

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 9th day of December, 2009.

In the Matter of the Application of Kansas City Power and Light Company for Approval to Make Certain Changes in its Charges for Electric Service to Continue the Implementation of its Regulatory Plan)
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File No. ER-2009-0089

ORDER REGARDING STAFF'S MOTION TO COMPEL

Issue Date: December 9, 2009

Effective Date: December 9, 2009

Background

On October 30,¹ the Commission's Staff filed a motion to compel the production of documents from Kansas City Power and Light Company ("KCPL"). The motion generically referred to documents referenced in Staff's Data Request 0631, which are invoices requested in association with the prudence review of environmental upgrades to Iatan I.

On September 14 and 15, the Regulatory Law Judge ("RLJ") held a discovery conference with the parties concerning thousands of pages of invoices, a small percentage of which contained redactions. During that conference, KCPL waived certain claims of privilege and the RLJ found the remaining asserted privileges appropriate.

On November 2, because: (1) the volume of materials encompassed by Staff's motion: (2) numerous assertions of privilege had been waived by KCPL and un-

¹ All dates throughout this order refer to the year 2009 unless otherwise noted.

redacted documents were provided to Staff; and (3) because of Staff's generic reference to all of the documents, the Commission directed its Staff to identify the specific invoice numbers and the page and line numbers of redactions in the much smaller number of documents that remain in dispute. The Commission ordered KCPL to provide the RLJ a copy of the pages of the invoices, once identified by Staff, revealing the redacted portions in the same manner KCPL had done for the discovery conference and to list its specific defenses or privileges that covered each item subject to the motion to compel. In this manner, the Commission could evaluate Staff's motion.

On November 9, Staff filed its response claiming that it could not comply with the Commission's order and would not identify the specific documents and redactions at issue because of the manner in which KCPL had effectuated its redactions, i.e. using whiteout. Staff simply stated that it was challenging every redaction. Staff's response at that time made it impossible for the Commission to evaluate each redaction that remains in dispute because the Commission had no way to identify which specific items are in dispute and evaluate KCPL's defenses to producing those items.

On November 12, another discovery conference was held. At that conference, issues were raised with regard to Staff's Data Requests Numbers 339, 342, 350, 358, 360, 363, 370, 411, 413, 415, 430, 490 (the DRs 339-490 were all made on January 14, 2009), and 0710 (request made August 17, 2009). At this conference the RLJ directed KCPL to disclose certain portions of the redacted documents at issue, and KCPL agreed to revisit certain documents following the RLJs instructions on which information was discoverable. Staff's motion to compel does not involve these data requests.

Also at the November conference, DR 0631 was again discussed. The parties agreed to submit a timeline for responses wherein KCPL would correct problems Staff claimed it was having with determining the extent of the redactions; i.e. provide blacked-out versions versus white-out versions. Staff would then provide a complete list of documents encompassed within its motion to compel involving DR 0631, and KCPL would then file its reply to Staff's amended motion. KCPL provided Staff with blacked-out versions of the redactions on November 16. Staff filed suggestions in support of its motion to compel on November 19, and amended its motion by including the required list of documents it sought on November 20. KCPL responded to the initial motion on November 19, and on November 30, it provided the RLJ with redacted and unredacted versions of the documents at issue.

To put the audit in perspective, KCPL, in its November 19 response, included the affidavit of Tim Rush, KCPL's Director of Regulatory Affairs. Mr. Rush, *inter alia*, states:

KCP&L initiated both electronic and manual analyses of the documents provided during its 2009 rate cases and associated construction audit. Based on the results of these analyses, KCP&L has provided over 103,000 documents (equivalent to approximately 4.0 million pages), including documents contained in CD and DVD computer disks and jump drives, or provided in hard copy. Of these, over 65,900 documents were provided to the MPSC audit and engineering Staff in the ER-2009-0089 case, with the remaining documents provided in the concurrent ER-2009-0090, HR-2009-0092 and 09-KCPE-246-RTS dockets. Additionally, KCP&L has responded to a total of 2,861 data requests during these cases, not including a large amount of data provided to the Commission's engineering staff. This total includes 1,457 data requests in this case (1,100 from the Commission's auditing staff) as well as an additional 878 data requests in the companion KCP&L Greater Missouri Operations Company rate cases (Case No. ER-2009-0090 and HR-2009-0092), and 526 data requests in Kansas Docket 09-KCPE-246-RTS.

With regard to the scope of discovery in this case, it should be noted that KCP&L has worked diligently to timely provide Staff with the requested

information requested and has objected and asserted the attorney-client or work product privilege sparingly (privilege has been asserted with respect to roughly only two percent of the data requests and many of those data requests have been subsequently answered). We asserted objections to approximately 50 data requests with unprivileged documents supplied. Subsequently, we withdrew in whole or in part over 20 of those data requests as a result of negotiations with Staff.

