the Special Master. This would make the procedure more effective and efficient, especially if periodic reports are made by the Special Master.

6. Finally, since Company has placed such emphasis on brevity in its Response, Staff is compelled to briefly reply to certain "implications" and arguments engaged in by the Company therein.

- a) Staff believes that KCPL has mischaracterized its law department file search. Staff is not seeking access to opinions, mental impressions, conclusions and legal theories of Company attorneys as to these proceedings. Staff is seeking facts regarding matters in which the law department has participated which affect Company's cost of service. These matters include information in law department files regarding litigation which was contemplated, pursued, and/or settled and contracts entered into by the Company regarding the Wolf Creek Nuclear Power Plant and other matters.

- b) Staff's Motion never took the position that the "privileges" do not apply. However, Staff cannot accept Company's interpretation of the application of these privileges and its blanket assertion thereof. At page 2 of Company's "Memorandum In Response To Staff's Suggestions", a flagrant misquotation of Staff's Suggestions appears. Company states "at page 5 of the suggestions, Staff states that the Commission has 'right to unrestricted access to the books and records of utility companies it regulates.'" This language does not appear on page 5 of Staff's Suggestions. The nearest equivalent is the following statement contained in the first full paragraph of page 5. "The Staff believes there are strong policy arguments that the Commission (and its Staff) should have unrestricted access to the books and records of utility companies it regulates."
- c) Staff believes that its arguments for "early" disclosure of work product documents in Commission rate cases are compelling. Appropriate interpretation of the Halford v. Yandell case and a reasonable application thereof would require disclosure subsequent to the prefiling of testimony. The Company, prior to the prefiling of Staff testimony and long prior to commencement of the hearings in this case, has conducted a file search of the Staff's files. Arguably, everything that Commission Staff auditors do in the course of their audit of the Company is "in anticipation of litigation" and, under KCPL's interpretation, would be immune from discovery as work product up until commencement of hearings before the Commission.

WHEREFORE, Staff respectfully requests the Commission to issue its Order reaffirming the requirement that KCPL provide a complete list of all documents withheld from the Staff and containing such other provisions as the Commission believes are appropriate regarding appointment of a Special Master to conduct in-camera proceedings of documents withheld from the Staff.

Respectfully submitted,



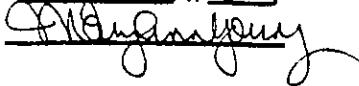
Mary Ann Young
Deputy General Counsel

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CERTIFICATE OF SERVICE

I hereby certify that
copies of the foregoing
have been mailed or hand-
delivered to all parties of
record on this 16th day of

May 19 85





STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held at its office
in Jefferson City on the 17th
day of May, 1985.

In the matter of Kansas City Power & Light)
Company of Kansas City, Missouri, for)
authority to file tariffs increasing rates)
for electric service provided to customers)
in the Missouri service area of the Company.)

Case No. ER-85-128

In the matter of the determination of)
in-service criteria for Kansas City Power)
& Light Company's Wolf Creek Generating)
Station and Wolf Creek rate base and related)
issues.)

Case No. EO-85-185

ORDER CONCERNING IN CAMERA PROCEEDING

On May 3, 1985, the Staff of the Missouri Public Service Commission (Staff) filed a Motion To Compel Production Of Documents And Request For Appointment Of Special Master. By its order issued May 7, 1985, the Commission issued its order directing the Company to: file a response to the Staff's motion; answer the Staff's first set of interrogatories; and provide a complete list of documents currently withheld on or before May 14, 1985.

The Staff's motion states that Kansas City Power & Light Company (KCPL) has refused to provide at least 700 documents during the course of the Staff's audit on the basis of either the attorney-client privilege or the attorney work product doctrine.

Staff further states that KCPL has "alleged immunity for these documents in a blanket fashion" that does not demonstrate that each communication sought to be withheld is indeed a privileged attorney-client communication or attorney work product.

Staff requests the appointment of a special master to conduct in camera proceedings to determine which of the withheld documents, or portions thereof, do qualify for immunity from discovery due to the attorney-client privilege or the work product doctrine. Staff suggests the special master be instructed to apply the criteria set forth by Staff as the appropriate standard for both doctrines. Staff asserts the most appropriate person to fulfill the role of special master would be one of the Commission's hearing examiners.

On May 14, 1985, KCPL filed its response to the Staff's request for a special master. KCPL states that it "could assert various grounds for objecting to use of a procedure such as this in an administrative proceeding, not the least of which is that there is no statutory authority for it." KCPL will agree to the special master in this case, in light of the volume of material involved, as well as the procedural deadlines for other aspects of the case. This agreement is made subject to eight conditions set forth by KCPL, including the appointment of the special master recommended by KCPL.

The Company further requests the Commission vacate its previous order of May 7, 1985, insofar as it pertains to ordering KCPL to answer Staff's first set of interrogatories and to provide a complete list of all withheld documents by May 14, 1985.

The Commission has considered the assertions of both of the parties and determines that an in camera proceeding is the best method to utilize in this matter. The Commission does not deem it necessary or appropriate to appoint a special master to perform the task. Through its delegation powers, pursuant to Section 386.240, R.S.Mo. 1978, the Commission is delegating its authority to determine these discovery matters to Cecil I. Wright, one of its hearing examiners (Examiner). The Commission determines the decisions of the Examiner will be binding on the parties and the Commission. The Commission will not review said decisions.

KCPL is hereby directed to provide the Staff and the Commission with a list of all withheld documents KCPL is still claiming fall within the immunity of the attorney-client privilege or the attorney work product doctrine. KCPL should provide that list to the Staff on or before May 24, 1985. An in camera proceeding will be scheduled to begin June 3, 1985, and continue as necessary to review the documents listed. The documents listed should be segregated into two categories, those for which the attorney-client privilege is claimed, and those for which the work product doctrine is claimed. Each list should be sequentially numbered to be readily identifiable to the Examiner during the proceeding.

At this time, the Commission does not consider a prehearing conference to be necessary. Should the parties determine that a prehearing conference would facilitate the process, they should so indicate to the Commission.

The Commission further determines KCPL's request that the Commission vacate the portion of its May 7, 1985, order pertaining to the furnishing of answers by KCPL to the Staff's first set of interrogatories is reasonable and should be granted.

In Staff's motion to compel filed May 3, 1985, in paragraph 11, Staff described the documents sought to be discovered. The Commission considers the categories set out in paragraph 11 too broad and so will not use them as a basis for deciding what documents are discoverable. By letter dated April 15, 1985, KCPL waived its claimed work product immunity to certain documents for those witnesses who had or would in the future prefile testimony. The Commission will therefore not consider in this in camera proceeding the documents for which KCPL has waived its claimed immunity.

For the documents for which KCPL has claimed either attorney-client privilege or work product immunity, the parties should be prepared to address specifically the claimed privilege or immunity. Based upon the decision of the Missouri Supreme Court in State ex rel. Great American Insurance Company v. Smith, 574 S.W.2d 379 (Mo. banc 1978), the documents for which attorney-client privilege is

claimed will not be viewed unless the documents come within the exception established in State ex rel. Friedman v. Provaznik, 668 S.W.2d 76, 79 (Mo. banc 1984). The documents for which the work product immunity is claimed will be viewed.

Staff has indicated it considers 4 CSR 240-2.130(5) to include both the attorney-client privilege and the work product immunity. The Commission considers this rule to only include the attorney-client privilege. Although many courts and some experts use the term "privilege" in discussing the work product immunity, the Commission believes the work product immunity is not a privilege on the same footing as the attorney-client privilege and so is not covered by this rule.

This clarification does not mean that the Commission does not accept or will not apply the work product immunity as established under Missouri law. The Commission considers this immunity an adjunct to discovery under the Rules Of Civil Procedure, and as such it is recognized in 4 CSR 240-2.090. Since 4 CSR 240-2.090 allows discovery the same as the Rules Of Civil Procedure, the Commission recognizes the work product immunity as set out in Supreme Court Rule 57.01.

KCPL should be prepared to establish specifically for each document for which it is claiming attorney-client privilege the elements necessary to have benefit of the privilege. Since this matter involves a corporate client and there appear to be no Missouri cases outlining how the privilege applies to a corporate client, the parties should follow the U.S. Supreme Court decision of Upjohn v. U.S., 101 S. Ct. 677 (1981), as well as Missouri case law concerning the privilege. To aid in the understanding of the relationship between KCPL attorneys and other KCPL personnel, KCPL shall provide an organizational chart with its filing of the lists. KCPL shall also provide organizational charts for any committees or other groups which have produced documents for which KCPL is claiming attorney-client privilege or work product immunity.

The claim of work product immunity is governed by Supreme Court Rule 57.01(b)(3). The first question to be addressed is whether the documents are

work product. KCPL should be prepared to meet specifically the requirements necessary to receive the benefit of the immunity for each document for which the immunity is claimed, as well as to present the documents for review. Although KCPL has waived its claimed immunity for prior inconsistent statements and documents of which testimonial use was made, there are still documents sought by Staff that bring into question whether and when the holding in Halford v. Yandell, 558 S.W.2d 400 (Mo. App. 1977) applies. The Halford decision does not specifically address nor answer the question of whether or when the work product immunity is removed with regard to prefiled testimony in an administrative hearing. The Commission considers that the Halford issue should be largely resolved by KCPL's waiver. For the remaining documents, the issues left are whether the withheld documents are work product, whether they fall within the protection from discovery of Rule 57.01(b)(3) ("mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation"), or are they work product which is discoverable upon a showing by Staff of substantial need and undue hardship.

Staff asserts there are more than 700 documents upon which a determination must be made. The in camera proceeding will continue until all documents have been considered. If counsel for the parties have suggestions for any procedures which would expedite this process, they should feel free to communicate those in writing to the Hearing Examiner who will conduct the proceeding. An attempt will be made to rule on each withheld document on the record. KCPL should be prepared to provide those documents found to be discoverable at the hearing or shortly thereafter.

It is, therefore,

ORDERED: 1. That the Staff's request for appointment of a special master be, and is, hereby denied.

ORDERED: 2. That Cecil I. Wright, Commission Hearing Examiner, is hereby delegated authority to conduct an in camera proceeding and make determinations

concerning the discoverability of certain documents as withheld by Kansas City Power & Light Company, in accordance with the procedures established in this order.

ORDERED: 3. That Kansas City Power & Light Company be, and is, hereby directed to submit to the Staff and the Commission a list of all documents it is still claiming fall within the immunity of the attorney-client privilege or the attorney work product doctrine on or before May 24, 1985.

ORDERED: 4. That the Commission does hereby vacate its order of May 7, 1985, as it pertains to the furnishing of answers by Kansas City Power & Light Company to the Staff's first set of interrogatories.

ORDERED: 5. That the in camera proceeding discussed herein be, and is, hereby scheduled to commence on June 3, 1985, at 10:00 a.m., and to continue as is necessary, in the Commission's hearing room on the fifth floor of the Harry S Truman State Office Building, Jefferson City, Missouri.

ORDERED: 6. That Kansas City Power & Light Company and Commission Staff will appear at the Commission Offices on June 3, 1985, at 10:00 a.m., and be prepared to address the issue of discovery of the documents withheld by KCPL under the proceedings and conditions as set out herein.

ORDERED: 7. That this order shall become effective on the date hereof.

BY THE COMMISSION

Harvey G. Hubbs

Harvey G. Hubbs
Secretary

(S E A L)

Steinmeier, Chm., Musgrave,
Mueller, Hendren and Fischer,
CC., Concur.

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of Kansas City)
Power & Light Company of Kansas)
City, Missouri, for authority to)
file tariffs increasing rates for)
electric service provided to)
customers in the Missouri service)
area of the Company.)

Case No. ER-85-128 ✓

In the matter of the determination)
of in-service criteria for Kansas)
City Power & Light Company's Wolf)
Creek Generating Station and Wolf)
Creek rate base and related issues.)

Case No. EO-85-185

APPLICATION FOR RECONSIDERATION OR REHEARING

Comes now Kansas City Power & Light Company ("KCPL") pursuant to §386.500 RSMo 1978, and applies for reconsideration or rehearing with respect to the matters determined by the Missouri Public Service Commission ("Commission") in the Commission's Order Concerning In Camera Proceeding ("the Order") issued and effective in this docket on May 17, 1985.

KCPL strongly desires to resolve this discovery dispute in a timely and expeditious manner without further proceedings, judicial or otherwise. It was in this spirit that KCPL consented to the use of a special master with certain conditions. KCPL remains hopeful that this dispute will be resolved on the administrative level in time for the Staff to utilize any materials or information, which it might be permitted to discover, in this case. Notwithstanding this, however, KCPL does not consent to the terms and conditions of the Order. The Order is unjust, unlawful, unconstitutional, in excess of statutory authority or jurisdiction, unsupported by competent and substantial evidence upon the whole record, is arbitrary, capricious and unreasonable, and involves an abuse of discretion, all in material matters of fact or law, individually or collectively, or both, as hereinafter set out:

FILED

MAY 20 1985

PUBLIC SERVICE COMMISSION

98.

X

1. The Order states that by means of its delegation authority in §386.240 RSMo 1978, the Commission is appointing one of its hearing examiners to determine certain discovery matters respecting the attorney client and work product privileges. That procedure is unlawful according to the decision of the Missouri Supreme Court in State ex rel. Great American Insurance Company v. Smith, 574 S.W.2d 379, 387 (Mo. banc 1978) because the Commission, in the first instance, lacks the authority to examine the documents. If it does not have the authority, it cannot delegate it to an employee.

In Great American, supra, the Supreme Court states that it would be improper for a trial judge, in a similar discovery dispute, to examine documents in camera:

We recognize that in some of the federal cases cited by Cannova [the party that wanted to see the letters of the attorney] the court has approved the utilization of an in camera examination by the court of attorney-client communications to determine how much, if any, thereof shall be made discoverable under the Wigmore approach. Bird v. Penn Central Company, 61 F.R.D. 43 (E.D. Pa. 1973) is such a case. However, no state court decision approving or adopting that procedure has been cited, and we have found none. We have concluded that we should not adopt such a rule in this case. The harm to the traditional attorney-client relationship which could result from permitting a trial judge to interrogate a lawyer or his client to learn what the attorney said in their conferences, or to examine the lawyer's letters to ascertain what he said to the client therein, in order to determine what portions thereof could be made available to the other parties under the Wigmore test could, and we believe it would, be considerable. It should not be permitted. (emphasis added)

Clearly, if the Missouri Supreme Court has ruled that a trial judge does not have the authority to conduct an in camera proceeding, it is equally unlawful for the Commission to do so since it functions as both judge and jury. If the Commission lacks the initial authority to perform the task, it is an elemental principle of law that it cannot delegate authority which it does not possess. The Commission's delegation authority, §386.240, is limited. It provides that the Commission may authorize an employee to do or perform any act which the commission is authorized by this chapter to do or perform. There

is no statutory authority in the Public Service Commission law for the Commission to do what it proposes, and even if such authority existed, State ex rel. Great American Insurance, supra, took it away.

It is the position of KCPL that the Commission lacks the authority to appoint a special master under these or any circumstances. Nevertheless, in a effort to resolve this dispute, KCPL agreed, in this case only, to the special master vehicle with certain conditions. One of those conditions is the use of former Chief Justice James A. Finch, Jr., as special master. Justice Finch is named for two main reasons: 1) his expertise, availability and willingness to serve; and 2) he has no employment relationship to either party.

