

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

In the Matter of the Construction Audit and)
Prudence Review of Environmental Upgrades)
To Iatan 1 Generating Plant, and Iatan) File No. EO-2010-0259
Common Plant, and the Iatan 2 Generating)
Plant, Including All Additions Necessary for)
These Facilities to Operate.)

**REQUEST FOR CLARIFICATION
OF ORDER REGARDING PENDING MOTIONS**

Comes now the Staff of the Public Service Commission of Missouri and respectfully requests the Commission clarify its March 31, 2010 *Order Regarding Pending Motions* as follows:

1. As the Commission is well aware, in performing an audit the reliability of the information reviewed for the audit is crucial. Requiring the person supplying information reviewed in an audit to be able to attest to the truthfulness and correctness of the information provided enhances the quality of the audit. Requiring the entity being audited to correct and supplement inaccurate or incomplete information it provided also enhances the quality of an audit.

2. The Staff of the Commission has no authority to take any action in regulating utilities or conducting investigations, except that which the Commission has delegated to it. The statute whereby the Commission may delegate that authority is § 386.240, RSMo 2000, which provides:

The commission may authorize any person employed by it to do or perform any act, matter or thing which the commission is authorized by this chapter to do or perform; provided, that no order, rule or regulation of any person employed by the

commission shall be binding on any public utility or any person unless expressly authorized or approved by the commission.

Although the word “chapter” appears in the statute, in the Public Service Commission Act (Laws 1913, p. 646) the word “act” appears. The entire Public Service Commission Act was published in one chapter of the Revised Statutes of Missouri until 1949 when the Revisor of Statues adopted the present system of no longer renumbering every statute with every revision. Therefore, this statute applies to several chapters, including chapter 393.

3. Among its investigatory powers, the Commission has statutory authority to conduct investigations of electrical corporations such as Kansas City Power & Light Company. § 393.140, RSMo 2000. Among its powers it may use in conducting such investigations, are the following:

Have power to compel, by subpoena duces tecum, the production of any accounts, books, contracts, records, documents, memoranda and papers. 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, contracts, documents and papers, or parts thereof, to be filed with it. **The commission may require of all such corporations or persons specific answers to questions upon which the commission may need information,** (Emphasis added.) and may also require such corporations or persons to file periodic reports in the form, covering the period and filed at the time prescribed by the commission. If such corporation or person shall fail to make specific answer to any question or shall fail to make a periodic report when required by the commission as herein provided within the time and in the form prescribed by the commission for the making and filing of any such report or answer, such corporation or person shall forfeit to the state the sum of one hundred dollars for each and every day it shall continue to be in default with respect to such report or answer. Such forfeiture shall be recovered in an action brought by the commission in the name of the state of Missouri. The amount recovered in any such action shall be paid to the public school fund of the state.

§ 393.140(9), RSMo 2000.

4. The quality of an audit is determined by how well the audit satisfies the purpose of the audit—the audit objectives. The Staff’s objectives in this audit are listed on page eight (8) of the Staff’s December 31, 2009 Report of the Construction Audit / Prudence Review of Environmental Upgrades to Iatan 1 and Iatan Common Plant. They are:

- 1) To determine whether the Iatan 1 AQCS and Common Plant needed to operate Iatan 1 segments of the Iatan Project contain inappropriate charges; and
- 2) To determine whether the cost overruns of approximately \$87 million exclusive of AFUDC were the result of imprudent management.

The Staff designed these audit objectives to provide a reasonable assurance that the expenditures charged to the Iatan 1 AQCS and Iatan Project are reasonable and prudent. The Staff is attempting to meet these audit objectives by conducting sufficient audit activities, given the related current risk environment, to provide a reasonable assurance that either 1) there were no inappropriate charges made to the project and 2) there were no unjustified cost overruns charged to Iatan 1 AQCS and related common plant, or 3) all significant inappropriate charges and cost overruns have been identified and brought to the Commission’s attention. The Staff’s ability to obtain information needed to conduct these audit activities is directly influenced by the authority the Commission delegates to the Staff and any direction the Commission gives, or commands.