In addition to providing the substantial documentation above, KCP&L conducted over 100 meetings and document review sessions with the MPSC audit and engineering Staff during both the main rate case and the subsequent construction audit. The majority of these meetings included multiple company subject matter experts in order to address Staff's request for additional information and explanations. Counsel for the Company and Staff have also engaged in a series of meetings in which discovery issues are addressed in an attempt to reach resolution. In early September 2009, KCP&L's counsel and Staff's counsel established a weekly call to discuss and attempt to resolve any outstanding discovery issues. In addition, counsel discuss matters as needed when they arise. All of these discussions are focused on Staff's concerns with discovery and KCP&L's attempt to resolve those concerns.

KCPL provided an itemized overview of the discovery requests in tabular form and that table appears in an appendix at the end of this order.

What remains in dispute with DR 0631 are approximately 41 documents, of which there are approximately 168 pages that bear some redacted language. The documents in question are composed of legal invoices from law firms providing both legal and business consulting services for KCPL.²

Discovery versus an Investigation or Audit

Although the Regulatory Law Judge agreed to assist the parties with these disputes, characterized as discovery disputes, it is noteworthy that the RLJ pointed out early on in these discussions that these attempts at mediating these disputes were

² The law firms are: Schiff Hardin, L.L.P., Sonnenchein Nath & Rosenthal, L.L.P., Morgan, Lewis & Bocklus, L.L.P., Spencer Fane Britt & Browne, L.L.P., the Law Office of James W. Farley, Cafer Law Office, L.L.C., and Fischer & Dority, P.C.

occurring outside of a contested case docket. File Number ER-2009-0089 was formally closed on August 8, following the effective date of the compliance tariff filings resulting from the Commission's approval of parties' stipulations and agreements.³ However, all disputed evidentiary issues in this matter were decided when the Commission's "Order Approving Non-Unanimous Stipulations and Agreements and Authorizing Tariff Filing" became effective on June 23, 2009.⁴ A separate order was issued on June 10 directing Staff to complete and file the construction audit and prudence review of the environmental upgrades at Iatan I no later than December 31.⁵ That order was an exercise of the Commission's investigatory authority encompassed within Chapters 386 and 393, RSMo.⁶

Commission Rule 4 CSR 240.090 provides that: "Discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court." "The rules of discovery enumerated by our Missouri Supreme Court are found at Rule 56 through Rule 61 of the Missouri Rules of Civil Procedure (the Discovery Rules)."⁷ "Litigants and lawyers involved in lawsuits have a right to perform discovery, and they are entitled to do so within the parameters of rules of discovery enacted by our Missouri

³ EFIS Docket Entry Number 300, *Order Approving Tariff Filings In Compliance With Commission Order*, issued July 28, 2009, effective August 7, 2009. File No. ER-2009-0089 is merely a depository for documents at this time.

⁴ EFIS Docket Entry Number 288, *Order Approving Non-Unanimous Stipulations and Agreements and Authorizing Tariff Filing*, issued June 10, 2009, effective June 23, 2009.

⁵ EFIS Docket Entry Number 287, *Order Regarding Joint Motion To Extend Filing Date*, issued June 10, 2009 and effective immediately upon issuance.

⁶ See in particular Sections 386.310, 386.360, 386.390, 386.420, 386.440, 386.460, 386.470, 393.110, 393.130, 393.140, 393.145, 393.146, 393.160, 393.170, 393.190, 393.260, and 393.270, RSMo 2000 and its supplements.

⁷ *State ex rel. Proctor v. Messina*, 2009 WL 3735919, 14 (Mo. App. W.D. 2009).

Supreme Court.”⁸ There is no provision or mechanism for the application of discovery rules outside the boundaries of the existence of a contested action.

Indeed, Supreme Court Rule 56.01(a) states:

Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. (Emphasis added).

And, Commission Rule 4 CSR 240-2.090(2) provides:

Parties may use data requests as a means for discovery.... 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.

The Commission has recognized the party – non-party distinction and has declared that data requests cannot be directed to non-parties in a contested case.⁹ However, the Commission has also recognized that Staff and the Public Counsel may use data requests outside of the context of a contested case pursuant to the specific statutory authority in Section 386.450, RSMo 2000,¹⁰ which provides:

At the request of the public counsel and upon good cause shown by him the commission shall require or on its own initiative the commission may require, by order served upon any corporation, person or public utility in the manner provided herein for the service of orders, the production within this state at such time and place as it may designate, of any books,

⁸ *Id.*

⁹ *Staff of Missouri Public Service Com'n v. Missouri Pipeline Co., LLC and Missouri Gas Company, L.L.C.*, 2006 WL 2658490 (Mo. P.S.C.) 2006 WL 2658490 (Mo.P.S.C.), Case No. GC-2006-0491, Order Denying Staff's Motion to Compel Response to Discovery Request, issued and effective on September 12, 2006. Commissioners Davis, Murray, Gaw, Clayton and Appling concurring.