2. The Order states, on page 2, that "the decisions of the Examiner will be binding on the parties and the Commission. The Commission will not review said decisions." This proposed procedure is unlawful and unreasonable because it violates one of the Commission's own rules, namely 4 CSR 240-2.130, which states that:

(4) Rulings of a presiding officer may be reviewed by the commission in determining the matter on its merits. In extraordinary circumstances, where prompt decision by the commission is necessary to promote substantial justice, the presiding office may refer the matter to the commission for determination during the process of the hearing.

This rule grants to parties the right of appeal of an examiner's decision to the Commission. The Commission cannot, by order in this proceeding, amend that rule to take away that substantive right. See §536.021 RSMo. Therefore, the proposed procedure is unlawful.

KCPL observes that making a decision of a hearing examiner "binding" on all parties is patently unlawful since any action of the Commission is subject to judicial review. Further, the entire concept of the hearing examiner ruling on the questions is unlawful for the reasons set out in paragraph 1.

3. The Order is unreasonable because KCPL is unable to determine the intent of the Commission from the language of the Order at the bottom of page 3 and the top of page 4 when it speaks of documents being viewed or not being viewed. The Order is unclear as to who the Commission contemplates will view the documents. A clear expression of the Commission's intent here is essential now since the Staff has asserted waiver of these doctrines on the part of KCPL and disclosure to third persons can constitute such a waiver. It is also unclear from the order as to what is meant by "the exception established in State ex rel. Friedman v. Provaznik". This is precisely the type of problem which KCPL seeks to avoid by the use of Justice Finch as a special master. His many years of judicial experience, especially in these matters, would avoid the problem of the Commission trying to declare the law in this area, a power which the Commission lacks, in any event.

4. The procedure ordered by the Commission, in the respects contained herein, also deprives KCPL of its rights to due process of law as guaranteed by Mo. Const. Art. I, §10 and U.S. Const. Amend. XIV, §1, its right to privacy and the guarantee of equal protection under the law.

5. KCPL takes this opportunity to reaffirm the commitments it made in its letter of April 15, 1985, regarding production of certain documents and its position as set out in the Response to the Staff's Motion filed on May 14, 1985.

WHEREFORE, KCPL respectfully requests the Commission to reconsider or rehear this matter and upon such reconsideration or rehearing, to modify its Order to conform with the points submitted herein.

Respectfully submitted,

Mark G. English

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James C. Swearengen

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Attorneys for
Kansas City Power & Light Company

Certificate of Service

The undersigned hereby certifies that a copy of the foregoing document has been either mailed or hand-delivered to counsel for all parties of record to this proceeding this 20th day of May, 1985.

Gary W. Duffy

Gary W. Duffy

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held at its office
in Jefferson City on the 23rd
day of May, 1985.

In the matter of Kansas City Power & Light
Company of Kansas City, Missouri, for
authority to file tariffs increasing rates
for electric service provided to customers
in the Missouri service area of the Company.

Case No. ER-85-128

In the matter of the determination of
in-service criteria for Kansas City Power
& Light Company's Wolf Creek Generating
Station and Wolf Creek rate base and related
issues.

Case No. EO-85-185

ORDER DENYING RECONSIDERATION

On May 17, 1985, the Commission issued an order establishing an in camera proceeding to review certain documents withheld from discovery by Kansas City Power & Light Company (KCPL). This procedure was adopted in response to Commission Staff filing a motion to compel KCPL to answer certain interrogatories. The Commission delegated authority to one of its hearing examiners to conduct the proceeding and review the documents. On May 20, 1985, KCPL filed an Application For Reconsideration Or Rehearing of the order establishing the in camera proceeding.

KCPL has set out what it considers are the errors in the order and its opinion that the Commission does not have authority to adopt an in camera proceeding to determine which documents are discoverable by Staff. KCPL states it does not consent to such a procedure.

The Commission will address those points of KCPL's application which it deems pertinent. First, the Commission is unaware and KCPL has cited no case law for the proposition that a party to a case must consent to a ruling of the Commission before it is effective. The Commission in rate cases attempts to proceed so all

parties have an opportunity to present their respective cases, but neither the courts nor the Commission has ever needed a party's consent to a ruling before the party must comply with the ruling. The law provides remedies if a trier of fact abuses its discretion or if a party wishes to seek review of a Commission decision.

Second, the Commission made it clear in its order that the hearing examiner would not view the documents for which attorney-client privilege is claimed. This complies with the requirements of State ex rel. Great American Insurance Company v. Smith, 574 S.W.2d 379, 387 (Mo. banc 1978). An exception to the ruling in the Great American case was made in State ex rel. Friedman v. Provaznik, 668 S.W.2d 76, 79 (Mo. banc 1984). The Missouri Supreme Court en banc carved an exception out of the holding in Great American that the trier of fact could not view the documents, even in camera, for which attorney-client privilege was claimed. The Friedman court allowed an in camera proceeding, stating:

In Great American, the letters sought to be discovered were on their faces protected by the attorney-client privilege; an in camera proceeding was not necessary to reach that determination. (Case cite omitted). In this case, no determination of the extent to which the subpoenaed materials reflect privileged communications can be made without an in camera inspection. Respondent has the discretion to examine and protect the identities and the privacy of relator's clients, and can demonstrate appropriate attention to matters claimed to be privileged. (668 S.W.2d at 80).

The Commission stated in its order that the hearing examiner would not view the documents for which attorney-client privilege is claimed in the in camera proceeding unless the document comes within the exception established by the Friedman case. The Commission will again state: the documents will not be looked at, viewed, observed or read unless the document is not clearly an attorney-client communication and is of such importance justice requires a review of the document itself by the hearing examiner. The fact the documents may not be viewed does not remove the requirement that KCPL establish the existence of the attorney-client privilege for each document.

The Commission stated in its order that the decision made by the hearing examiner concerning each document would be binding on the parties and the Commission would not review the decision. The Commission, under its delegation authority, delegated the decision concerning the discoverability of the documents to the hearing examiner. The Commission established this proceeding, it believed, in response to KCPL's and Staff's request that the Commissioners not view the documents. The Commission established a procedure it believed would guarantee an expeditious and thorough review of the documents in question. The Commission did not intend to imply in its order that KCPL could not seek judicial review of the decisions on discoverability at the appropriate time. In its application for reconsideration, KCPL now alleges the delegation violates its right under 4 CSR 240-2.130 to have the Commission review the examiner's decision. 4 CSR 240-2.130 does not give a party that right. The rule provides the Commission may review the examiner's rulings or the examiner may refer a ruling to the Commission. The Commission will not review the examiner's rulings unless the examiner determines that to promote substantial justice he should refer the ruling to the Commission.

KCPL asserts it does not understand who will view the documents in the in camera proceeding. The Commission believes its order is clear. A hearing examiner has been delegated the authority to conduct the in camera proceeding and view the documents. The hearing examiner to whom the authority is delegated is not involved in the Phase IV portion of the proceedings. The examiner will be the only person, party or entity to view the documents unless they are determined to be discoverable. This should remove KCPL's concerns.

The Commission wishes to address one other issue which underlies this entire matter. There seems to be a feeling on the part of KCPL that the Commission hearing examiners are either unable to make objective, impartial decisions or are unqualified to do so. The examiners are attorneys licensed to practice law in the State of Missouri. The examiners are aware of their obligation to conduct fair and

impartial hearings and to apply the law to the various issues before them and to make decisions based upon the facts rather than information outside the record. The Commission would point out that its hearing examiners have a wide variety of legal experience, especially in public utility regulation, and they regularly conduct complex proceedings involving legal, factual and evidentiary questions. Addressing discovery questions is a part of the hearing examiners' duties and the Commission believes the hearing examiners are quite capable of dealing with the matters in dispute.

The Commission has determined it is not necessary to go outside its own hearing examiner staff to handle this dispute. The Commission does not believe the KCPL ratepayers should be required to pay for a procedure which can be handled by a Commission hearing examiner. The Commission believes the procedure it has adopted is the most expeditious and most effective way to review the discovery questions and still meet the hearing schedule for the remainder of this case.

Based upon the foregoing discussion, the Commission will deny KCPL's application for reconsideration.


It is, therefore,

ORDERED: 1. That the application for reconsideration is hereby denied.

ORDERED: 2. That the procedures set forth in the Commission's order of May 17, 1985, are still in effect.

ORDERED: 3. That this order shall become effective on the date hereof.

BY THE COMMISSION



Harvey G. Hubbs
Secretary

(S E A L)

Steinmeier, Chm., Mueller,
Hendren and Fischer, CC.,
Concur.
Musgrave, C., Absent.

KANSAS CITY POWER & LIGHT COMPANY

1330 BALTIMORE AVENUE

KANSAS CITY, MISSOURI 64105

LAW DEPARTMENT
(816) 556-2785

RECEIVED

May 28, 1985

File No. 0501-80

MAY 29 1985

COMMISSION COUNSEL
PUBLIC SERVICE COMMISSION

Mr. Cecil I. Wright, Esq.
Hearing Examiner
Missouri Public Service Commission
P. O. Box 360
Jefferson City, Missouri 65102

RE: Case Nos. ER-85-128 and EO-85-185;
In-Camera Proceeding

Dear Mr. Wright:

Please find enclosed two listings of documents withheld by KCPL as being privileged attorney-client communications or privileged work product. KCPL withheld and retained these documents on a file-by-file basis, regardless of the privilege asserted, and the document lists previously provided to the Staff grouped these documents by file. To minimize the difficulty in reconciling the contents of the enclosed listings and the prior document lists, KCPL structured the enclosed listings on a file basis. The documents set forth in the listings are sequentially numbered, described, and the privilege(s) asserted are indicated. We have also provided columns to record your ruling on each of the documents. The contents of both enclosed listings are identical, except that on one of them the numbers of all documents asserted to be privileged attorney-client communications have been lined through, and on the other list the numbers of all documents asserted to be privileged work product have been lined through. Some documents are asserted to be both privileged attorney-client communications and privileged work product, and they have not been lined through on either list. We would suggest treating the attorney-client communications first, and then the remainder of the documents.

Two areas of documents withheld, or to be withheld, are not included in the enclosed listings. The first area entails various files of C. E. Linderman, a K&T employee, which have not been reviewed by Staff. It is my understanding that, due to the demands of the Kansas rate cases, this listing will not be provided to me until later this week.

Mr. Cecil I. Wright, Esq.
May 28, 1985
Page 2

The second area concerns the privileged documents which KG&E removed from the files of its employees (such as its president, Wilson Cadman) before Staff reviewed such files. KCPL has not reviewed these withheld documents, but understands that many of them constitute attorney-client communications between KG&E personnel and its lawyers on issues not involving its Wolf Creek partners (KCPL and KEPCo). A listing of such documents is anticipated to be provided to KCPL this week, and we would like to discuss the issue of KG&E-specific attorney-client communications at the commencement of these proceedings.

Pursuant to your conversation with Mr. Gary Duffy, a copy of the complete listing was provided to Staff on May 27. Ms. Mary Ann Young is also being provided copies of the enclosed listings.

Thank you for your consideration.

Very truly yours,



Mark G. English

MGE:cp

cc: ✓ Ms. Mary Ann Young
Mr. Mark Comley

STATE OF MISSOURI

PUBLIC SERVICE COMMISSION

In the matter of Kansas City Power & Light Company of Kansas City, Missouri, for authority to file tariffs increasing rates for electric service provided to customers in the Missouri service area of the Company.

Case No. ER-85-128

In the matter of the determination of in-service criteria for Kansas City Power & Light Company's Wolf Creek Generating Station and Wolf Creek rate base and related issues.

Case No. EO-85-185

ORDER CONCERNING DISCOVERABILITY
OF WITHHELD DOCUMENTS

On May 17, 1985, the Missouri Public Service Commission issued an order establishing an in camera proceeding to determine the discoverability of certain documents withheld by Kansas City Power & Light Company (KCPL) based upon claims of attorney-client privilege and work product immunity. The in camera proceeding was established in response to a motion to compel the disclosure of the withheld documents filed by Commission Staff. The in camera proceeding was established within the context of the ongoing rate case procedures, which are being conducted to determine the appropriate rates to be charged KCPL's customers.

By its order the Commission delegated to one of its hearing examiners the decision of which documents should be disclosed. Originally, Staff estimated approximately 700 documents had been withheld. At the beginning of the in camera proceeding, a list of 2,028 documents (Exhibit C) was presented by KCPL. These first 2,028 documents are the subject matter of this order. KCPL disclosed it still was withholding a substantial number of documents for which a list had not been prepared. Those documents will be addressed in this in camera proceeding once the list is prepared.

To support its claims of attorney-client privilege and work product immunity, KCPL presented the testimony of its General Counsel, A. Drue Jennings, and one of its Assistant Counsel, Mark English. The KCPL witnesses gave statements concerning the conduct of KCPL's rate case preparation, especially in relation to the withheld documents. Much of the testimony was general or related to certain categories of documents. Although the case law with regard to attorney-client privilege and work product immunity places the burden on the party asserting the privilege or immunity to establish the applicability of the claim specifically for each document, in these circumstances that specificity was not required. Because this proceeding occurs within the middle of the hearings in the rate case, a detailed presentation would be counterproductive. The purpose of the in camera proceeding was an expeditious handling of the dispute.

After the efforts of the party's counsel, most of the disputes concerning the documents for which attorney-client privilege was asserted were resolved. Rulings were made on the few remaining documents for which attorney-client privilege was asserted on the record and will not be repeated here. KCPL was given three days after a ruling on the record to either take other action or disclose the document.

This order will only concern the questions of work product immunity left unresolved. There are two general categories of documents to be dealt with. Staff sought certain documents, asserting they were not work product. Staff sought disclosure of other documents under the substantial need and undue hardship provision of Supreme Court Rule 57.01(b)(3) since Staff conceded these documents were work product. To support its claim of substantial need and undue hardship, Staff presented two witnesses, Robert Schallenberg and Cary Featherstone, both accountants involved in the preparation of the rate case. Staff's presentation was general in nature for the same reason as KCPL's. Staff did present specific testimony for some of the documents.

To set the background for the rulings on discoverability, the dispute must first be placed in context. This dispute arises within the regulation of public utilities as established by statute. The Missouri legislature has seen fit to grant certain corporations who provide electric service to Missouri citizens a monopoly for that service. To protect the interests of the ratepayer (customer) that would occur in a competitive market, the legislature established the Public Service Commission to regulate public utilities. This means that the Staff of the Commission is authorized and empowered to review a public utility's books, records and management decisions when the utility seeks a rate increase. Regulation by the Commission thus is the substitute for a competitive market and KCPL, as a public utility, must seek Commission approval before it can recover from its customers the costs of any construction.

The rate increase sought in these dockets includes the costs of the Wolf Creek nuclear power plant. The construction of this power plant has been continuing since the early 1970s. Staff has been auditing the project for many years in the context of earlier rate cases. Many thousands of documents have been generated and reviewed.

Staff uses an informal procedure in seeking documents from public utilities. Staff uses Data Requests (DRs) which ask for documents or other tangible items or responses to certain questions. One of its DRs (Exhibit B) sought the production of the documents in dispute in this proceeding. In response to the Data Request KCPL asserted attorney-client privilege and work product immunity and refused to disclose certain documents.