5. The Staff finds the direction and authority the Commission provided in its March 31, 2010 *Order Regarding Pending Motions* unclear.

6. In its March 31, 2010 *Order Regarding Pending Motions* the Commission denied Staff’s “motion to authorize discovery enforcement by use of contested case procedures” and, among other things, stated in the order:

Staff further requests the Commission to direct KCPL and GMO to follow Commission Rule 4 CSR 240-2.090 as it relates to data

requests in the investigatory docket. On December 9, 2009, the Commission issued a lengthy order delineating the proper methods of discovery, and the proper methods of enforcement of discovery, in an investigatory docket as opposed to a contested case docket. That order did not in any way limit Staff's ability to engage in discovery and recognized that data requests could be employed in non-contested cases such as this.

Staff is currently seeking to have the Commission order discovery enforcement mechanisms contrary to the proper application of the Commission's Rule and Missouri's Administrative Procedures Act, and contrary to its December 9, 2009 order. The enforcement mechanisms Staff seeks apply in contested cases, not investigatory dockets. To grant Staff's relief would require the Commission to re-write its rule, and such a rulemaking is beyond the parameters of this docket.

7. The portion of the prayer of Staff's motion referenced in the foregoing order that relates to data requests follows: **"WHEREFORE**, the Staff prays that the Commission . . . (b) direct KCPL and GMO to follow Commission Rule 4 CSR 240-2.090, in particular, as it relates to data requests." In paragraph 17 of the body of its motion Staff stated,

The Staff is requesting that the Commission open an investigation docket for the evaluation of Iatan 2, Iatan Common Plant-Remainder, Iatan 1 AQCS and Common Plant Used to operate Iatan 1 for the purpose of there being a formal case for the Staff to conduct discovery within, prior to KCPL and GMO filing their Iatan 2 rate cases. Of course, the Staff is suggesting that 4 CSR 240-2.090 of the Commission's Rules apply to this investigation docket.

8. Commission Rule 4 CSR 240-2.090, pertinent to data requests, provides:

4 CSR 240-2.090 Discovery and Prehearings

PURPOSE: This rule prescribes the procedures for depositions, written interrogatories, data requests and prehearing conferences.

(1) Discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court. Sanctions for abuse of the discovery process or failure to comply with commission orders regarding discovery shall be the same as those provided for in the rules of civil procedure.

(2) Parties may use data requests as a means for discovery. The party to whom data requests are presented shall answer the requests within twenty (20) days after receipt unless otherwise agreed by the parties to the data requests. If the recipient objects to data requests or is unable to answer within twenty (20) days, the recipient shall serve all of the objections or reasons for its inability to answer in writing upon the requesting party within ten (10) days after receipt of the data requests, unless otherwise ordered by the commission. If the recipient asserts an inability to answer the data requests within the twenty (20)-day time limit, the recipient shall include the date it will be able to answer the data requests simultaneously with its reasons for its inability to answer. Upon agreement by the parties or for good cause shown, the time limits may be modified. As used in this rule, the term data request shall mean an informal written request for documents or information which may be transmitted directly between agents or employees of the commission, public counsel or other parties. Answers to data requests need not be under oath or be in any particular format, but shall be signed by a person who is able to attest to the truthfulness and correctness of the answers. Sanctions for failure to answer data requests may include any of those provided for abuse of the discovery process in section (1) of this rule. The responding party shall promptly notify the requesting party of any changes to the answers previously given to a data request.

* * * *

- (8) Except when authorized by an order of the commission, the commission will not entertain any discovery motions, until the following requirements have been satisfied:
- (A) Counsel for the moving party has in good faith conferred or attempted to confer by telephone or in person with opposing counsel concerning the matter prior to the filing of the motion. Merely writing a demand letter is not sufficient. Counsel for the moving party shall certify compliance with this rule in any discovery motion; and
 - (B) If the issues remain unresolved after the attorneys have conferred in person or by telephone, counsel shall arrange with the commission for an immediate telephone conference with the presiding officer and opposing counsel. No written discovery motion shall be filed until this telephone conference has been held.