¹⁰ *In re Missouri-American Water Company's Tariff to Revise Water and Sewer Rate Schedules*, 2003 WL 22866791 (Mo. P.S.C.), Case No. WR-2003-0500, Order Concerning Motion to Compel, issued and effective on December 2, 2003. Commissioners Gaw, Simmons and Clayton concurring; Commissioner Murray dissenting.

accounts, papers or records kept by said corporation, person or public utility in any office or place within or without this state, or, at its option, verified copies in lieu thereof, so that an examination thereof may be made by the public counsel when the order is issued at his request or by the commission or under its direction.

Data requests, by definition, are informal written requests for documents and information, and when used outside of the framework of a contested case discovery rules do not provide any means to compel production of the information requested. Use of data requests in a non-case audit fall under the Commission's investigatory power, and production of documents in this procedural context can only be compelled by use of a subpoena as provided for in Sections 386.440 and 536.077, RSMo. Section 536.077 delineates the enforcement mechanism of subpoenas as follows:

The agency or the party at whose request the subpoena is issued shall enforce subpoenas by applying to a judge of the circuit court of the county of the hearing or of any county where the witness resides or may be found for an order upon any witness who shall fail to obey a subpoena to show cause why such subpoena should not be enforced, which said order and a copy of the application therefor shall be served upon the witness in the same manner as a summons in a civil action, and if the said circuit court shall, after a hearing, determine that the subpoena should be sustained and enforced, said court shall proceed to enforce said subpoena in the same manner as though said subpoena had been issued in a civil case in the circuit court. The court shall permit the agency and any party to intervene in the enforcement action. Any such agency may delegate to any member, officer, or employee thereof the power to issue subpoenas in contested cases; provided that, except where otherwise authorized by law, subpoenas duces tecum shall be issued only by order of the agency or a member thereof.¹¹

The proper procedure for Staff to have followed was to seek production of the disputed documents by means of a subpoena and its enforcement. Nevertheless, the

¹¹ See also *Division of Labor Standards, Department of Labor and Indus. Relations v. Chester Bros Const. Co.*, 42 S.W.3d 637, 639 (Mo. App. E.D. 2001).

Commission will still review and analyze Staff’s request pursuant to general principles of discovery.

Discovery Standards and Assertion of Privilege

Commission Rule 4 CSR 240.090 provides that: “Discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court.” Data requests are frequently used during Commission proceedings in forms similar to interrogatories or requests for production of documents and the rule further provides that: “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.”

Rule 56.01 governs the scope of discovery in civil actions in the circuit court, and generally, “[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action....”¹² Relevance, for purposes of discovery, is “broadly defined to include material “reasonably calculated to lead to the discovery of admissible evidence.”¹³ The party seeking discovery shall bear the burden of establishing relevance.¹⁴

“The discovery process’ purpose is to give parties access to relevant, non-privileged information while reducing expense and burden as much as is feasible.”¹⁵

“The circuit court must ascertain that the process does not favor one party over another

¹² Rule 56.01(b)(1); *Ratcliff v. Sprint Missouri, Inc.*, 261 S.W.3d 534, 546 -547 (Mo. App. W.D. 2008).

¹³ *State ex rel. Wright v. Campbell*, 938 S.W.2d 640, 643 (Mo. App. E.D. 1997); *State ex rel. Pooker ex rel. Pooker v. Kramer*, 216 S.W.3d 670, 672 (Mo. banc 2007).

¹⁴ *State ex rel. Collins v. Roldan*, 289 S.W.3d 780, 786 (Mo. App. W.D. 2009).

¹⁵ *State ex rel. American Standard Ins. Co. of Wisconsin v. Clark*, 243 S.W.3d 526, 529 (Mo. App. W.D. 2008), *citing to*, *State ex rel. Ford Motor Company v. Messina*, 71 S.W.3d 602, 606 (Mo. banc 2002).

by giving it a tactical advantage: ‘The discovery process was not designed to be a scorched earth battlefield upon which the rights of the litigants and the efficiency of the justice system should be sacrificed to mindless overzealous representation of plaintiffs and defendants.’”¹⁶

As noted, the information sought in discovery must not only be relevant, it must not be protected by a legally recognized privilege. “According to Black’s Law Dictionary, a privileged communication is a “communication that is protected by law from forced disclosure.”¹⁷ “Claims of privilege present an exception to the general rules of evidence which provide that all evidence, material, relevant and competent to a judicial proceeding shall be revealed if called for.”¹⁸

As Missouri courts have elucidated:

Under subdivision [Rule 56] (b)(1), privileged matters are absolutely non-discoverable. *Id.*; *May Dep’t Stores Co. v. Ryan*, 699 S.W.2d 134, 136, 137 (Mo. App. E.D. 1985). The attorney-client privilege prohibits “the discovery of confidential communications, oral or written, between an attorney and his client with reference to ... litigation pending or contemplated.” *State ex rel. Terminal R.R. Ass’n of St. Louis v. Flynn*, 363 Mo. 1065, 257 S.W.2d 69, 73 (Mo. banc 1953) (citation omitted). To be privileged, the purpose of a communication between an attorney and client must be to secure legal advice. *St. Louis Little Rock Hosp., Inc. v. Gaertner*, 682 S.W.2d 146, 150 (Mo. App. E.D. 1984).¹⁹

In addition to the Attorney-Client privilege,²⁰ Missouri also recognizes the work-product privilege:

¹⁶ *Id.*

¹⁷ *State ex rel. Hope House, Inc. v. Merrigan*, 133 S.W.3d 44, 49 (Mo. banc 2004); Black’s Law Dictionary 273 (7th ed. 1999).

¹⁸ *State ex rel. Dixon Oaks Health Center, Inc. v. Long*, 929 S.W.2d 226, 229 (Mo. App. S.D. 1996).

¹⁹ *Ratcliff*, 261 S.W.3d at 546-547.

²⁰ Privilege communications also include spousal, physician-patient, clergy, etc., but those privileges are not at issue in this matter and will not be discussed.

The work product doctrine in Missouri protects two types of information from discovery: both tangible and intangible. *Ratcliff v. Sprint Mo., Inc.*, 261 S.W.3d 534, 547 (Mo. App. W.D. 2008). Tangible work product consists of documents and materials prepared for trial and is given a qualified protection under Rule 56.01(b)(3); its production may be required on a showing of substantial need. *State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 367-68 (Mo. banc 2004). Intangible work product consists of the mental impressions, conclusions, opinions, and legal theories of an attorney. *Ratcliff*, 261 S.W.3d at 547. Intangible work product has absolute protection from discovery. *Bd. of Registration for Healing Arts v. Spinden*, 798 S.W.2d 472, 476 (Mo. App. W.D. 1990). The doctrine limits discovery in order to prevent a party in litigation “from reaping the benefits of his opponent's labors” and to guard against disclosure of the attorney's investigative process and pretrial strategy. *Westbrooke*, 151 S.W.3d at 366 n. 3; *State ex rel. Atchison, Topeka & Santa Fe Ry. Co. v. O'Malley*, 898 S.W.2d 550, 553 (Mo. banc 1995).²¹

The party claiming that a privilege precludes discovery of a matter bears the burden to show the privilege applies.²²

DR 0631

Staff submitted DR 0631 to KCPL on June 17, 2009 requesting the following:

1. Please provide a copy of the document titled ‘Iatan Projects - Accounting for Certain Activities.’
2. Please provide a copy of the meeting minutes and other documents provided at or discussed in the 12/14/06 Iatan Joint Owners meeting.
3. Please provide copies of computer disks of all invoices given to the Kansas Corporate Commission (KCC) regarding their investigation into Iatan 1 and Common Facilities.

On July 30, Staff Counsel and Counsel for KCPL had a telephone conversation about the status of DR 0631, in which KCPL’s Counsel stated that KCPL was in the process of replacing the disks provided to the KCC and would shortly provide Staff with the copies of the new disks it was providing KCC. Tim Rush, KCPL’s Director of

²¹ *Kenney v. Vansittert*, 277 S.W.3d 713, 719 (Mo. App. W.D. 2008).

²² *Ratcliff*, 261 S.W.3d at 549.

Regulatory Affairs, in his affidavit accompanying KCPL's response to Staff's motion to compel, explained the reason for replacing the disks provided to KCC was an inadvertent disclosure of privileged matters to KCC and the Citizens Utility Ratepayer Board ("CURB"). Mr. Rush further explained the complicated process involved with managing this information that lead to the inadvertent disclosure, a disclosure KCC and CURB agreed to allow KCPL to retract. As Mr. Rush explains:

KCP&L has taken great strides to timely provide responses to the immense number of discovery requests while maintaining its internal review process and protecting highly confidential and attorney-client and work product privileged information. However, even with the Company's best efforts in place, we experienced a rare clerical error that resulted in an inadvertent disclosure of attorney-client and work product information contained in legal invoices that KCP&L fully intended to be redacted and designated as attorney-client and/or work product privileged before production. This error occurred in the release of information to the KCC Staff and CURB in response to Kansas Data Requests 0267, 0267S2, 0267S3 and 0267S5, related to all vendor invoices. To my knowledge, that is the only inadvertent disclosure of privileged information that has occurred throughout this discovery process.