There are several broad categories of documents, as well as documents which are distinctive. The documents will be reviewed as they were provided to the hearing examiner. When a document is part of a category, all later documents will be included in that ruling unless specifically excluded. Because of the number of documents, the analysis will be brief. The evidence to support each party's position

is in the record and will only be used if it is necessary in indicating the basis of the ruling.

This process is hampered somewhat by the lack of definitive case law in Missouri concerning work product immunity in administrative cases, and in public utility law in particular. There is also little case law in Missouri concerning work product in the corporate setting. Where necessary, where a ruling is made based upon an interpretation of Rule 57.01(b)(3), it will be stated. Citation of cases may be omitted for brevity.

The leading case in Missouri on work product discovery is Halford v. Yandell, 558 S.W.2d 400 (Mo. App. 1977). This case establishes that Rule 56.01(b)(3) limits pretrial discovery and is not a qualified evidentiary privilege at hearing. The Halford court quotes extensively from United States v. Nobles, 95 S. Ct. 2160 (1975), and other cases that once a person is made a witness and presents testimony, the work product immunity is waived with respect to matters covered in that witness's testimony.

Public Service Commission cases present this issue in a different light, since parties prefile testimony. This presents the question of when is the immunity waived, at the time the prefiled testimony is filed, or at the hearing when the prefiled testimony is offered, or at some other time. This issue has been resolved largely by KCPL's agreement to provide all documents to Staff for persons who have filed prefiled testimony. KCPL has limited its agreement to documents used for testimonial purposes. Staff asserts all documents reviewed by the witness should be released since even though a witness does not use the document, the witness has reviewed it and has made a decision not to use it. KCPL's position is that only those documents relied upon are discoverable.

Commission litigation again presents a unique aspect of this problem. In major rate cases many persons prepare the information and testimony of a particular witness. The witness may only review what has been presented to him and not all of

the documents on which his testimony is based. An excellent example are the drafts prepared by Bishop. Bishop is not a witness, but he prepared testimony on several contested matters. Does the waiver at trial reach Bishop's preparation and does the waiver pertain to all documents reviewed or only those relied upon?

The Nobles court did not address these questions. The Halford court tangentially addressed the issue in its facts. In Halford one party sought to discover statements taken by an investigator for the other party's insurer. These statements were inconsistent with the testimony of a witness at the trial. The court said the work product immunity did not apply once the witness had testified and the prior inconsistent statements are discoverable. This decision seems logically to extend to documents utilized by a witness before the Commission. If a witness reviews two documents, one which supports his position and one which does not and both are records of the utility company, the presentation of that witness's testimony waives work product immunity for both documents. The better rule with regard to testimonial use is that all documents reviewed are discoverable.

The documents will be ruled on as they were reviewed. Numerical sequence is not important. If a document is determined to be work product it will then be decided whether Staff has met the provisions of Rule 57.01(b)(3). For easy reference, the number of the document will be listed in the left-hand column, as well as the word "PROTECTED" if the document is not discoverable or the words "NOT PROTECTED" if it is discoverable.

#219
NOT PROTECTED

This is a document from a KCPL Vice President to a KCPL Chief Executive Officer (CEO) concerning an order by the Kansas Corporation Commission (KCC) on the application of KEPCO to buy a percentage of the Wolf Creek nuclear power plant. This document is from a member of upper management to the head of the corporation, neither acting as an attorney for the corporation. Again, no Missouri case law can be found interpreting Rule 57.01(b)(3) in this context. Although the document contains the thoughts and suggested strategy of the sender, there is no indication it was prepared for KCPL attorneys or at their request. The same is true

for the attachment. Therefore, it is not work product.

#1058
PROTECTED

This is an agenda for a meeting between KCPL and Kansas Gas & Electric Company (KGE). The agenda details assignments and completion dates. Although seemingly innocuous, it might indicate emphasis or other strategy of KCPL and so is work product. The document does not indicate its author or recipients but the content supports the ruling. No substantial need was shown.

#1059
PROTECTED

This is another document without author or routing. It contains rate case preparation assignments and so is protected. There has been no allegation the names of the persons assigned to the various projects have been withheld. No showing of substantial need.

#1065
PART PROTECTED
PART NOT PROTECTED

This is an assignments agenda for preparation of the rate case. Attachments are DRs from Staff and KCPL's response. The agenda is work product but the attachments are not and should be disclosed if Staff has not already received them.

#1068
PART PROTECTED
PART NOT PROTECTED

This is a document in the general category of Wolf Creek Team agendas and assignments. The testimony was that KCPL formed a team of employees to work specifically on the preparation of the Wolf Creek rate case. The agendas for the meetings of this team are work product. KCPL attorneys were involved in the process. There has been no contention the names of the team members or their assignments have been withheld from Staff. This agenda and others throughout these documents are work product and there has been no showing of substantial need or undue hardship to support their disclosure. All attachments to these agendas which are DRs from the Missouri Commission or KCC and the responses thereto are not protected and should be disclosed with the deletion of any handwritten comments or notes.

#1071
PART PROTECTED
PART NOT PROTECTED

Same as #1068.

#1076
PART PROTECTED
PART NOT PROTECTED

The agenda is protected the same as with #1068. Mr. Carroll's resume is not. Wolf Creek Team assignments are protected. DR 74 from C.J. Renken is not protected. The letter from Pendleton to Roadman dated 4/5/83 is not protected.

#1079
PROTECTED

Wolf Creek Issues Committee and draft Wolf Creek Rate Case Team are protected. No substantial need shown.

#1080
NOT PROTECTED

This document was generated prior to the establishment of the Wolf Creek Team and is for personnel purposes, not actual preparation of the rate case, and is not protected. This was not generated for an attorney or at his direction.

#1081
PROTECTED

Same as #1068.

#1082
PROTECTED

Same as #1068.

#1083
NOT PROTECTED

This memo is from the head of the Wolf Creek Team to its members. Though KCPL attorneys are copied, this is not work product.

#1085
PROTECTED

Memo from KCPL attorney.

#1086
PROTECTED

Same as #1068.

#1087
PROTECTED

Wolf Creek assignments for Knodel. Same as #1068.

#1088
PROTECTED

Notes for Wolf Creek Team assignments. Same as #1068.

#1089
PROTECTED

Wolf Creek Team work outline. Same as #1068.

#1090
NOT PROTECTED

Memo concerning Staff DRs in Case No. EO-82-88. Memo indicates discussion with Staff concerning the information contained in this document. This is not work product and if it were, the protection has been waived by subsequent disclosure by Pendleton to Staff.

#1091
PART PROTECTED
PART NOT PROTECTED

Staff agreed this document is work product. It is a draft of documentation of KCPL's demand forecasting methodologies from 1968 to the beginning of the econometric modeling prepared by B. Rist. Attached are a chart and a list of reference sources. There is no showing of substantial need for this draft. The attached documents are not protected.

#1092
PROTECTED

Letter seeking to engage Financial Concepts, Inc. (Fincap) to present testimony in the rate case. Staff has agreed it is work product. No substantial need is shown.

#1093
NOT PROTECTED

Letter from Fincap in response to #1092. This letter sets out Fincap's estimate of the total cost of its services. Because of the estimate, this document is discoverable.

#1094
PROTECTED

Letter accepting Fincap's conditions. Staff has agreed this is work product. No substantial need shown.

#1110
(2 copies)
PROTECTED

This is a compilation of testimony before other regulatory bodies and studies done by KCPL or its consultants. KCPL states these documents have previously been provided to Staff. If this is true there is no need for disclosing these two compilations.

#1113
NOT PROTECTED

Letter from Booz Allen & Hamilton, Inc. (BAH) concerning the estimated fees for their rate case preparation. This is discoverable for comparison purposes with the final rates charged.

#1114
PROTECTED

Rate case strategy for Phase II by Shaw, Pittman, Potts & Trowbridge (SPPT).

#1210
PART PROTECTED
PART NOT PROTECTED

This packet includes three memos from Bishop to Haines and Wood (KCPL attorney) concerning Bishop's preparation for the rate case. This is work product and is a draft of the final document. Included is a document entitled "IV Inventory of Spare Parts". Staff showed a substantial need for this document. The rest will not be disclosed.

#1211
NOT PROTECTED

A list of preliminary questions sent to McPhee to be answered for the preparation of his testimony by SPPT. Also a series of questions not to be included in McPhee's prepared testimony. The answers to the questions are included. Since SPPT prepared McPhee's testimony based upon the answers to these questions, this document should be released under KCPL's agreement to disclose documents of which testimonial use was made.

#1212
NOT PROTECTED

This is a list of retrieval numbers for documents requested by SPPT for preparing McPhee's testimony. These are the documents used by SPPT to prepare McPhee's testimony and are discoverable.

#1213
NOT PROTECTED

This is a packet of documents requested by SPPT for preparation of McPhee's testimony. KCPL states that none of the documents have been withheld from Staff. Since none of these documents have been withheld, there is no work product to protect.

#1215
PROTECTED

Staff has agreed this is work product. No substantial need is shown.

#1217
PROTECTED

Staff has agreed this is work product. No showing of substantial need.

#1218
PROTECTED

Same as #1217.

#1219
PROTECTED

Same as #1217.

#1220
PROTECTED

Same as #1217.

#1223
NOT PROTECTED

A note from Cagnetta to English with attached graphs. These graphs appear to be basic data and so should be disclosed to Staff.

#1224
PROTECTED

Outline prepared by EBASCO for rebuttal. No substantial need shown.

#1227
PROTECTED

EBASCO document prepared for possible rebuttal. No substantial need shown.

#1229
PROTECTED

EBASCO request for information for possible rebuttal testimony. No substantial need shown

#1231
PROTECTED

Packet of documents concerning BAH request for information. Document states lists of documents were provided to Staff. No substantial need shown.

#1239
PROTECTED

Wolf Creek Issues Committee and Rate Case Team document. No substantial need shown.

#1240
PROTECTED

Staff agreed this is work product. No substantial need shown.

#1242
NOT PROTECTED

This is the same document as #1080.

#1243
NOT PROTECTED

Undated unsigned piece of paper.

#1244
PROTECTED

Staff agrees this is work product. No substantial need shown.

#1246
PROTECTED

Letter from Black & Veatch (B&V) prepared for rate case. No substantial need shown.

#1271
PROTECTED

Work product from prior litigation. No substantial need shown.

#1290
PROTECTED

Staff agrees this is work product. No substantial need shown.

#1291
PROTECTED

Same as #1290.

#1292
PROTECTED

Suggestions by Pendleton for response to Staff DR. Opinion of Pendleton.

#1293
PROTECTED

Same as #1292.

#1294
PROTECTED

Same as #1290.

#1295
PROTECTED

Draft reply to Renken. No substantial need shown.

#1296
PROTECTED

Same as #1295.

#1300
PROTECTED

Memo setting out issues that need to be addressed in the rate case. No substantial need shown.

#1303
NOT PROTECTED

List of additional capacity expansion related studies. This list of underlying documents should be disclosed to ensure Staff has access to all underlying documents. This meets the requirement of substantial need.

#1316
NOT PROTECTED

This is an agenda. It is not work product.

#1317
NOT PROTECTED

Draft of proposed outline for Individual Reconciliation Reports. This document is the first in the category of documents involving the reconciliation packages (Rec Pacs). These Rec Pacs are developed by KCPL to reconcile later projected costs of various parts of Wolf Creek with the original projections made in the definitive estimate. KCPL contends these are work product and only prepared for this rate case. Staff contends Rec Pacs are a management tool and would be prepared whether or not a rate case was filed, and so are not work product. KCPL testimony was that many of the Rec Pac drafts and documents had already been disclosed to Staff.

Since management is always concerned with the changes in costs from an original estimate to later projections based upon actual costs, these reconciliation packages are not protected under the work product immunity. If they were work product, they contain information which is not produced elsewhere, so Staff would have substantial need of the documents. Also, in this case KCPL has given many similar documents to Staff. It would not be proper to allow KCPL to selectively disclose information on this issue.

#1318
NOT PROTECTED

Same as #1317.

#1319
NOT PROTECTED

Same as #1317.

#1320
NOT PROTECTED

Same as #1317.

#1321
NOT PROTECTED

Same as #1317.

#1322
NOT PROTECTED

Same as #1317.

#1323
PROTECTED

Staff agrees this is work product. No substantial need shown.

#1344
PROTECTED

Mental impressions concerning preparation of rate case.

#1345
PROTECTED

Wolf Creek Team assignments. Same as #1068.

#1346
PROTECTED

Wolf Creek Team agenda. Same as #1068.

#1347
PROTECTED

Staff agrees this is work product. No substantial need shown.

#1348
PROTECTED

Same as #1347.

#1349
PROTECTED

Mental impressions concerning rate case preparation.

#1376
PROTECTED

Wolf Creek issues. No substantial need shown.

#1378
PROTECTED

Same as #1376.

#1379
PROTECTED

Same as #1376.

#1381
PROTECTED

Same as #1376.

#1384
PROTECTED

Same as #1376.

#1386
NOT PROTECTED

There is no indication this document is prepared for the rate case. It is not work product.

#1387
NOT PROTECTED

Same as #1386.

#1388
NOT PROTECTED

Same as #1386.

#1390
PROTECTED

These are survey responses from other utilities. The names of the other utilities have been disclosed. No substantial need shown.

#1392
PROTECTED

Wolf Creek issues. Same as #1376.

#1393
PROTECTED

Wolf Creek testimony strategy and opinion.

#1394
PROTECTED

Same as #1392.

#1395
PROTECTED

Same as #1392.

#1396
NOT PROTECTED

This is a Wolf Creek Team document. There is a question of whether it is work product or not because it involves KCPL's decisions on meeting commercial operability criteria. This document sets out topic assignments to personnel. The objective of the document is "to discuss and evaluate the legal and technical criteria that need to be met to establish the commercial operability of the Wolf Creek Nuclear Unit." This document would have to be prepared whether or not there was a rate case. It is not work product.

#1397
NOT PROTECTED

This document is similar to #1396. It appears to be a management document and not a rate case litigation document.

#1398
NOT PROTECTED

This is a document similar to #1396 and #1397.

#1399
NOT PROTECTED

Same as #1396 and #1397.

#1400
PROTECTED

This is a packet of documents prepared by Bishop. The top memo establishes the assignment of Bishop to assist in development of "rate case support material" pertaining to certain named items taken from Wolf Creek Team assignments. The other documents are Bishop's Biweekly Reports on his progress. The reports are numbered 1-16. Staff agrees this is work product. There is no showing of substantial need for Bishop's Biweekly Status Reports.

#1401
NOT PROTECTED

Draft of "Inventory of Spare Parts" testimony. As decided earlier, Staff has shown substantial need for documents involving spare parts.

#1402
NOT PROTECTED

Same as #1401.

#1403
NOT PROTECTED

Same as #1401.

#1404
PROTECTED

Wolf Creek rate case document. No substantial need shown.

#1405
PROTECTED

Staff has agreed this is work product. No substantial need shown.

#1406
NOT PROTECTED

Same as #1317.

#1407
PROTECTED

Same as #1405.

#1408
NOT PROTECTED

Same as #1317.

#1410
PROTECTED

This document involves reconciliations but contains strategy and opinion, so will not be disclosed.

#1412
PROTECTED

Same as #1410.

#1426
PART PROTECTED
PART NOT PROTECTED

Suggested answers to Staff DRs. No substantial need shown. Attachments are not protected.

#1427
PROTECTED

Staff agrees this is work product. No substantial need shown.

#1428
PROTECTED

Draft of answer to Staff letter. No substantial need shown.

