

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

In the Matter of the Application of Kansas City)	
Power & Light Company for Approval to Make)	<u>Case No. ER-2007-0291</u>
Certain Changes in its Charges for Electric)	
Service to Implement its Regulatory Plan)	

MOTION TO STRIKE

COMES NOW the Office of the Public Counsel and for its Motion to Strike states as follows:

1. On September 30, 2007, the Staff of the Commission filed the Surrebuttal Testimony on Janice Pyatte. Ms. Pyatte’s testimony contains a discussion of privileged settlement negotiations. (Pyatte Surrebuttal, page 9, line 19 through page 11, line 16).

2. In introducing this section of her testimony, Ms. Pyatte states: “KCPL and OPC have left Staff with no alternative other than to, on advice of Staff counsel, reveal what are otherwise confidential settlement communications that took place during the negotiations of the sentence in question.” Ms. Pyatte admits that what she discloses is – but for her revealing it in her testimony – “otherwise confidential information.”

3. There is no question that settlement negotiations are privileged and confidential. Indeed, the Commission has a rule that expressly states so: Commission Rule 4 CSR 240-2.090(7), which states that “settlement offers are privileged and, except by agreement, shall not be used against participating parties unless fully substantiated by other evidence.”

4. None of the parties appear to have waived privilege with respect to the settlement negotiations Ms. Pyatte reveals in her surrebuttal testimony – certainly Public Counsel never did.

5. In two recent cases, the Commission has acted to protect settlement negotiations when parties have tried to disclose them. In the recent Suburban Water case¹ the Commission stated:

While the Commission certainly encourages compromise and settlement of contested claims in general, the Commission finds that both objections are well taken. As correctly noted by Public Counsel and Staff, at present there is no completed, multilaterally-negotiated "stipulation" or "agreement" for the Commission to approve -- instead, there is only an offer from Suburban. Furthermore, while portions of Exhibit A have evidently been used by the parties in an attempt to settle Case No. WC-2008-0030, it clearly does not constitute a completed negotiated settlement involving two or more parties; the confidential settlement negotiation information it contains was not intended to be revealed to the Commission or to the public; neither Public Counsel nor Staff agreed to the disclosure of any such information to either the Commission or the public; and [*4] Suburban's pleadings contain certain factual assertions that are vigorously contested by Public Counsel and Staff. Instead, Suburban filed the documents with the Commission as if they had been mutually agreed on without first obtaining permission from or even notifying Public Counsel or Staff.²

In the currently pending Missouri-American Water rate case³ the Commission struck an attachment to a pleading filed by intervenor City of Joplin because it improperly revealed privileged settlement negotiations:

¹ The Staff of the Missouri Public Service Commission, Complainant, v. Suburban Water and Sewer Company, Inc., and Gordon Burnam, Respondents, Case No. WC-2008-0030, "Order Sustaining Objections And Granting Motions to Strike" issued September 6, 2006

² *Ibid*, pages 3-4.

³ In the Matter of Missouri-American Water Company's request for Authority to Implement a General Rate Increase for Water Service provided in Missouri Service Areas, Case No WR-2007-0216, "Order Extending Time For Responses to Late-Filed Exhibits and Striking Amendment to Late-Filed Exhibit" issued August 27, 2007.

Section 536.070(8), RSMo 2000, and Commission Rule 4 CSR 240-2.130 provide that the rules of privilege are effective to the same extent that they are in civil actions. Commission Rule 4 CSR 240-2.090(7) notes that settlement offers are privileged, except by agreement, and shall not be used against participating parties unless fully substantiated by other evidence. “Because settlements are encouraged under the law, the general rule is that evidence procured from settlement is to be excluded at trial.”⁴

6. In both of these cases, the Commission granted motions to strike the portions of the filings that revealed settlement negotiations. The Commission should do so here. Ms. Pyatte attempts to justify revealing these privileged communications by stating that other parties disagree with her interpretation of the final, filed settlement agreement. There is no exception to the rules of privilege that allow a party to unilaterally reveal settlement negotiations simply because that party disagrees with another party’s interpretation of a public, filed agreement.

WHEREFORE, Public Counsel respectfully requests that the Commission strike the portion of Staff witness Pyatte’s surrebuttal testimony from page 9, line 19 through page 11, line 16.

Respectfully submitted,

OFFICE OF THE Public Counsel

/s/ Lewis R. Mills, Jr.

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⁴ *Ibid*, at page 3; footnote omitted.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been emailed to all parties this
4th day of October 2007.

/s/ Lewis R. Mills, Jr.