The following is a summary of the system established to protect privileged information contained in the legal invoices from disclosure:

- a. Information containing potential attorney-client or work product privileged information was reviewed, processed, and redacted or released through attorneys in the Law Department.
- b. Legal invoices, in particular, Schiff-Hardin legal invoices, were excluded from the Company's normal invoice approval process of scanning all invoices, including all supporting documentation, into the Company's Voucher Imaging Payment System. Legal invoices are routed directly to the Law Department, reviewed by the Law Department and supporting documentation is removed and retained by the Law Department prior to submission for scanning into the Company's Voucher Imaging Payment System and processed for payment.
- c. As with other potential attorney-client or work product privileged information, if legal invoices were requested in discovery, they were to be reviewed, processed, and redacted or released through attorneys in the Law Department.

d. Despite our best efforts, there was an inadvertent disclosure of certain attorney-client and work product privileged information that was contained on various legal invoices provided to the KCC Staff and CURB.

e. The inadvertent disclosure occurred due to an error in the process described above whereby these certain legal invoices were scanned into the Voucher Imaging Payment System without being submitted to the Law Department for review and removal of supporting documentation first. This error in the process resulted in the Company providing un-redacted legal invoices, including supporting documentation, in a data request without first going to the Law Department for review and release of the information.

f. In preparing the response to Kansas Data Requests 0267, 0267S2, 0267S3 and 0267S5, a Company employee unknowingly transferred these certain legal invoices and supporting documentation onto computer disks that were provided to the KCC Staff and CURB. The inadvertent disclosure consisted of 121 un-redacted legal invoices out of a total of 6,414 vendor invoices contained on 14 DVDs provided to Kansas Staff and CURB in the above mentioned data requests.

g. Once discovered, the inadvertent disclosure was brought to the attention of the KCC Staff and CURB and was rectified without objection with all invoices containing privileged information destroyed and replaced with redacted invoices.

h. I understand that the legal counsel for KCC Staff was notified of the inadvertent disclosure on July 13, 2009 and the matter was fully concluded on August 18, 2009 with the agreement that KCC Staff and CURB would destroy and/or erase the un-redacted invoices from any computer upon which they were downloaded and KCP&L would provide a DVD containing the redacted replacement invoices. Because the invoices had been loaded onto the KCC Staff and CURB's computers, some level of coordination was required to identify and replace the invoices in question.

On August 4, KCPL provided Staff with thirteen compact disks containing the copies of the legal invoices encompassed by DR 0631. Staff states that 6227 batches of invoices were contained in KCPL's response, and as previously noted, approximately 41 of these invoices contained the redactions.

Staff's Arguments and KCPL's Responses

Staff argues KCPL must produce unredacted copies of the 41 documents at issue in DR 0631 for two reasons. First, Staff asserts that because KCPL failed to redact the same documents when it *first* provided them to the Kansas Corporation Commission (“KCC”) in KCPL’s 2008 Kansas rate case that KCPL has waived all privileges. Staff does not believe this disclosure was inadvertent because of the time it took for KCPL to replace the documents with redacted versions.

Second, Staff claims that KCPL failed to timely object to DR 0631 when it provided Staff with the redacted documents. DR 0631 was submitted to KCPL on June 17, 2009. Staff states that it and KCPL agreed to maintain a shortened response time to data requests after the Commission’s decision in ER-2009-0089 was issued, and that KCPL had only 10 days to answer DR 0631 and raise objections. KCPL, according to Staff, has waived any claim to privilege by not timely objecting to the data request.

KCPL responds to Staff’s first argument by asserting that the disclosure to KCC was inadvertent, and that because of the process involved with processing the massive amounts of documents involved that it took some time to discover the inadvertent disclosure and correct it. KCC agreed to return or destroy the unredacted documents, which KCPL replaced with redacted versions, thus preserving their claim of privilege with KCC. KCPL further argues there is no authority to support the position that an inadvertent disclosure in a different jurisdiction, in a different case, before a different governmental entity constitutes a waiver of privilege in an audit in Missouri.

KCPL’s response to Staff’s second argument is that assertion of privilege through the provision or redacted documents is not the equivalent of an objection to a data request. KCPL states that it was not objecting to the data request and provided

answers to it, but that it is claiming that some of the documents provided in response to the data request contain privileged information. KCPL points out that the Commission has previously ruled on this very issue and consistently held that privilege is not the same as an objection and need not be asserted within the ten-day objection period. Consequently, KCPL maintains that it appropriately asserted privilege protection of the redacted materials.

Analysis

A. Inadvertent Disclosure

Because Missouri courts have not adopted a *specific* test regarding when an inadvertent disclosure of privileged matters could constitute a waiver of privilege, both Staff and KCPL point to federal case law and federal rules for persuasive authority regarding how the Commission should analyze whether privilege has been waived.²³ Staff cites to one Missouri state case that is more closely on point, but appears to miss

²³ KCPL cites to *Zapata v. IBP, Inc.* 175 F.R.D. 574 (D. Kansas 1997); *Monarch Cement Co. v. Lone Star Industries, Inc.*, 132 F.R.D. 558, 559 (D. Kans. 1990); *Kansas City Power & Light Co. v. Pittsburg & Midway Coal Mining Co.*, 133 F.R.D. 171, 172 (D. Kan. 1989). These courts have employed a five-factor test to determine if inadvertent disclosure of documents effects a waiver of the attorney-client privilege or attorney-work product protections. The factors typically applied are as follows: 1) The reasonableness of the precautions taken to prevent inadvertent disclosure; 2) The time taken to rectify the error; 3) The scope of the discovery; 4) The extent of the disclosure; and 5) The overriding issue of fairness. *Zapata* at 4. See also *Gray v. Bicknell*, 86 F.3d. 1472 (8th Cir. 1996)(endorsing a middle ground balancing test) and Federal Rule of Evidence Rule 502.