#1429
(For KCPL
determination)

This is a draft of testimony prepared by Bishop. Bishop did not prefile testimony but it is understood his preparations were used by others. If KCPL released all of the documents used by Bishop in the preparation of this draft under its waiver for witness testimonial use, this is not discoverable. If the documents underlying Bishop's preparation were not released, this document is discoverable.

#1431
(For KCPL
determination)

Same as #1429.

#1432
(For KCPL
determination)

Same as #1429.

#1433
PART NOT PROTECTED

Handwritten draft of reconciliations for O&M budget. Same as #1429. There is a typewritten page attached concerning spare parts. The page concerning spare parts is discoverable.

#1434
NOT PROTECTED

Bishop memo on spare parts. Discoverable on same basis as other spare parts documents, #1401.

#1437 (For KCPL determination)	Same as #1429.
#1439 (For KCPL determination)	Same as #1429.
#1440 PROTECTED	Handwritten outline. No substantial need shown.
#1442 NOT PROTECTED	Is not protected for the same reasons as #1396.
#1443 (For KCPL determination)	Same as #1429.
#1444 PROTECTED	Same as #1440.
#1445 (For KCPL determination)	Same as #1429.
#1446 NOT PROTECTED	Although these two documents involve the Wolf Creek Team assignments, their objectives indicate they are generated for management decisions, not rate case preparation.
#1447 PROTECTED	Response to Wolf Creek Team inquiry. No substantial need shown.
#1448 PROTECTED	Same as #1447.
#1449 PROTECTED	Same as #1447.
#1450 PROTECTED	Same as #1447.
#1451 PROTECTED	Same as #1447.
#1452 PROTECTED	Handwritten comments of Pendleton concerning preparation of rate case. No substantial need shown.
#1453 PROTECTED	Similar to #1452 so same ruling.
#1454 PROTECTED	Same as #1452.
#1455 NOT PROTECTED	Not protected under rationale of #1317.

#1456
NOT PROTECTED

Same as #1317.

#1457
PROTECTED

Although this involves Rec Pacs, it contains strategy and mental impressions.

#1458
PROTECTED

Same as #1457.

#1459
PROTECTED

Same as #1457.

#1460
PROTECTED

Same as #1457.

#1461
NOT PROTECTED

This is an outline of Huston's group planned activities per attached referral slip. There is no author or date. No indication this is work product.

#1466
PROTECTED

Staff has agreed this is work product. No substantial need shown.

#1467
NOT PROTECTED

Same as #1317.

#1468
NOT PROTECTED

Same as #1317.

#1469
NOT PROTECTED

Same as #1317.

#1470
NOT PROTECTED

Same as #1317.

#1471
NOT PROTECTED

Same as #1317.

#1472
NOT PROTECTED

Same as #1317.

#1477
PROTECTED

Staff has agreed this is work product. No substantial need shown.

#1478
PROTECTED

Same as #1477.

#1480
PROTECTED

Strategy and opinions for rate cases.

#1481
(For KCPL
determination
per ruling)

Cover letter states this is "final earthwork cost reconciliation data package sent to Renken." This copy has notes indicating problem with data. If this was sent to Renken as is (without notes), then

	Staff has a substantial need for the problem noted. If an updated version was supplied to Staff with problem corrected, this need not be disclosed.
#1490 PROTECTED	Bishop Biweekly Reports #16, 17, 15, 13. Ruling same as #1400.
#1491 PROTECTED	Wolf Creek assignments. No showing of substantial need.
#1493 PROTECTED	Staff agrees this is work product. No showing of substantial need.
#1494 PROTECTED	Same as #1493.
#1496 PROTECTED	Strategy and opinions for KCC rate case.
#1497 PROTECTED	Same as #1493.
#1498 PROTECTED	Same as #1493.
#1499 PROTECTED	Same as #1493.
#623 NOT PROTECTED	This is merely a letter indicating contacts with Staff's experts. It is not work product.
#628 NOT PROTECTED	Not work product.
#631 NOT PROTECTED	Not work product.
#640 NOT PROTECTED	Not work product.
#641 NOT PROTECTED	Not work product.
#642 NOT PROTECTED	Not work product.
#643 NOT PROTECTED	Not work product.
#645 NOT PROTECTED	Same as #628.
#646 NOT PROTECTED	Not work product.

#647
NOT PROTECTED

Not work product.

#650
NOT PROTECTED

Not work product.

#672
NOT PROTECTED

Not work product.

#684
NOT PROTECTED

Drafts of executive summary of earthwork reconciliation report. Note indicates final was given to Staff. These documents are not work product under the rationale of #1317.

#685
NOT PROTECTED

Same as #684.

#686
PROTECTED

Although this document involves the reconciliation program, it contains strategy and opinions.

#691
PROTECTED

Same as #686.

#693
NOT PROTECTED

Not work product.

#697
NOT PROTECTED

Not work product.

#1066
PROTECTED

Rate case activities memo. No substantial need shown.

#1069
PROTECTED

Priority issues for rate case. Opinions and strategy.

#1070
PROTECTED

Wolf Creek Team assignments. No substantial need shown.

#1075
PROTECTED

Same as #1070.

#1077
PROTECTED

Same as #1070.

#1078
PROTECTED

Same as #1070.

#1096
NOT PROTECTED

Not work product.

#1097
NOT PROTECTED

Not work product.

#1098
NOT PROTECTED

Not work product.

#1099 NOT PROTECTED	Not work product.
#1100 NOT PROTECTED	Not work product.
#1101 NOT PROTECTED	Not work product.
#1104 PROTECTED	Same as #1070.
#1107 NOT PROTECTED	Not work product.
#1108 NOT PROTECTED	This is a list of documents sent to SPPT to prepare McPhee's testimony. See discussion of <u>Halford</u> case earlier in this order. Based upon that discussion, this document falls within KCPL's agreement to provide all documents of which testimonial use was made for witnesses that have prefiled prepared testimony.
#1109 NOT PROTECTED	Same as #1108.
#1111 (For KCPL determination)	The letter says four questions are attached. In fact, four statements are attached. These statements contain certain facts concerning history of generation expansion studies. This document contains facts which Staff may not otherwise have been able to obtain. If Staff has information, this need not be disclosed.
#1112 PROTECTED	Work product mental impressions.
#1245 PROTECTED	Assignment for rate case to SPPT. No substantial need shown.
#1247 NOT PROTECTED	Not work product.
#1298 NOT PROTECTED	Although from an attorney, this document appears to be for a management decision, not the rate case.
#1301 PROTECTED	Wolf Creek rate case issues. No substantial need shown.
#1302 NOT PROTECTED	Not work product.
#1304 PROTECTED	Discussion of response to DR. No substantial need shown.

#1377
PROTECTED

Same as #1301.

#1389
NOT PROTECTED

Not work product.

#1492
NOT PROTECTED

Not work product.

#1532
NOT PROTECTED

Same as #1099.

#1555
NOT PROTECTED

Not work product.

#1503 & #1504
PROTECTED

Staff agreed this is work product. No substantial need shown.

#1505
PROTECTED

Opinions concerning reconciliation packages.

#1506
PROTECTED

Staff agreed this is work product. No substantial need shown.

#1507
PROTECTED

Same as #1506.

#1509
PROTECTED

Same as #1506.

#1510
PROTECTED

Same as #1506.

#1511
PROTECTED

This is a memo discussing a hearing of a different generating facility before the KCC. KCPL employee Pendleton was only copied. Staff has agreed this is work product. No substantial need shown.

#1512
PROTECTED

Same as #1506.

#1513
PROTECTED

Same as #1506.

#1517
PROTECTED

Same as #1506.

#1518
(For KCPL
review)

If this document was used to prepare testimony on issue of procurement of Wolf Creek simulator, it is discoverable.

#1519
PROTECTED

Same as #1506.

#1520
PROTECTED

Same as #1506.

#1521
PROTECTED

Same as #1506.

#1522
PROTECTED

Same as #1506.

#1526
PROTECTED

Same as #1506.

#1527
PROTECTED

Same as #1506.

#1530
PROTECTED

Although this is a reconciliation document, it is a preliminary proposal for 1985 project forecast for preparation of rate case. No substantial need shown.

#1542
PROTECTED

Same as #1506.

#1544
PROTECTED

Same as #1506.

#1547
NOT PROTECTED

This is not work product on the same rationale as earlier reconciliation documents, #1317.

#1548
NOT PROTECTED

Not work product.

#1549
PROTECTED

Same as #1506.

#1550
NOT PROTECTED

Not work product.

#1551
NOT PROTECTED

Same as #1550.

#1552
NOT PROTECTED

Same as #1547.

#1558
PROTECTED

Same as #1506.

#1559
PROTECTED

Same as #1506.

#1561
PROTECTED

Same as #1506.

#1562
PROTECTED

Same as #1506.

#1563
PROTECTED

Same as #1506.

#1564
PROTECTED

Same as #1506.

#1565
PROTECTED

Rate case issues. No substantial need shown.

#1715
NOT PROTECTED

This is discoverable upon Staff's showing of substantial need for all "spare parts" documents.

#1716
PROTECTED

Same as #1506.

#1717
PROTECTED

Same as #1506.

#1718
PROTECTED

Same as #1506.

#1719
PROTECTED

Same as #1506.

#1720
PROTECTED

Same as #1506.

#1721
PROTECTED

Same as #1506.

#1722
(KCPL review)

This is a draft of material for the rate case. If this material was utilized by a person who prefiled testimony, it is discoverable as included within KCPL's agreement to provide testimonial use documents unless all underlying documents have been disclosed.

#1723
PROTECTED

This is a more preliminary document than #1722. No substantial need is shown.

#1725
(KCPL review)

Same as #1722.

#1732
PROTECTED

Same as #1506.

#1733
PROTECTED

Same as #1506.

#1734
PROTECTED

Same as #1506.

#1735
PROTECTED

Same as #1506.

#1736
(KCPL review)

Same as #1722.

#1737 PROTECTED	Same as #1506.
#1738 PROTECTED	Same as #1506.
#1739 PROTECTED	Same as #1506.
#1740 PROTECTED	Same as #1506.
#1741 PROTECTED	Same as #1506.
#1742 PROTECTED	Same as #1506.
#1743 PROTECTED	Same as #1506.
#1746 PROTECTED	Same as #1506.
#1748 - #1763 PROTECTED	This is not discoverable on rationale of Bishop Biweekly Reports set out earlier, #1400.
#1765 - #1777 NOT PROTECTED	This is discoverable under earlier "spare parts" ruling, #1401.
#1778 - #1780 PROTECTED	Same as #1506.
#1781 NOT PROTECTED	Same as #1765.
#1782 - #1784 PROTECTED	Same as #1506.
#1822 PROTECTED	Same as #1506.
#1823 NOT PROTECTED	Results of study from Bechtel to Union Electric Co. Staff has established substantial need.
#1848 PROTECTED	Rate case package schedule. Same as #1506.
#1888 NOT PROTECTED	This is a packet of documents. All are work product except the letter and report of Sol Kunter Associates, Inc. These are discoverable. The memo dated 8/18/83 from Huston is also discoverable. Substantial need is shown.

#1915
NOT PROTECTED

This is discoverable under the earlier rulings concerning reconciliation packages and documents, #1317.

#1957
NOT PROTECTED

Same as #1915.

#1958
NOT PROTECTED

Same as #1915.

#1961
NOT PROTECTED

Same as #1915.

#1962
NOT PROTECTED

Same as #1317.

#1964
PROTECTED

Involves reconciliation but is strategy and opinion.

#1965
NOT PROTECTED

Same as #1317.

#1966
NOT PROTECTED

Same as #1317.

#1967
NOT PROTECTED

Same as #1317.

#1968
NOT PROTECTED

Same as #1317.

#1969
(2 copies)
NOT PROTECTED

Same as #1317.

#1970
(2 copies)
NOT PROTECTED

Same as #1317.

#1971
(2 copies)
NOT PROTECTED

Same as #1317.

#1972
NOT PROTECTED

Same as #1317.

#1973
NOT PROTECTED

Same as #1317.

#1974
NOT PROTECTED

Same as #1317.

#1976
NOT PROTECTED

Same as #1317.

#1977
PROTECTED

Opinions concerning reconciliation packages.

#1978
PROTECTED

Opinion of reconciliation packages.

#1981
NOT PROTECTED

Same as #1317.

#1556
PROTECTED

Staff concedes this is work product. No substantial need shown.

#1982
NOT PROTECTED

Same as #1317.

#1983
NOT PROTECTED

Same as #1317.

#1985
NOT PROTECTED

Same as #1317.

#1995
NOT PROTECTED

Same as #1317.

#1996
PROTECTED

Opinion on reconciliation packages.

#1997
PROTECTED

Opinion on reconciliation packages.

#2006
NOT PROTECTED

Same as #1317.

#2007
NOT PROTECTED

Same as #1317.

#2008
NOT PROTECTED

Same as #1317.

#2009
NOT PROTECTED

Same as #1317.

#2010
NOT PROTECTED

Same as #1317.

#2011
NOT PROTECTED

Same as #1317.

#2012
NOT PROTECTED

Same as #1317.

#2013
PROTECTED

Opinions concerning draft reconciliation package.

#2018
(2 copies)
NOT PROTECTED

Same as #1317.

#2019
(2 copies)
NOT PROTECTED

Same as #1317.

#2020
(2 copies)
NOT PROTECTED

Same as #1317.

#2017
NOT PROTECTED

This is a group of several large packets of documents the majority of which, the cover letters indicate, have already been released to Staff. They all involve reconciliation. These documents are discoverable under the rationale of #1317 and because of the fact they have already been released.

#1963
NOT PROTECTED

Not work product.

#1975
NOT PROTECTED

Same as #1317.

#1980
NOT PROTECTED

Same as #1317.

KCPL requested that a late-filed exhibit number be reserved. Exhibit Number R was so reserved. KCPL, with Staff's concurrence, offered Exhibit R while off the record. Exhibit R is received at this time.

The in camera hearing will recommence at 1:00 PM, June 12, 1985, to allow the parties to ask for reconsideration of any of the rulings in this order. KCPL then will be given three days to either disclose the documents or take other action.

It is, therefore,

ORDERED: 1. That the rulings on the documents withheld by Kansas City Power & Light Company are as set out in the above order.

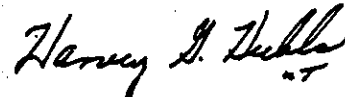
ORDERED: 2. That Exhibit R is received into the record.

ORDERED: 3. That the in camera hearing will recommence at 1:00 PM, June 12, 1985.

ORDERED: . 4. That Kansas City Power & Light Company has three days after the reconsideration of the rulings in this order to disclose the documents or take other action.

ORDERED: 5. That this order shall become effective on the date hereof.

BY THE COMMISSION



Harvey G. Hubbs
Secretary

(S E A L)

Cecil I. Wright, Hearing Examiner,
by delegation of authority under
Commission order issued May 17,
1985, pursuant to Section 386.240,
R.S.Mo. 1978.

Dated at Jefferson City, Missouri,
on this 11th day of June, 1985.

PUBLIC SERVICE COMMISSION

Case No. ER-85-128

Case No. EO-85-185

Case No. EO-85-224

On June 11, 1985 an order was issued containing rulings on the discoverability of certain documents withheld by Kansas City Power and Light Company (KCPL). The parties were allowed an opportunity to address those rulings on the record on June 12, 1985. This order addresses those documents for which reconsideration was sought on June 12, 1985.