9. The last sentence of the first paragraph of the Commission's March 31, 2010 Order, quoted in paragraph six (6) above, states that in its December 9, 2009 order the Commission "did not in any way limit Staff's ability to engage in discovery and recognized that data requests could be employed in non-contested cases such as this." From the Commission's Order of March 31, 2010, it is obvious to the Staff that the Staff was not sufficiently clear in its March 12, 2010 motion as to its request for guidance regarding Rule 4 CSR 240-2.090. The Staff was attempting to ask the Commission for a clear indication of the specific provisions of 4 CSR 240-2.090 that the Commission deems applicable in a Staff investigation, such as, and in particular regarding, File No. EO-2010-0259. Regardless of the Staff's understanding of the Public Service Commission Law, the Missouri Administrative Procedure and Review Act, and Missouri caselaw, the Staff was not requesting in its motion that the Commission reconsider its ruling in its December 9, 2009 Order regarding compelling discovery, e.g., the use of subpoenas versus motions to compel, nor is it doing so here.

10. What the Commission has not yet clarified is the extent to which, if any, the provisions of Commission Rule 4 CSR 240-2.090 relating to data requests apply in this investigation. Therefore, the Staff requests the Commission to clarify the following:

- a. Is the response time for data requests in this investigation twenty (20) days from receipt as provided by 4 CSR 240-2.090(2)? If not, what is the response time, and what is that time based on, or does the Commission expect the Staff and KCPL to agree to a response time, and seek Commission resolution if they cannot agree?
- b. If the recipient of data request in this investigation objects or is unable to answer the data request within twenty (20) days, must the recipient object and state its reasons why it is unable to answer within twenty (20) days in writing served on

the requesting party within ten (10) days after receipt of the data request as provided by 4 CSR 240-2.090(2)? If not, when must the recipient of a data request object, or state why the recipient is unable to answer the data request and state when it will answer, and what is that time(s) based on, or does the Commission expect the Staff and KCPL to reach agreement on these matters, and seek Commission resolution if they cannot agree?

- c. Must answers to data requests in this investigation be signed by a person who is able to attest to the truthfulness and correctness of the answers as provided by 4 CSR 240-2.090(2)? If not, is any form of attestation required, or does the Commission expect the Staff and KCPL to agree on a resolution of this, and seek Commission resolution if they cannot?
- d. In this investigation, is a data request an informal written request for documents or information which may be transmitted directly between agents or employees of the commission, public counsel or other parties, as defined by 4 CSR 240-2.090(2)? If not, what is a data request in this investigation?
- e. Is the party who responds to a data request in this investigation obligated to promptly notify the requesting party of any changes to the answers previously given to a data request as provided by 4 CSR 240-2.090(2)? If not, what, if any obligation does a responding party have to update a response made to a data request in this investigation, or does the Commission expect the Staff and KCPL to agree to these matters, and seek Commission resolution if they cannot agree?

- f. Do the sanctions available for failure to answer data requests in this investigation include any of those provided for abuse of the discovery process in Commission rule 4 CSR 240-2.090(1)? If not, what, if any, sanctions are available?
 - i. If an objection is made to a data request in this investigation, does one obtain a ruling on that objection—the practice the undersigned attorney is familiar with in conducting litigation in the Circuit Courts of Missouri, one which the Cole County Circuit Clerk’s Office related is the practice there, and one that appears contemplated by Missouri Supreme Court Rule 61.01—before seeking an order to enforce the data request?
 - ii. Is seeking enforcement of a Commission *subpoena duces tecum*—a Commission order to appear and produce documents—rather than by a motion seeking a Commission order directing a party to answer a data request the only means by which a party may seek an answer to a data request in this investigation when a response is not provided?
- 11. Clarification of the foregoing matters will aid the Staff in conducting its audit in this investigation.

Wherefore, the Staff of the Public Service Commission of Missouri requests the Commission to clarify its March 31, 2010 *Order Regarding Pending Motions* regarding the matters set forth above.

Respectfully submitted,

/s/ Nathan Williams _____

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or emailed to all counsel of record this 7th day of April 2010.

/s/ Nathan Williams _____