Staff cites to *United States v. Massachusetts Institute of Technology*, where the First Circuit held that by disclosing legal bills to the Defense Contract Audit Agency, the auditing arm of the Department of Defense, MIT waived attorney-client privilege as to those billings. 129 F.3d 681, 684-686 (1st Cir. 1997). Staff also references *Bergonzi* (*not fully cited*) where Defendants sought production of document reports of an internal investigation made by McKeelson and shared with the Government in response for leniency. 216 F.R.D. 487 (N.D. Cal. 2003). Defendants argued the Company waived any claim of privilege by producing the material to the Government. *Id.* Staff finally cites to The U.S. District Court for the Northern District of California where it determined that once a party has disclosed work product to one adversary, it waives work product protection as to all other adversaries. See *McMorgan v. First Cal. Mortg. Co.*, 931F.Supp. 703 (N.D. Cal. 1996). The Court found that disclosure of the Report and Back-up Materials to the Government constitutes a disclosure of the documents to an adversary.

the pertinent language in the holding. As Staff notes: in *Lipton v. St. Louis Housing Authority*, the Missouri Appellate Court for the Eastern District stated:

Confidentiality of communications between attorney and client is essential for an effective attorney-client relationship because confidentiality fosters candor on the part of a client who is seeking advice and guidance from his chosen representative. . . . Generally all of what the client says to the lawyer *and* what the lawyer says to the client is protected by the attorney-client privilege. 705 S.W.2d 565, 570 (Mo. App. 1986) (internal citations omitted).

As Staff observes further, the Court went on to state that the attorney-client privilege is waived where the client **voluntarily** shares the communication with a third party, with an exception if the client and third party share a common interest in the outcome of the litigation and the communication by the client to the third party was made in confidence. *Id.* (Emphasis added).

KCPL correctly notes that Missouri provides strong protection for attorney-client communications.²⁴ And the crux of Missouri's *general* test as to whether a privilege has been waived is the disclosure must be voluntary, and disclosure of information in response to an adverse party's discovery is not normally considered to be voluntary.²⁵ It must be remembered that the attorney-client privilege belongs to the client,²⁶ and a waiver of that privilege "presupposes both knowledge and acquiescence."²⁷ In order to waive privilege, the waiver must be made knowingly, voluntarily, and the entity waiving privilege must be acquiescing, i.e. not attempting to preserve the privilege. Moreover,

²⁴ *State ex rel. Tracy v. Dandurand*, 30 S.W.3d 831, 835 (Mo. banc 2000), citing to, *State ex rel. Great American Ins. Co. v. Smith*, 574 S.W.2d 379 (Mo. banc 1978).

²⁵ *State ex rel. Chance v. Sweeney*, 70 S.W.3d 664, 670 (Mo. App. S.D. 2002). This case involved the confidential physician-patient privilege.

²⁶ *State v. Timmons*, 956 S.W.2d 277, 285 (Mo. App. W.D. 1997).

²⁷ *Frazier v. Metropolitan Life Ins. Co.*, 141 S.W. 936, 938 (Mo. App. 1911), citing to, *Haysler v. Owen*, 61 Mo. 270 (1875).

the inadvertent disclosure in Kansas was to adversarial parties in response to their discovery requests, and as Missouri courts have noted, this was not, by its nature, a voluntary disclosure.

KCPL's inadvertent disclosure to the KCC was not made knowingly, was not done voluntarily, and KCPL did not acquiesce. Instead, as soon as KCPL discovered the disclosure, it asserted its privileges, and withdrew and replaced the unredacted documents. KCPL's inadvertent disclosure to KCC did not waive its asserted privileges with respect to this Commission's audit.