This document is in response to a request for the thoughts of Pendleton on areas to be addressed in preparing for the rate cases. The request is from Rasmussen. Neither person is acting as an attorney nor is there any indication a KCPL attorney requested this information.

#1093
NOT PROTECTED
(except for deleted part)

This document will be disclosed with the deleting of paragraph 2.

#1113
PROTECTED
(except for total
dollar estimate)

This document includes costs not associated with the rate case and is work product. No substantial need is shown for the individual amounts. Only the total dollar estimate need be disclosed.

#1223
PROTECTED

KCPL stated the information underlying the graphs has been disclosed therefore these graphs need not be disclosed.

#1085
PROTECTED

Staff agreed is work product. No substantial need shown.

#1715
NOT PROTECTED
#1716, 1717
PROTECTED

Documents relating to spare parts were ordered disclosed because of the testimony of Staff witness found on page 291 of the transcript of the in camera proceeding. This testimony distinguishes spare parts information from O&M and nuclear fuel.

#1779, 1780
NOT PROTECTED

These documents relate to spare parts and so are ordered disclosed.

#1556

Staff has agreed on work product. No substantial need shown.

It is, therefore,

ORDERED: 1. That the rulings on the documents withheld by Kansas City Power and Light Company are as set out in this order.

ORDERED: 2. That this order shall become effective on the date hereof.

BY THE COMMISSION

Harvey G. Hubbs

Harvey G. Hubbs
Secretary

(S E A L)

Cecil I. Wright, Hearing Examiner,
by delegation of authority under
Commission order issued May 17,
1985, pursuant to Section 386.240,
RSMo 1978.

Dated at Jefferson City, Missouri,
on this 13th day of June, 1985.

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

In the matter of Kansas City Power & Light Company of Kansas City, Missouri, for authority to file tariffs increasing rates for electric service provided to customers in the Missouri service area of the Company.)
)
)
)
)
)
)

Case No. ER-85-128

In the matter of the determination of in-service criteria for Kansas City Power & Light Company's Wolf Creek Generating Station and Wolf Creek rate base and related issues.)
)
)
)
)
)
)

Case No. EO-85-185

In the matter of Kansas City Power & Light Company, a Missouri corporation, for determination of certain rates of depreciation.)
)
)
)
)
)
)

Case No. EO-85-224

ORDER CONCERNING SECOND LIST
OF WITHHELD DOCUMENTS

On May 17, 1985, the Commission established an in camera proceeding to determine whether certain documents withheld by Kansas City Power & Light Company (KCPL) were discoverable by Commission Staff. The Commission delegated its authority to review the discoverability to one of its Hearing Examiners. Rulings have been made concerning the first list of withheld documents. This order involves a second list of withheld documents.

During the hearing involving the first list, KCPL indicated it would be submitting a second list of withheld documents from the files of Charles E. Linderman (CEL). That list was presented on June 17, 1985. At that time Linderman testified concerning the preparation of documents numbered 2029 through 3391 (Exhibit S). As with the previous list, the testimony was general with regard to the preparation of many of the documents and specific with regard to some of them. KCPL is asserting work product immunity for all of these documents.

KCPL has deleted the descriptions of some of the documents on Exhibit S. These were deleted because KCPL is asserting work product immunity for the selection of these documents to put in various files and not for the documents themselves. KCPL admits the documents are not work product. KCPL asserts the placing of these documents within certain files indicates the legal opinion or conclusion of KCPL concerning the documents' importance or legal significance.

Staff presented several witnesses who provided testimony concerning the substantial need of Staff for certain of the listed documents. After the testimony of Staff witnesses and Linderman the parties reduced the original list, Exhibit S, to a list of documents still in dispute, Exhibit Z. The documents listed on Exhibit Z will be those addressed by this order. Staff disputes the claim of work product immunity for the documents in Exhibit Z and asserts it has shown substantial need for the documents if a document is found to be work product.

As with the previous order, this order will address each document in a summary manner in order to expedite the proceedings. There appear to be several documents that can be addressed by category and this will be done where possible.

The first category of documents are those for which the descriptions have been deleted or obliterated. Since the documents themselves are not work product, the claim by KCPL appears to fall outside of the scope of Supreme Court Rule 56.01(b)(3). That rule only addresses "documents" or "tangible things". The work product sought to be protected is the selection of these documents, not the documents themselves. The selection is "intangible" and therefore arguably not within Rule 56.01(b)(3).

No other provision of the rule of discovery addresses this category of work product. Without the structure of a rule to apply, there is a question of whether this type of work product is protected. A good discussion of this problem can be found in an article on work product in the Cornell Law Review. Special Project, The Work Product Doctrine, 68 Cornell L. Rev. 421-980, p. 755 (1983).

The law review article addresses the shortcomings of Federal Rule 26(b)(3) from which 56.01(b)(3) is adopted. One of the shortcomings is the failure to address intangible work product. The article concludes that since the rule does not apply, the U.S. Supreme Court case of Hickman v. Taylor, 329. U.S. 495 (1947) is controlling. Since Halford v. Yandell, 558 S.W.2d 400 (Mo. App. 1977), discusses the Hickman case favorably, it is determined that Hickman would control this question in Missouri.

The Hickman court applied standards similar to those in Federal Rule 26(b)(3) and Mo. Rule 56.01(b)(3) to intangibles. In this instance the intangible work product sought to be protected is the opinion of KCPL concerning the legal significance of certain documents. These legal opinions would be absolutely protected under Rule 56.01(b)(3) if they were in writing. Intangible opinions and mental impressions should receive the same protection. Since the documents are not protected, if a document has not previously been disclosed to Staff it shall be disclosed with its number obliterated. A list of the numbers of those documents from Exhibit S which had their descriptions obliterated or deleted, and which are disclosed pursuant to this order, will be provided to the Hearing Examiner.

KCPL contends that all of the documents on this second list were taken from the files kept by Linderman. Linderman was in charge of the Reconciliation Group which prepared the Reconciliation Packages (Rec Pacs) which were ruled discoverable in the order concerning the first list. KCPL's position is that all of the documents are from files prepared after October 1984. The Reconciliation Group at that time was transformed into a Rate Case Group to provide support for KCPL and Kansas Gas & Electric Company (KGE) attorneys.

The Rate Case Group (nee Reconciliation Group) was given the task of preparing Rate Case Packages (Rate Pacs) on certain issues as directed by KCPL attorney Wood and KGE attorney Haines. Linderman testified the only persons to review those files or the Rate Pacs were group members, himself, his supervisor

Charlie Huston, or the two attorneys. KCPL asserted that these Rate Pacs were not used for testimonial purposes and therefore are not subject to the waiver already agreed to by KCPL. Linderman testified the use of the work "reconciliation" on some of the documents is a misnomer and occurred because of the carry-over of the group.

KCPL stated the documents on Exhibit S fall into five categories. The first category are Rec Pacs or drafts of Rec Pacs without group notes. These KCPL agreed to turn over to Staff. The second category are documents which are not work product but which have Rate Case Group notes on them. KCPL agreed to turn over these documents without the Rate Case Group notes but with any notes indicating factual errors in the documents. The third category are documents which are excerpts from larger documents. KCPL agreed to disclose the entire document but would remove any Rate Case Group notes. For these three categories the agreement was to disclose all notes made prior to October 1984, which is the time of the switch of the Reconciliation Group from the reconciliation process to rate case preparation.

Category four are the documents with all descriptions deleted or obliterated. Rulings have been made on these documents earlier in this order. Category five are source documents which are fully described in Exhibit Y. Staff is seeking some of the documents from categories one, two, three and five with the group notes, and so has placed them on Exhibit Z even though KCPL has agreed to disclose the documents without the group notes. The documents are addressed below as set out on Exhibit Z.

Many documents on this list have "reconciliation" in their title or mention reconciliations. This carry-over of the term "reconciliation" to the rate case process causes some questions concerning the purpose of the documents. There is no evidence, though, to doubt Linderman's testimony concerning the switch from the reconciliation effort to the rate case preparation by the group. This determination is further supported for some documents because a copy of the document is carbon copied to the rate case file. Some of the documents show a carbon copy being sent to

"File" or to "File 1.17". This is assumed to be the rate case file, based upon Linderman's testimony.

There are serious questions concerning certain types of documents which bear the word "reconciliation" in their title. This group includes documents entitled "Reconciliation Schedule Group". These documents are undated and there is no identity to their preparation. Although Linderman's testimony will support many of the documents which have "reconciliation" in their title or contents, it will not support the Reconciliation Schedule Group documents. Those documents are specifically addressed in the rulings below.

There are other documents without date or identity of the preparer. These documents are not given work product immunity because of the absence of this information. Though Linderman testified all of the files were prepared by his group, all of the documents in the files were not. Without a date or an identity of the preparer there is no way to determine who prepared the documents or when they were prepared. Since many of the documents do contain a date and a group member name or initials, the lack of the information on other documents indicates they were not prepared after October 1984 or by a group member.

There seemed to be some question at the hearing concerning whether Staff had made specific data requests for some of the documents. Staff witnesses' response was that they considered their original data requests to be ongoing for any new or additional information prepared on the subject of the data request. Specific data requests were made if other data was sought. Staff's position follows the practice under the rules of civil procedure for answers to interrogatories. Hopefully, KCPL has been providing followup information updating Staff's data requests as the information becomes available.

#2029
(For KCPL review
per this ruling)

This document concerns the as-built schedule for the Wolf Creek power plant. There is a cover memo asking Bechtel Power Corporation, the lead architect and engineer (A/E), for assistance. This document is work product. Staff has a substantial need for all information concerning the as-built

schedule not previously disclosed. There are no handwritten notes or conclusions or impressions on this document. KCPL will review the document to determine if any of the information has not previously been disclosed.

#2030
(For KCPL review
per this ruling)

The cover letter of this document indicates the document was prepared to assist personnel working on the rate case. The document indicates the regulations dealt with were those referenced in Wolf Creek rate case materials such as the Management Performance Evaluation, Reconciliation Management Summary and Reconciliation Packages. The document contains discussion of the impact of individual regulations on Wolf Creek and asks Bechtel to fill in any gaps and make corrections. This document is work product. Staff witness Renken indicated he was seeking this document only if it contained reference to the impact of regulations on Wolf Creek not previously disclosed. Renken was especially concerned with impacts after January 1, 1985. Based upon Renken's testimony, Staff has shown substantial need for any reference in the document to the regulation impacts not previously disclosed.

#2031
PROTECTED

This document contains three letters from CEL to Bechtel requesting responses to questions concerning design changes, instrumentation and scheduling. The letters are dated 2/25/85, 3/8/85 and 3/1/85. Attached to these letters is a chart of various systems with variances, turnover delays and DCPs. The letters ask for Bechtel input to this chart for KCPL's scheduling effort. This document is work product since it indicates KCPL's preparation for the rate case. Staff has not shown substantial need for this document.

#2032
PROTECTED

This document indicates it is a copy of a study which includes drawings issued for the reactor building. The cover letter requests Bechtel to provide root causes for the design changes. Linderman indicated these studies were done at the direction of a KCPL attorney. The study involves samples drawn by the Rate Case Group. This document is work product. No substantial need was shown for this study.

#2033
PROTECTED

Work product. This document is seeking explanation for certain design changes. Staff could have asked Bechtel the same questions. No substantial need shown.

#2035
PROTECTED

Work product. Rate Case Group preparation. No substantial need shown.

#2036
(For KCPL review
per ruling)

Same as #2029.

#2037
PROTECTED

Work product. No substantial need shown. Involves development of chart showing regulatory changes. Asks for Bechtel input.

#2039
NOT PROTECTED

These documents were prepared for the Callaway rate case. Not work product.

#2040
PART PROTECTED
NOT PROTECTED

This document is an engineering rate coordination work list. This is not work product since it PART appears to be a source document. The handwritten notes are protected.

#2041
PART PROTECTED
PART NOT PROTECTED

Same as #2040.

#2042
PROTECTED

Same as #2033.

#2043
PROTECTED

This is a status sheet of Bechtel's answers to KCPL questions. No substantial need shown.

#2044
(For KCPL deter-
mination per
ruling)

Answers to KCPL questions. Staff could have asked questions. No substantial need shown unless information is inconsistent with information previously disclosed to Staff.

#2045
PROTECTED

Cover letter to response. No attachment. No substantial need shown.

#2046
PROTECTED
(with KCPL
determination
per ruling)

Attachment #1 is a status summary and is protected the same as #2043. Attachment #2 are answers to CEL questions on Wolf Creek design. No substantial need shown unless information is inconsistent with information previously disclosed to Staff.

#2047
PROTECTED

Work product. No substantial need shown.

#2048
PROTECTED

CEL questions to Bechtel. The letter indicates the questions relate to increased material costs experienced over the definitive estimate. These questions are work product. No substantial need shown.

#2049
PROTECTED

CEL questions to Bechtel. No substantial need shown.

#2050
PROTECTED

List of information sought by Junium from Daniel to continue KGE cost reconciliation. No substantial need shown.

#2051
PROTECTED

Same as #2049.

#2052
PROTECTED

Same as #2049.

#2053
PROTECTED

Same as #2049.

#2054
PROTECTED

Same as #2049.

#2055
PROTECTED

Same as #2049.

#2056
PROTECTED

This is a letter asking Bechtel to do a survey of their experience on similar projects. No substantial need shown.

#2057
PROTECTED

Same as #2049.

#2058
PROTECTED

Same as #2049.

#2059
PROTECTED

Same as #2049.

#2060
PROTECTED

Same as #2049.

#2061
PART PROTECTED
PART NOT PROTECTED

These are questions from CEL concerning hanger and piping design. The cover letter indicates Attachment A was part of the reconciliation effort. It should be disclosed if Staff has not already received it. Attachment B is a list of hangers that were voided. This is discoverable if not already disclosed. The cover letter is protected.

#2062
(For KCPL determination per this ruling)

Questions concerning mechanical equipment not included in definitive estimate. If the items on this list have been previously disclosed, this document need not be disclosed. If not, Staff has a substantial need for the mechanical equipment listed.

#2063
PROTECTED

Preparation of rate case strategy.

#2064
PROTECTED

Same as #2063.

#2077A
PROTECTED

This is a list of Reconciliation Group/Rate Case Group responsibilities for certain Rate Pac development. No substantial need shown.

#2084
PROTECTED

Staffing of Reconciliation Group/Rate Group. No substantial need shown.

#2085
PROTECTED

Same as #2084.

#2086
PROTECTED

Work product. Cover memo and notes. No substantial need shown.

#2088
PROTECTED

Work product. Handwritten notes of meeting. No substantial need shown.

#2089
PROTECTED

Same as #2084.

#2090
PROTECTED

Same as #2084.

#2091
PROTECTED

Same as #2084.

#2092
PROTECTED

Same as #2084.

#2093
PROTECTED

Work product. No substantial need shown.

#2094
PROTECTED

Same as #2084.

#2097
PROTECTED

Work product. Data for use in rate case. No substantial need shown.

#2098
NOT PROTECTED

This document is not work product. The notes are not protected since some are corrections and others indicate areas that need further explanation.

#2099
PROTECTED

Same as #2097.

#2100
NOT PROTECTED

Same as #2098.

#2101
PROTECTED

Same as #2097.

#2102
NOT PROTECTED

Same as #2098.

#2103
PART PROTECTED
PART NOT PROTECTED

Same as #2097. Attachment same as #2098.

#2104
PROTECTED (with
KCPL review per
order)

This document is work product and indicates all information is from UE rate case testimony, 1985 Forecast Reconciliation Package I.L. Overtime Costs, 1985 Reconciliation Backup Package I.L. Overtime Costs, supplementary documentation, and applicable data requests. No substantial need has been shown for this document. If the backup packages have not been disclosed to Staff, Backup Package I.L. Overtime Costs shall be disclosed. KCPL should review this document in relation to information provided Staff in the reconciliation packages to determine whether there are any factual inconsistencies between this data and that provided Staff. These inconsistencies will be provided to Staff.

#2105
(For KCPL determination per ruling)

If this information has not been disclosed to Staff this document shall be disclosed. If this information has previously been disclosed to Staff, this document is protected.

#2106
PROTECTED

Work product; strategy.

#2107
NOT PROTECTED

This is not work product.

#2108
PROTECTED

Strategy cover memo attached to document #2104.

#2109
NOT PROTECTED

Cover memo. Not work product.

#2110
PROTECTED (with
KCPL review per
order)

Same as #2104.

#2111
PROTECTED (with
KCPL review per
order)

Same as #2104.

#2112
(KCPL review
per ruling)

This is work product. If the source information for preparing this document has not been disclosed to Staff, this document shall be disclosed because of substantial need.

#2113
(KCPL review
per ruling)

The cover letter and memo are the same as #2097. The cover page for Attachment A has notes which are protected. The rest of Attachment A and all of Attachment B are discoverable if not already provided to Staff.

#2114
PROTECTED

Questions by CEL and responses. Work product. No substantial need shown.

#2115
PROTECTED

Same as #2114.

#2116
NOT PROTECTED

Per the summary of document, this document contains a "narrative description of the process used by the Wolf Creek Reconciliation Group to prepare summary reconciliation packages and subsequent reconciliation backup packages." If this information has not been disclosed to Staff, it shall be disclosed per previous rulings concerning reconciliation packages.

#2117
(2 copies)
PROTECTED

Work product. Rate case review packages. No substantial need shown.

#2118
(2 copies)
PROTECTED

Same as #2117.

#2119
PROTECTED

Same as #2117.

#2120
PROTECTED

Same as #2117.

#2121
PROTECTED

Same as #2117.

#2122
PROTECTED

Same as #2117.

#2123
PROTECTED

Same as #2117.

#2124
(For KCPL review
per this ruling)

This document contains the data collected on the issue of the DIC Backcharge Program. If the data collected has not previously been disclosed to Staff, it shall be disclosed based upon substantial need. Only that data not previously disclosed need be released.

#2125
NOT PROTECTED

The cover letter dated 4/2/85 from Borgman is discoverable. The rest of the document are responses to data requests and other documents generated before October 1984. These documents are discoverable if not already disclosed to Staff.

#2126
PROTECTED (with
KCPL review per
order)

Same as #2104.

#2127
PROTECTED

Notes from reconciliation review meeting with Mansher & Winn. No substantial need shown.

#2128
PROTECTED

Work product. This is an index for completing the as-built schedule. No substantial need shown.

#2129
(KCPL review
per ruling)

This is a handwritten document concerning the as-built schedule. This document need not be disclosed if the information contained therein has previously been disclosed to Staff. If it has not, there is substantial need.

#2130
PROTECTED

Same as #2128.

#2131
PROTECTED

Work product. No substantial need shown.

#2132
NOT PROTECTED

This document and attachments are not work product.

#2134
(For KCPL
determination
ruling)

Work product. This document concerns the as-built schedule. Substantial need has been shown for this document if the information has not previously per been disclosed to Staff.

#2135
(For KCPL
determination
per ruling)

This is the same document as #2134 with a note "To go to OKA".

#2136
PROTECTED (with
KCPL review per
order)

Same as #2104.

#2137
PROTECTED

This document contains a draft of #2136 with notes by Junium. No substantial need shown.

#2143
PROTECTED (with
KCPL review per
order)

Same as #2104.

#2144
PROTECTED

Same as #2137 except notes are by Borgman.

#2145
(KCPL review
per ruling)

This document is a handwritten summary of overtime costs. Not discoverable unless basic data is different from that released to Staff in Rec Pacs.

#2146
(KCPL review
per ruling)

Same as #2145.

#2147
(KCPL review
per ruling)

Same as #2145.

#2148
(KCPL review
per ruling)

Same as #2145.

#2150
PROTECTED

This appears to be a worksheet prepared by Hannon.
No substantial need shown.

#2152
(KCPL review per
ruling/delete
portions not
sought by Staff)

This document contains a combination of handwritten
calculations and a draft of a Rate Pac. These
documents need not be disclosed if source documents
and facts have been disclosed previously to Staff.

#2153
(KCPL review per
ruling/delete
portions not
sought by Staff)

Same as #2152. Remove portions not sought by
Staff.

#2154
(KCPL review
per ruling)

Same as #2152. No Staff deletions.

#2156
PART PROTECTED
PART NOT PROTECTED

This document contains questions of Rate Group to
DIC personnel concerning overtime. No substantial
need has been shown for these. There is a document
entitled "Overtime Data Corrections" dated 1/15/85
which shall be disclosed. There is also an attach-
ment with answers to questions. Substantial need
has been shown for this attachment.

#2157
PROTECTED

Remove portion not sought by Staff. Question 8
Wolf Creek overtime worksheets is protected. No
substantial need has been shown for other portions
of this document.

#2159
(KCPL review
per ruling)

Delete portion not sought by Staff. This document
should be disclosed if underlying data has not been
disclosed or if it is inconsistent with data
already provided to Staff.

#2160
PART PROTECTED
PART NOT PROTECTED

Remove portions not sought by Staff. The graphs
are work product and no substantial need is shown
unless underlying data has not been disclosed. The
construction management portion labeled "Huston" is
not work product.

#2161
(KCPL review
per ruling)

This document need not be disclosed unless the
underlying data has not been disclosed to Staff or
it is inconsistent with that data previously
disclosed to Staff. Remove portions not sought by
Staff.

#2162
(KCPL review
per ruling)

Same as #2161. Remove portion not sought by Staff.

#2163
(KCPL review
per ruling)

Same as #2161. Remove portions not sought by
Staff.

#2165
NOT PROTECTED

This document is not work product. There are no
handwritten notes.

#2166
(KCPL review
per ruling)

These are again graphs of overtime at Wolf Creek.
This data is through December 1984. Treat the same
as #2161.

#2167
(KCPL review
per ruling)

Same as #2166.

#2168
(KCPL review
per ruling)

Same as #2166.

#2169
(KCPL review
per ruling)

Same as #2166.

#2170
(KCPL review
per ruling)

Same as #2166.

#2171
PART PROTECTED
PART NOT PROTECTED

Not work product. Notes are protected.

#2172
PART PROTECTED
PART NOT PROTECTED

Same as #2171.

#2173
PART PROTECTED
PART NOT PROTECTED

Same as #2171.

#2175
(KCPL review
per ruling)

Same as #2161.

#2177
(KCPL review
per ruling)

Same as #2161.

#2178
PART PROTECTED
ART NOT PROTECTED

Same as #2171.

#2179
PART PROTECTED
ART NOT PROTECTED

Same as #2171. This document is not work product.

#2180
PART PROTECTED
PART NOT PROTECTED

The graph and calculation chart are work product. No substantial need shown. The DIC "Time Scheduling Work Schedule Listing" appears to be a source document. It is discoverable. If the notes are Rate Case Group notes, they may be obliterated.

#2192
(For KCPL review
per ruling)

This is information provided to the Rate Case Group by KGE employee. Any facts or data contained therein inconsistent with the information previously given Staff shall be disclosed.

#2222
PROTECTED

Work product. No substantial need shown.

#2223
NOT PROTECTED

This is work product. Based upon Staff witness Renken's testimony, this area has not been fully responded to by KCPL. There is therefore a substantial need for information concerning instrumentation.

#2224
PROTECTED

Work product. No substantial need shown.

#2225
PROTECTED

Same as #2224.

#2230
NOT PROTECTED

Not work product. No date.

#2231
NOT PROTECTED

Same as #2230.

#2232
NOT PROTECTED

Same as #2230.

#2242
PROTECTED

Work product. No substantial need shown.

#2243
PROTECTED

Same as #2242.

#2247
PROTECTED

Work product. No substantial need shown.

#2248
NOT PROTECTED

Work product. Substantial need has been shown for any data inconsistent with previous disclosures.

#2249
NOT PROTECTED

Not work product.

#2250
PROTECTED

Work product. No substantial need shown.

#2251
PROTECTED

Work product. No substantial need shown.

#2252
PROTECTED

Same as #2251.

#2253
PROTECTED

Same as #2251.

#2254
PROTECTED

Same as #2251.

#2255
NOT PROTECTED

Computer run not work product.

#2256
PROTECTED

Work product. No substantial need shown.

#2257
PROTECTED

Same as #2256.

#2258, #2259,
#2260, #2261
PROTECTED

Same as #2256.

#2262
PART PROTECTED
PART NOT PROTECTED

Same as #2256 except tax information attachment is not work product.

#2263
NOT PROTECTED

No date, no identity of preparer. Not work product.

#2264
NOT PROTECTED

Same as #2263.

#2265
NOT PROTECTED
(Notes protected
per ruling)

Not work product. Notes are protected if they do not indicate errors in the basic document.

#2266
NOT PROTECTED

Not work product.

#2267
PART NOT PROTECTED
PART PROTECTED

Cover page not work product. The rest of the document is work product. No substantial need shown.

#2268
PROTECTED

Work product. No substantial need shown.

#2269
PROTECTED

Work product. No substantial need shown.

#2270
NOT PROTECTED

Undated, no identity of preparer. Not work product.

#2271
PROTECTED

Work product. No substantial need shown.

#2272
PROTECTED

Same as #2271.

#2273
(KCPL determina-
tion per ruling)

Work product. No substantial need shown unless in-
formation is inconsistent with information
previously disclosed to Staff.

#2274
PROTECTED

Same as #2271.

#2275
NOT PROTECTED

These documents are entitled Reconciliation
Schedule Group, therefore they come within previous
rulings on Rec Pacs.

#2276
NOT PROTECTED

No date, no identity of preparer. Not work
product.

#2277, #2278,
#2279
PROTECTED

Work product. No substantial need shown.

#2280
PART PROTECTED
PART NOT PROTECTED

Work product. No substantial need shown except for
instrumentation information.

#2281
PROTECTED

Work product. No substantial need shown.

#2282
NOT PROTECTED

No date, no identity of preparer. Not work
product.

#2283
PROTECTED

Work product. No substantial need shown.

#2284
PROTECTED

Same as #2283.

#2285, #2286,
#2287, #2288,
#2289
PROTECTED

Same as #2283.

#2290, #2291
NOT PROTECTED

Same as #2171.

#2292
NOT PROTECTED

Same as #2171.

#2293, #2294,
#2295
NOT PROTECTED

Same as #2275.

#2296, #2297
NOT PROTECTED

Same as #2171.

#2298
PROTECTED

Work product. No substantial need shown.

#2299
(KCPL determination per ruling)

Work product. Involves as-built schedule. Substantial need if information is inconsistent or not previously disclosed to Staff.

#2300
PROTECTED

Work product. No substantial need shown.

#2301
NOT PROTECTED

No date, no identity of preparer. Not work product.

#2302, #2303,
#2304
PROTECTED

Work product. No substantial need shown.

#2305
PROTECTED

Work product. No substantial need shown.

#2306
PROTECTED

Same as #2305.

#2307
NOT PROTECTED

Same as #2301.

#2308
NOT PROTECTED

Same as #2301.

#2309
NOT PROTECTED

Same as #2301.

#2310
NOT PROTECTED

Same as #2301.

#2311
NOT PROTECTED

Same as #2301.

#2312
NOT PROTECTED

Not work product.

#2313
NOT PROTECTED

Not work product.

#2314
PROTECTED

Same as #2104.

#2315
PROTECTED

Same as #2305.

#2316
NOT PROTECTED

Same as #2296.

#2317
NOT PROTECTED

Same as #2301.

#2318, #2319
NOT PROTECTED

Not work product.

#2320, #2321,
#2322, #2323,
#2324
PROTECTED

Same as #2305.

#2325
NOT PROTECTED

Same as #2292.

#2326, #2327,
#2328, #2329,
#2330, #2331,
#2332, #2333
PROTECTED

Same as #2305.

#2334
NOT PROTECTED

Same as #2301.

#2335, #2336
NOT PROTECTED

Same as #2292.

#2337
PART PROTECTED
PART NOT PROTECTED

Same as #2180.

#2338, #2339,
#2340, #2341,
#2342, #2343,
#2344, #2345,
#2346
PROTECTED

Same as #2305.

#2347
NOT PROTECTED

Same as #2301.

#2348, #2349,
#2350
PROTECTED

Not work product. Same as #2305.

#2353
NOT PROTECTED

Same as #2301.

#2357, #2358
PROTECTED

Work product, No substantial need shown.

#2359
PART NOT PROTECTED
PART PROTECTED

The basic document is not work product. Dates have been added. They are discoverable. Any other notes or marks may be deleted.

#2360, #2361
PART NOT PROTECTED
PART PROTECTED

Same as #2171.

#2362
PROTECTED

Work product. No substantial need shown.

#2363, #2364
NOT PROTECTED

These documents contain preoperational daily status reports through early 1985. Staff has shown substantial need for this information.

#2365
PART NOT PROTECTED

Same as #2171.

#2366, #2367,
#2368
PROTECTED

Work product. No substantial need shown.

#2369
(for KCPL
determination
per ruling)

This document contains information from Bechtel concerning corrections to engineering release dates. If these dates or the data are inconsistent or have not been disclosed to Staff previously, they shall be disclosed.

#2370
(for KCPL
determination
per ruling)

The date of this document is 1/18/85 so is with work done by Rate Case Group and is work product. If dates contained therein are inconsistent with dates previously given Staff, those dates shall be disclosed.

#2374, #2375
PROTECTED

Work product. No substantial need shown.

#2376
NOT PROTECTED

Undated, no identity of preparer. Not work product.

#2377
PROTECTED

Work product. No substantial need shown.

#2378
(for KCPL deter-
mination per ruling)

Same as #2369.

(#2379)

(Description obliterated group.)

#2380, #2381,
#2382
PROTECTED

Same as #2377.

#2383
NOT PROTECTED

Same as #2292.

#2384, #2385
(For KCPL
determination
per ruling)

This is work product. Substantial need is shown for any dates or data that is inconsistent with that previously disclosed to Staff.

#2386
NOT PROTECTED

Not work product.

#2389
PROTECTED

Work product. No substantial need shown.

#2390, #2391
#2392
PROTECTED

Same as #2389.

#2402
PROTECTED

Work product. No substantial need shown.

#2545
PROTECTED

Rate Pac. Same as #2104.

#2546
NOT PROTECTED

Reconciliation Schedule Group documents. Same as #2275.

#2547, #2548
NOT PROTECTED

Same as #2546. Undated, no identity of preparer.

#2549, #2550
NOT PROTECTED

Same as #2546.

#2551, #2552,
#2553, #2554,
#2555
NOT PROTECTED

Same as #2546.

#2556, #2557,
#2558, #2559,
#2560, #2561,
#2562, #2563,
#2564, #2565,
#2566, #2567,
#2568
NOT PROTECTED

Same as #2546.