B. Timely Objection versus Assertion of Privilege

With regard to Staff's second argument, that KCPL waived its privileges by not raising timely objections to the data request, the Commission has addressed this same argument before and determined it is without merit. The Commission has previously determined an objection is not the same as an assertion of privilege.²⁸ KCPL did not object to the data request on the basis of some defective inquiry, i.e. relevance for example, but ultimately complied with the data request by producing documents redacting only those portions considered to be privileged. As the Commission elucidated in EM-2000-753, where a discovery dispute arose when KCPL sought authority to transfer electrical generation assets:

A party must comply with 4 CSR 240-2.090(2) by making a timely objection to a data request. Thus, for example, if a data request is vague, over broad or unduly burdensome, or if, on its face, a data request calls for the production of documents that would be protected by the attorney-client or work product privilege, then the responding party must make its written objection to the data request within ten days as required by the

²⁸ Moreover, KCPL provided the documents requested in a redacted form, and arguably, the form itself asserts the privilege. Privileged materials, as a matter of law, are not discoverable – they are not subject to discovery, unless the privilege is knowingly and voluntarily waived. Supreme Court Rule 56(1).

rule. **However, the requirement that such written objection be filed within ten days does not, and cannot, apply to privilege claims relating to specific documents to be disclosed under otherwise unobjectionable data requests.** The Commission holds that claims of privilege relating to specific documents need not be asserted within ten days of service of a data request.²⁹ (Emphasis added).

This distinction has been further explained by the Commission and supported by Missouri case law.

Given the volume of data requests, and the volume of documents sought in the data requests, the company must have sufficient time, frequently beyond the 10-day response period, to review the documents and ascertain the fact that the data would be protected by privilege.³⁰ The ten-day response rule is inapplicable to the assertion of privilege.³¹ Instead, the proper time for objection on the basis of privilege falls between when the question calling for disclosure of privileged matters is asked and before that

²⁹ *In the Matter of the Application of Kansas City Power & Light Company for an Order Authorizing the Transfer of Certain Electric Generation Assets Used to Provide Electric Service to Customers in Missouri and Other Relief Associated with Kansas City Power & Light Company's Plan to Restructure Itself into a Holding Company, Competitive Generation Company, Regulated Utility Company and Unregulated Subsidiary*, Case No. EM-2000-753, Order Regarding Motion to Compel, issued January 30, 2001, effective February 9, 2001, Lumpe, Ch., Drainer, Murray, Schemenauer, and Simmons, CC. concur. It should be noted that in subsequent Commission orders referencing this order, a typographical error occurred whereby the word "unobjectionable" was replaced with the word "objectionable." "Unobjectionable" is the proper word. See also Footnote 30, *infra*.

³⁰ *Staff of the Missouri Public Service Commission v. Union Electric Company, d/b/a AmerenUE*, 2002 WL 1311615 (Mo. P.S.C.), Case No. EC-2002-1, Order Denying Motion to Compel Data Requests 554 and 555, issued on January 24, 2002 and effective on February 3, 2002; Simmons, Ch., Murray, Lumpe, Gaw, Forbis, CC., Concur; AND 2002 WL 1584623, Order Denying Motion to Compel Data Requests 554 and 555, issued and effective on February 3, 2002; Simmons, Ch., Murray, Lumpe, Gaw, Forbis, CC., Concur.

In the Matter of the Application of Union Electric Company, Doing Business as AmerenUE, for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company, Doing Business as AmerenCIPS, and, in Connection Therewith, Certain Other Related Transactions, 2004 WL 431838 (Mo. P.S.C.), EO-2004-0108, Order on Reconsideration Concerning Discovery, issued and effective on February 26, 2004. Gaw, Ch., Murray, and Clayton, CC., Concur.

³¹ See Footnotes 29 and 30, *supra*.

question is answered.³² Or stated differently, privilege is not waived unless the answer has already been given.³³

The relevant timeline of the data request and the response is as follows:

1. June 17, 2009: Staff submitted data request 0631 to KCPL, a part of which requested documents submitted to KCC regarding their investigation into Iatan 1 and Common Facilities.
2. July 13, 2009: KCPL discovers the inadvertent disclosure to KCC Staff and CURB while reviewing the material and notifies Legal Counsel for KCC Staff and CURB of the inadvertent disclosure.
3. July 28, 2009: Staff sends KCPL a “Golden Rule” letter concerning the discovery request.
4. July 30, 2009: KCPL’s counsel informs Staff that it is delaying its response until corrected documents can be prepared and swapped out with KCC and CURB.
5. August 4, 2009: KCPL provides Staff with the invoices in redacted form.
6. August 18, 2009: Everything concluded with KCC & CURB destroying the set of documents containing the inadvertent disclosure.

Staff was made aware of the assertion of privilege on July 30 and the data request was fully answered on August 4. The documents in question have not been disclosed or become public in any other format or manner.

While KCPL could have more timely replied to the data request, it asserted privilege protection prior to answering the data request and did not waive the attorney-client or work product privileges. Staff has not objected to the late response to the data request, but claims no formal objection on the basis of privilege was raised by KCPL until Sept 6, 2009 when a conference call was held with the RLJ.

³² *Id.*; *Rock v. Keller*, 312 Mo. 458, 278 S.W. 759, 766(4) (1926); *Gipson v. Target Stores, Inc.*, 630 S.W.2d 107, 109 (Mo. App. E.D. 1981).