#2571

Reconciliation Group document dated 3/7/84. This is subject to ruling concerning Rec Pac information.

#2572
NOT PROTECTED

Same as #2546.

#2573
NOT PROTECTED

No date, no identity of preparer. Not work product.

#2574
NOT PROTECTED

Not work product. Document dated 3/19/84.

#2575, #2576,
#2577, #2578,
#2579
NOT PROTECTED

Same as #2574. Dated 3/84.

#2580, #2581
PROTECTED

Rate Pacs. Same as #2104.

#2583, #2584,
#2585, #2586,
#2587, #2588
NOT PROTECTED

These documents concerning instrumentation and so are covered by the substantial need found for this information. These documents are also undated and no identity of preparer.

#2606
PROTECTED

Rate Pac. Same as #2104.

#2607
NOT PROTECTED

Undated, no identity of preparer. Not work product.

(#2611 &
#2612)

(These documents were two of those whose description was obliterated.)

#2613, #2614,
#2615, #2616
NOT PROTECTED

No date, no identity of preparer. It involves instrumentation.

#2619, #2620,
#2621, #2622,
#2623, #2624,
#2625, #2626
NOT PROTECTED

Undated, no identity of preparer. Not work product.

#2628
NOT PROTECTED

Document dated 4/27/84. Attached is Labor Craft Summary printout. This is not work product.

#2630
NOT PROTECTED

Same as #2619.

#2631
NOT PROTECTED

Same as #2619 and concerns instrumentalities.

#2632
NOT PROTECTED

Same as #2628.

#2633
NOT PROTECTED

Same as #2619.

#2635, #2636
NOT PROTECTED

Same as #2619 and attachment is not work product.

#2639
NOT PROTECTED

Not work product.

(#2640)

(Document is one on list with description obliterated.)

#2641
PROTECTED

Work product. No substantial need shown.

#2642
NOT PROTECTED

Same as #2619.

#2643 PROTECTED	Same as #2641.
#2644, #2645, #2646, #2647 NOT PROTECTED	Same as #2619.
#2648, #2649, #2650, #2651, #2652 PROTECTED	Same as #2641.
#2654*	*Missing (there were some loose pages in file).
#2655, #2656 PROTECTED	Same as #2641.
#2657, #2658, NOT PROTECTED	Same as #2619.
#2659 PROTECTED	Same as #2641.
#2660, #2661, #2662, #2663, #2667, #2669 #2670, #2673, #2674, #2675, #2676, #2679. NOT PROTECTED (#2668, #2671, #2672 were stricken by Staff at hearing)	Same as #2619.
#2688 (KCPL determina- tion per ruling)	If this document or the information on it has not previously been disclosed, there is substantial need for its disclosure, otherwise it is protected.
#2689 (For KCPL . determination per ruling)	Work product. There is substantial need for any information contained in the document which has not previously been disclosed or is inconsistent with information previously disclosed.
#2691 PROTECTED	Work product. No substantial need shown.
#2692 PROTECTED	Same as #2691.
#2693 PROTECTED	Same as #2691.
#2694, 2696 PROTECTED	Same as #2691.

#2697
PROTECTED

Same as #2691.

#2698
PROTECTED

Rate Pac. No substantial need shown.

#2699
(For KCPL
determination
per ruling)

Same as #2689.

#2700, #2701
NOT PROTECTED

No date, no identity of preparer. Not work product.

#2703, #2704
PROTECTED

Work product. No substantial need shown.

#2705, #2706,
#2707
NOT PROTECTED

Same as #2700.

#2709
(For KCPL deter-
mination per
this ruling)

Same as #2062.

#2710
(For KCPL deter-
mination per
this ruling)

Response to #2709. Same ruling.

#2711
(For KCPL deter-
mination per
this ruling)

Response to #2709. Same ruling.

#2712
(For KCPL deter-
mination per
this ruling)

Responses to questions from CEL. This is work product. No substantial need shown unless data is inconsistent with that previously disclosed to Staff.

#2715
(For KCPL deter-
mination per
this ruling)

Same as #2712.

#2716
PROTECTED

Work product. No substantial need shown.

#2717
NOT PROTECTED

No date, no identity of preparer. Not work product.

#2718
NOT PROTECTED

Same as #2717.

#2719
NOT PROTECTED

Same as #2717.

#2720
(For KCPL deter-
mination per
this ruling)

Same as #2712.

#2721
PROTECTED

Same as #2716.

#2722
PROTECTED

Same as #2716.

#2723
PROTECTED

Same as #2716.

#2724
PROTECTED

Same as #2716.

#2725
PROTECTED

Same as #2716.

#2726
(For KCPL deter-
mination per
this ruling)

Same as #2712.

#2727
PROTECTED

Same as #2716.

#2728
(For KCPL deter-
mination per
this ruling)

Same as #2712.

#2729
(For KCPL deter-
mination per
this ruling)

Same as #2712.

#2730
(For KCPL deter-
mination per
this ruling)

Same as #2712.

#2731
PROTECTED

Same as #2716.

#2732
(For KCPL deter-
mination per
this ruling)

Same as #2712.

#2733
PROTECTED

Same as #2716.

#2734 (For KCPL deter- mination per this ruling)	Same as #2712.
#2735 PROTECTED	Same as #2716.
#2736 (For KCPL deter- mination per this ruling)	Same as #2712.
#2751, #2752, #2753 PART PROTECTED PART NOT PROTECTED	Basic document is not work product. Notes are work product. Any dates which are inconsistent with those provided Staff shall be disclosed. No substantial need shown for other notes or marks.
#2754 PROTECTED	Same as #2716.
#2761, #2762 NOT PROTECTED	Same as #2717.
#2763, #2764, #2765, #2768, #2770, #2771 NOT PROTECTED	Same as #2717.
#2772 NOT PROTECTED	This document shows date of 3/13/84. Not work product.
#2774 NOT PROTECTED	Not work product.
#2778, #2779, #2780 NOT PROTECTED	Same as #2717.
#2781 NOT PROTECTED	Same as #2717.
#2782 NOT PROTECTED	Not work product.
#2785 PROTECTED	Same as #2716.
#2795 NOT PROTECTED	Same as #2717.
#2796 NOT PROTECTED	Document dated October 1983. Not work product.

#2805
NOT PROTECTED

Same as #2717.

#2706, #2807
#2808
PROTECTED

Same as #2716.

#2709, #2810
#2811, #2812
#2813, #2814
#2815
PROTECTED

Same as #2716.

#2819, #2820,
#2821, #2822
NOT PROTECTED

Same as #2717.

#2828, #2829
NOT PROTECTED

Same as #2717. #2829 had no notes.

#2832, #2833,
#2834, #2835
PROTECTED

Same as #2716.

#2836, #2838
PROTECTED

Same as #2716.

#2939
NOT PROTECTED

Not work product.

#2840, #2841,
#2842, #2843
#2844, #2845
NOT PROTECTED

Same as #2717.

#2846
NOT PROTECTED

Document dated 8/25/84. Not work product.

#2847, #2850,
#2851
NOT PROTECTED

Same as #2717.

#2853
NOT PROTECTED

Not work product. I found no notes.

#2854, #2855
NOT PROTECTED

Not work product.

#2856, #2857
PROTECTED

Rate Pacs. No substantial need shown.

#2858
PROTECTED

Same as #2716.

#2859, #2860
PROTECTED

Same as #2716.

#2861
NOT PROTECTED

Not work product. All documents are dated before 10/84.

#2862
PROTECTED

Same as #2716.

#2863, #2864,
#2865
NOT PROTECTED

Same as #2717.

#2866
PROTECTED

Same as #2716.

#2872
PROTECTED

Same as #2716.

#2873
PROTECTED

Excerpt is work product. No substantial need shown.

#2874
PROTECTED

Rate Pac. No substantial need shown.

#2875, #2876
#2877
PROTECTED

Same as #2716.

#2878, #2879,
#2880, #2881,
#2882, #2883
#2884
PROTECTED

Same as #2716.

#2886, #2887,
#2888, #2889,
#2890, #2891,
#2892, #2893,
#2894, #2895,
#2896, #2897
PROTECTED

Same as #2717. Even though undated and no identity of preparer, contents indicate rate case preparation.

#2898, #2899,
#2900, #2901,
#2902
PROTECTED

Rate Pacs. No substantial need shown.

#2903
PROTECTED

Same as #2716.

#2904
PROTECTED

Rate Pac. No substantial need shown.

#2905
PROTECTED

Same as #2716.

#2913, #2914,
#2915, #2916,
#2917, #2918,
#2919, #2920,
#2921, #2922,
#2923, #2924,
#2925, #2926
PROTECTED

These documents are Rate Case Package preparation documents. No substantial need shown.

#2928
NOT PROTECTED

Not work product.

#2929
PROTECTED

Same as #2716.

#2930
NOT PROTECTED

Same as #2928.

#2931, #2932,
#2933, #2934,
#2935, #2936,
#2937, #2938
#2939
PROTECTED

Same as #2913, et al.

#2940, #2941
PROTECTED

Same as #2913, et al.

#2942, #2943,
#2944, #2945
PROTECTED

Rate Pac. No substantial need shown.

#2946
PROTECTED

Same as #2716.

#2947, #2948
PROTECTED

Same as #2716.

#2949, #2950,
#2951
PROTECTED

Same as #2913, et al.

#2953, #2954
PROTECTED

Same as #2913, et al.

#2955, #2956
PROTECTED

Same as #2913, et al.

#2957, #2958
PROTECTED

Same as #2913, et al.

#2959, #2960
PROTECTED

Same as #2913, et al.

#2962
PROTECTED

Rate Pac. No substantial need shown.

#2963, #2964
PROTECTED

Same as #2716.

#2965
PROTECTED

Same as #2716.

#2966, #2967,
#2968, #2969,
#2970, #3035,
#3036, #3071
NOT PROTECTED

Same as #2717.

#3109, #3110,
#3111, #3112,
#3113, #3114,
#3115, #3116,
#3117, #3118,
#3119
PROTECTED

Rate Pacs. No substantial need shown.

#3120, #3121,
#3122, #3123
NOT PROTECTED

Same as #2717.

#3124, #3127
PROTECTED

Same as #2716.

#3126, #3128
NOT PROTECTED

Same as #2717.

#3129
NOT PROTECTED

Not work product. Rate case related notes are work product. No substantial need shown.

#3130
NOT PROTECTED

Not work product.

#3131
NOT PROTECTED

Document dated 6/84. Not work product.

#3132
NOT PROTECTED

Same as #3131.

#3133
NOT PROTECTED

No date or identity on cover page. Other documents not work product.

#3137, #3138
PROTECTED

Rate Pacs. No substantial need shown.

#3139
NOT PROTECTED

Not work product.

#3140, #3141, #3142 PROTECTED	Work product. No substantial need shown.
#3143 NOT PROTECTED	Not work product. The only notations appear to be corrections. They are not protected.
#3144 NOT PROTECTED	Not work product. No notes.
#3145 NOT PROTECTED	Not work product. No notes.
#3146 PROTECTED	Work product. No substantial need shown.
#3147 NOT PROTECTED	Not work product.
#3148 PROTECTED	Same as #3146.
#3149 NOT PROTECTED	Same as #3147.
#3150 PROTECTED	Same as #3146.
#3151 NOT PROTECTED	Same as #3147.
#3152 PROTECTED	Same as #3146.
#3153 NOT PROTECTED	Not work product.
#3155 NOT PROTECTED	Not work product.
#3156, #3157 PROTECTED	Work product. No substantial need shown.
#3158 NOT PROTECTED	Not work product.
#3159 PART PROTECTED PART NOT PROTECTED	First two pages not work product. The rest of pages are work product. No substantial need shown.
#3160 NOT PROTECTED	Same as #3155.
#3161, #3162 PROTECTED	Work product. No substantial need shown.

#3163
NOT PROTECTED

Same as #3155.

#3164
PROTECTED

Work product. No substantial need shown.

#3165
NOT PROTECTED

Same as #3155.

#3166
NOT PROTECTED

Not work product.

#3167
PROTECTED

Same as #3164.

#3168, #3169,
#3170
NOT PROTECTED

Same as #3155.

#3173, #3174,
#3175
NOT PROTECTED

Not work product. Reconciliation Schedule Group.

#3176, #3177
NOT PROTECTED

No date, no identity of preparer.

#3178
NOT PROTECTED

Not work product.

#3179, #3180,
#3181, #3182,
#3183
PART PROTECTED
PART NOT PROTECTED

Not work product. Notations are work product. No substantial need shown.

#3192, #3195
PROTECTED

Work product. No substantial need shown.

#3196
NOT PROTECTED

Not work product. Dated 7/5/84.

#3197
PROTECTED

Same as #3192.

#3198, #3199,
#3200, #3201,
#3202, #3203
NOT PROTECTED

No date, no identity of preparer.

#3204
PROTECTED

Rate Pac. No substantial need shown.

#3205, #3206, #3207 NOT PROTECTED	Not work product.
#3208 NOT PROTECTED	Same as #3198.
#3209, #3210 NOT PROTECTED	Same as #3205.
#3211 NOT PROTECTED	Same as #3198.
#3212 PROTECTED	Work product. No substantial need shown.
#3213, #3214 NOT PROTECTED	Same as #3198.
#3215 PROTECTED	Same as #3212.
#3216 NOT PROTECTED	Same as #3205.
#3217 NOT PROTECTED	Same as #3198.
#3219, #3221 NOT PROTECTED	Not work product.
#3222, #3225 NOT PROTECTED	Same as #3198.
#3227, #3229, #3230 NOT PROTECTED	Not work product. For #3230 the only handwritten notes are top of first page and numbers on fourth page. These are protected if not corrections or made prior to October 1, 1984.
#3232 NOT PROTECTED	Same as #3198.
#3236, #3237, #3238 PROTECTED	Rate Pacs. No substantial need shown.
#3240 PART PROTECTED PART NOT PROTECTED	Not work product. Notes are work product. No substantial need shown.
#3242, #3246 NOT PROTECTED	Same as #3198.
#3247, #3248 PROTECTED	Rate Pacs. No substantial need shown.

#3249
NOT PROTECTED

Same as #3198.

#3251
PROTECTED

Rate Pac. No substantial need shown.

#3253
NOT PROTECTED

Same as #3198.

#3254, #3255
PROTECTED

Rate Pacs. No substantial need shown.

#3256
PROTECTED

Work product. No substantial need shown.

#3257, #3259,
#3260, #3261
NOT PROTECTED

Not work product.

#3262, #3263
NOT PROTECTED.

Same as #3198.

#3264, #3265
PROTECTED

Rate Pacs. No substantial need shown.

#3267
PROTECTED

Work product. No substantial need shown.

#3269
NOT PROTECTED

Same as #3198.

#3271, #3272
PROTECTED

Rate Pacs. No substantial need shown.

#3292
NOT PROTECTED

Same as #3198.

#3303
PART PROTECTED
PART NOT PROTECTED

Not work product. Whatever notes are on document are protected.

#3308
NOT PROTECTED

Not work product.

#3316, #3317
#3318
PROTECTED

Work product. No substantial need shown.

#3319, #3320
NOT PROTECTED

Same as #3198.

#3321
NOT PROTECTED

Not work product. Reconciliation Schedule Group.

#3222, #3223 NOT PROTECTED	Same as #3198.
#3325 PROTECTED	Work product. No substantial need shown.
#3326 NOT PROTECTED	Not work product.
#3327 PROTECTED	Same as #3325.
#3328 NOT PROTECTED	Same as #3326.
#3329, #3330 PROTECTED	Same as #3325.
#3331 NOT PROTECTED	Not work product.
#3332, #3333 PROTECTED	Work product. No substantial need shown.
#3334 NOT PROTECTED	Same as #3331.
#3335 PROTECTED	Work product. No substantial need shown.
#3336 NOT PROTECTED	Same as #3198.
#3337 PART PROTECTED PART NOT PROTECTED	Basic document, not work product. Notes on first page are protected.
#3338 (For KCPL review per ruling)	This document indicates it was sent to Chuck (CEL) on 1/25/85. There is no indication of when it was prepared. If prepared after October 1, 1985, it is work product and is protected. If prepared before October 1, 1985, it is not work product.
#3351 NOT PROTECTED	Not work product.
#3352, #3353 NOT PROTECTED	Same as #3198.
#3354 NOT PROTECTED	Not work product. Reconciliation Schedule Group.
#3355 NOT PROTECTED	Same as #3198.

#3556 PROTECTED	Work product. No substantial need shown.
#3357 NOT PROTECTED	Same as #3354.
#3358 PROTECTED	Same as #3356.
#3359 NOT PROTECTED	Same as #3354.
#3360 PROTECTED	Same as #3356.
#3361 PROTECTED	Rate Pac. No substantial need shown.
#3362, #3363 PROTECTED	Work product. No substantial need shown.
#3364 PROTECTED	Rate Pac. No substantial need shown.
#3365 PROTECTED	Work product. No substantial need shown.
#3366 PROTECTED	Rate Pac. No substantial need shown.
#3368, #3369, #3370 NOT PROTECTED	Not work product.
#3371 PROTECTED	Rate Pac. No substantial need shown.
#3372, #3373 PROTECTED	Work Product. No substantial need shown.
#3374 PROTECTED	Rate Pac. No substantial need shown.
#3375, #3376 PROTECTED	Same as #3372.
#3377, #3378 PROTECTED	Rate Pacs. No substantial need shown.
#3379, #3380 PROTECTED	Same as #3372.
#3381 PROTECTED	Rate Pac. No substantial need shown.

#3382, #3383 PROTECTED	Same as #3372.
#3384 PROTECTED	Rate Pac. No substantial need shown.
#3385, #3386 PROTECTED	Same as #3372.
#3387 PART PROTECTED PART NOT PROTECTED	Not work product. Notes are protected.
#3388 NOT PROTECTED	Same as #3198.
#3389 NOT PROTECTED	Not work product.
#3390 PROTECTED	Work product. No substantial need shown.
#3391 PROTECTED	Rate Pac. No substantial need shown.

The above rulings have been made with two basic concepts in mind. One is the purpose of the work product doctrine. That purpose is to allow a party to prepare its collection, evaluation and presentation of the facts without fear of an adverse party discovering that case preparation before trial. The second concept is the need for full disclosure of all relevant facts concerning a public utility's operations to allow Staff to properly evaluate the utility's operations. The company's records are the only source of facts for the Staff to prepare its case.

Based upon the above two competing concepts, these rulings have been made toward disclosing all information which is inconsistent with information previously provided Staff or, in some instances, which has not previously been disclosed. The burden of proof is on the party asserting work product immunity. The burden usually requires specific proof with regard to each document. In this case the number of documents required a less stringent application of this requirement. In some instances, though, specific proof has been required because of the lack of sufficient support for the asserted immunity.

It is, therefore,


ORDERED: 1. That the rulings concerning the withheld documents are as set out in this order above.

ORDERED: 2. That Kansas City Power & Light Company has three (3) days from the date of this order to either comply with the above rulings.

ORDERED: 3. That the parties will be given an opportunity to seek reconsideration of any rulings.

ORDERED: 4. That this order shall become effective on the date hereof.

BY THE COMMISSION



Harvey G. Hubbs
Secretary

(S E A L)

Cecil I. Wright, Hearing Examiner,
by delegation of authority under
Commission order issued May 17,
1985, pursuant to Section 386.240,
R.S.Mo. 1978.

Dated at Jefferson City, Missouri,
on this 2nd day of July, 1985.

STATE OF MISSOURI

PUBLIC SERVICE COMMISSION

In the matter of Kansas City Power & Light Company of Kansas City, Missouri, for authority to file tariffs increasing rates for electric service provided to customers in the Missouri service area of the Company.)
)
)
)
)
)
)
Case No. ER-85-128

In the matter of the determination of in-service criteria for Kansas City Power & Light Company's Wolf Creek Generating Station and Wolf Creek rate base and related issues.)
)
)
)
)
)
)
Case No. EO-85-185

In the matter of Kansas City Power & Light Company, a Missouri corporation, for determination of certain rates of depreciation.)
)
)
)
)
)
)
Case No. EO-85-224

ORDER OF RECONSIDERATION CONCERNING
SECOND LIST OF WITHHELD DOCUMENTS

On July 2, 1985, an order was issued making rulings on the second list of documents withheld by Kansas City Power & Light Company (KCPL) from discovery. On July 3, 1985, a hearing was held to allow the parties to ask for reconsideration of particular rulings. This order addresses the documents for which reconsideration was sought.

KCPL has sought reconsideration of two categories of documents, listed on Exhibit AA. The first category are documents on which the original rulings held the documents were not protected because they involved the Reconciliation Schedule Group. These documents showed no date or indication of the preparer as well.

KCPL presented the testimony of Charles E. Linderman (CEL) to support its request for reconsideration. Linderman testified the Reconciliation Schedule Group was not formed until after October 1, 1984. Linderman testified all of the documents in Category I on Exhibit AA were prepared by him or his group members for rate case

preparation. The documents in Category I on Exhibit AA will be reviewed based upon Linderman's testimony.

Category II on Exhibit AA are documents which were ruled not protected from discovery because the documents contained no indication of the date prepared or the preparer. Exhibit AA contains more specific descriptions of these documents. The documents in Category II on Exhibit AA will be reviewed based upon the descriptions provided on Exhibit AA.

Staff sought reconsideration of certain documents for which C. J. Renken gave additional testimony. Staff was concerned that the documents withheld by KCPL contained information updating or changing information originally disclosed to Staff, or information not disclosed previously concerning the construction of the Wolf Creek power plant. Renken specifically sought information concerning design changes since October 1984 and information concerning the man-hours expended to implement any design changes since October 1984.

Renken testified he had outstanding data requests for the information but KCPL had supplied no additional information concerning man-hours expended since October 1984. This information could not be sought from Bechtel Power Corporation (Bechtel), the lead architect/engineer, since Bechtel had refused to provide information directly to Staff. Renken is seeking this information through KCPL. Staff read the numbers of the documents sought into the record. The documents sought by Staff will be reconsidered based upon Renken's testimony.

Category I - Exhibit AA

#2275
PROTECTED

This document contains several curves showing relationships between "Quantity" and "Job Hours". Linderman testified these were prepared by the Rate Case Group after October 1, 1984. Linderman testified the underlying data for these curves had been previously disclosed to Staff. Based upon Linderman's testimony, these curves are work product. Since Staff has received the underlying documentation, there is no substantial need shown for these curves.

#2293
PART PROTECTED
(Part for KCPL
review per
ruling)

This document contains the same type of curves and has a worksheet attached. This document is work product. The curves are protected. The attached worksheets are protected if they do not contain information inconsistent with that previously disclosed to Staff or information not previously disclosed to Staff. If the worksheets contain such information, that information shall be disclosed.

#2294
PROTECTED

Same as #2275.

#2295
PROTECTED

Same as #2275.

#2549
PROTECTED

Same as #2275.

#2546
PROTECTED

Same as #2275.

#2552
PROTECTED

Same as #2275.

#2553
PROTECTED

Same as #2275.

#2557
PROTECTED

Same as #2275.

#2568
PROTECTED

Same as #2275.

#3321
PROTECTED

Same as #2275.

#3359
PART PROTECTED
(Part for KCPL
review per ruling)

Same as #2293.

#3357
PART PROTECTED
(Part for KCPL
review per ruling)

Same as #2293.

#2548, #2550
PROTECTED

These documents are indexes showing which curves apply to which part of the construction. These are protected the same as the curves in #2275.

#3353
PART PROTECTED
(Part for KCPL
review per ruling)

Curves as #2275. Contains indexes to curves and worksheets. The worksheets are to be reviewed per ruling on #2293.

#2547
PROTECTED

Same as #2548.

#3354
PART PROTECTED
(Part for KCPL
review per ruling)

Same as #2293.

#2551
PROTECTED

Same as #2548.

#2554
PART PROTECTED
(Part for KCPL
review per ruling)

Same as #2293.

#2555
PROTECTED

Same as #2548.

#2556
PROTECTED

Same as #2548.

#2565
(For KCPL review
per ruling)

This document is a worksheet. There are no curves attached. If the information on this worksheet has not previously been disclosed or is inconsistent with information previously disclosed to Staff, that information shall be disclosed.

#2564
(For KCPL review
per ruling)

Same as #2565.

#2563
(For KCPL review
per ruling)

Same as #2565.

#2562
(For KCPL review
per ruling)

Same as #2565.

#2559
(For KCPL review
per ruling)

Same as #2565.

#2560
(For KCPL review
per ruling)

Same as #2565.

#2561
(For KCPL review
per ruling)

Same as #2565.

#2558
(For KCPL review
per ruling)

Same as #2565.

#2567
PROTECTED

Same as #2548.

#3173
PROTECTED

Same as #2275.

#3175
PROTECTED

Same as #2275.

#3174
PROTECTED

Same as #2275.

Category II - Exhibit AA

#2125
PART NOT PROTECTED
(Part for KCPL
review per ruling)

The original ruling on this document was: "The cover letter dated 4/2/85 from Borgman is discoverable. The rest of the document are responses to data requests and other documents generated before October 1984. These documents are discoverable if not already disclosed to Staff." Upon review, this ruling will not be changed.

#2264
(For KCPL review
per ruling)

Based upon the description on Exhibit AA this document is work product. This document need not be released if the data and information contained therein have been disclosed previously to Staff or is not inconsistent with information previously disclosed to Staff.

#3352
PROTECTED

Based upon description on Exhibit AA, this is work product. No substantial need shown.

#3336
PROTECTED

Same as #3352.

#3269
PROTECTED

Same as #3352.

#3259
(For KCPL review
per ruling)

Same as #2264.

#3263, #3246
PROTECTED

Same as #3352.

#3208
(For KCPL review
per ruling)

Same as #2264.

#3177
PROTECTED

Same as #3352.

#3126
PROTECTED

Same as #3352.

#2967
(For KCPL review
per ruling)

Same as #2264.

#2968
PROTECTED

Same as #3352.

#2864
NOT PROTECTED

This document relates to instrumentation. Per the ruling concerning instrumentation information in July 2, 1985, order, the document is discoverable.

#2865
NOT PROTECTED

This document is not listed on Exhibit AA. It was ruled discoverable in the July 2 order because of no date and no identity of preparer, which is the reason for reconsideration of some of the documents in Category II. Without the additional description this document is still discoverable.

#2851
PROTECTED

This document is work product. No substantial need shown.

#2844
PROTECTED

Based upon the description on Exhibit AA, this is work product strategy.

#2719
PROTECTED

Same as #3352.

#2660, #2662,
#2663, #2667,
#2669, #2670,
#2673, #2674
(#2661 was in
packet of
documents for
reconsideration
but not on
Exhibit AA)
(For KCPL review
per ruling)

Same as #2264. The description indicates these documents were prepared for rebuttal testimony. If any document is used for rebuttal testimony, it is subject to KCPL's waiver and the ruling concerning testimonial use in the order concerning the first list of documents.

#2658
PROTECTED

Same as #3352.

#2657
PROTECTED

Same as #3352.

#2635
PART NOT PROTECTED
PART PROTECTED

Attachment is not work product. Cover page is work product. No substantial need shown.

#2376
(For KCPL review
per ruling)

Same as #2264.

#2654
PROTECTED

This document was not ruled on in original order.
This is work product. No substantial need shown.

Staff's List

#2031
(For KCPL review
per ruling)

This document contains three letters from CEL to Bechtel requesting answers to certain questions. This is work product. The questions asked indicate KCPL's approach to issues in the rate case. Letter three involves instrumentation and shall be disclosed per ruling on instrumentation information if the information in this letter has not previously been disclosed. The attached charts are work product, but the information is discoverable if it has not previously been disclosed or is inconsistent with information previously disclosed to Staff.

#2032
PROTECTED

This document contains a survey of drawings prepared by CEL for the rate case preparation. The cover letter requests Bechtel to provide reasons for the design changes. These questions indicate KCPL's rate case preparation. They are work product and contain no information from Bechtel in response. No substantial need shown.

#2037
PROTECTED

Same as #2032. There is no design change information after early 1984.

#2043
PROTECTED

Work product. There has been no showing of substantial need for this status sheet.

#2044
(For KCPL review
per ruling)

The original ruling on this document was that only information or data inconsistent with information or data is discoverable. The disclosure includes any information or data not previously disclosed.

#2045
PROTECTED

Work product. No substantial need shown. This is a transmittal letter.

#2046
PROTECTED
(For KCPL review
per ruling)

Same as original ruling.

#2048
PART PROTECTED
(Part KCPL review
per ruling)

This document contains questions by CEL for Bechtel. This is work product. No substantial need is shown. Staff could have sought additional information concerning design changes from Bechtel through KCPL. The questions by CEL indicate KCPL's approach to the rate case. The information on page

three concerns instrumentation. This information is not protected unless previously disclosed to Staff.

#2049
PROTECTED

These again are questions from CEL to Bechtel. No substantial need shown.

#2050
PROTECTED

Same as original ruling.

#2051
PROTECTED

Same as original ruling.

#2052
PART PROTECTED
(Part KCPL review
per ruling)

The letter contains questions from CEL. The attachments are not protected if they have not previously been disclosed to Staff.

#2053
PROTECTED

Same as original ruling.

#2054
PROTECTED

Same as original ruling.

#2055
PROTECTED

Same as original ruling.

#2056
PROTECTED

Same as original ruling.

#2057
PROTECTED

Same as original ruling.

#2058
PROTECTED

Same as original ruling.

#2059
PROTECTED

Same as original ruling.

#2060
PROTECTED

Same as original ruling.

#2061
PART PROTECTED
PART NOT PROTECTED

Same as original ruling. All information in the attachments is to be reviewed to determine if it has already been disclosed.

#2062
(For KCPL determination per ruling)

Same as original ruling.

The rulings on the above-listed documents have been reconsidered pursuant to the parties' requests. The rulings made herein supercede those in the July 2, 1985, order where in conflict.

It is, therefore,

ORDERED: 1. That the above rulings concerning the documents enumerated herein are hereby made.

ORDERED: 2. That Kansas City Power & Light Company has three (3) days to comply with the rulings in this order.

ORDERED: 3. That this order shall become effective on the date hereof.

BY THE COMMISSION

Harvey G. Hubbs

Harvey G. Hubbs
Secretary

(S E A L)

Cecil I. Wright, Hearing Examiner,
by delegation of authority under
Commission order issued May 17,
1985, pursuant to Section 386.240,
R.S.Mo. 1978.

Dated at Jefferson City, Missouri,
on this 8th day of July, 1985.