³³ *Id.*

Given the volume of materials requested and provided, and the continuous communications ongoing between Staff and KCPL, as demonstrated in Mr. Rush's affidavit, the Commission believes KCPL's delay in responding to the data request was reasonable. KCPL's actions do not demonstrate bad faith, nor do they constitute actions being maintained for an improper purpose, to create unnecessary delay, to gain an unfair tactical advantage or to increase the cost of litigation. The Commission believes that Staff was fully aware of KCPL's assertion of privilege on July 30, and that the assertion of privilege was cemented when redacted documents were submitted to Staff on August 4.

Decision

In making its decision, the Commission bears in mind the relevant purpose of the prudence audit, i.e., to determine the prudence of the expenditures outlined in the invoices. In that regard, it is noteworthy that Staff makes no allegation or demonstration that it lacks sufficient information to perform its audit, i.e. evaluate the prudence of KCPL's expenditures.

Staff also failed to follow proper audit procedure (i.e., seeking production of the unredacted documents by means of a subpoena and its enforcement), and even the unnecessary application of discovery principles outside the boundaries of a contested case does not aid Staff's position. Staff does not allege or demonstrate that it would be a hardship to acquire any additional necessary information in order to overcome the properly raised qualified privilege for tangible work product. Moreover, after reviewing the unredacted invoices *in camera*, it is abundantly clear that sufficient information has been provided in the redacted invoices for Staff to complete its prudence review, and

that the attorney-client privilege and the intangible work product privilege, both absolute privileges, have been properly asserted.

THE COMMISSION ORDERS THAT:

1. The Staff of the Missouri Public Service Commission's motion to compel is denied.
2. This order shall become effective immediately upon issue.

(S E A L)

BY THE COMMISSION



**Steven C. Reed
Secretary**

Clayton, Chm., Davis, Gunn, and Kenney, CC., concur;
Jarrett, C., concurs with concurring opinion attached.

Stearley, Senior Regulatory Law Judge

Appendix A

Number of Documents Provided by KCPL In Response to Data Requests

	ER-2009-0089 KCPL-MO	ER-2009-0090 GMO-Elec	HR-2009-0092 GMO-Steam	09-KCPE-246-RTS KCP&L-KS	All Cases
Approximate number of Documents/Invoices Provided in Response to Data Requests					
Number of Data Requests	1,457 (a)	761	117	526	2,861
Number of Attachments					
Electronic in CaseWorks	24,478	9,963	1,548	4,382	
CD's, DVD's, jump drives	31,754	13,501		7,757	
Hard copy (estimate)	120	30			
Provided to Engineering	78				
Hard copy from Legal Dept	9,500				
Total Attachments	65,930	23,494	1,548	12,139	103,111
Data file size (Megabytes)					
Electronic in CaseWorks	193	137	50	96	
CD's, DVD's, jump drives	56,490	10,759		8,612	
Provided to Engineering	1,286				
Total Electronic Files-Mb	57,968	10,896	50	8,708	77,622
Approximate Total Page Count of These Documents					
Electronic files (b)	2,898,421	544,809	2,494	435,379	
Hard copy attachments (c)	1,800	1,400			
To Audit Staff	1,400			11,800	
Audit from KCPL Legal	54,494				
To Engineering Staff	10,400				
Total Approx Pages	2,966,515	546,209	2,494	447,179	3,962,396
Number of Meetings to Discuss Information and Resolve Issues					
Main Case	49 (d)	13	1	4	
Construction Audit					
Audit Staff	24				
Engineering Staff	13				
Total	86	13	1	4	104

NOTES

(a) MPSC Staff - 1,098; Other Parties - 359

(b) Conversion rates from megabyte to pages differ depending on file type.
 MicroSoft Word = 63 pages per Mb; Excel = 161 pages/Mb, Images = 15 pages/Mb.
 A approximate average conversion of 50 pages per Mb was used.

(c) New ream of paper - 2 inches = 500 sheets. Use conversion of 2-1/2 inches = 500 sheets

	Inches	No. of Pages
KCPL-MO		
To Audit Staff	9	1,800
To Engineering Staff	43	8,600
KCPL-MO		10,400
GMO-Elec	7	1,400
GMO-Steam	0	0
KCPL-KS	0	0
		11,800

(d) Includes 27 joint KCPL/GMO meetings

Appendix B
Staff's List of Documents in Dispute

Invoice Number	Voucher #	Date of Document	Pages Needed
1066785	00790995	September 1, 2006	12 & 13
1066783	00790996	September 1, 2006	5,6,7,24,25 & 27
1081919	00801488	October 31, 2006	3 & 18
1081005	00801489	October 31, 2006	12, 13 & 18
1104268	00814254	January 19, 2006	5, 7 & 19
1111931	00821214	February 20, 2007	4, 5 & 6
1120268	00829753	March 20, 2007	18, 21, 22,27,34, 35 & 36
1120263	00829754	March 20, 2007	4

Invoice Number	Voucher #	Date of Document	Pages Needed
1120996	00833671	April 18, 2007	2, 30 & 33
1128177	00833672	April 18, 2007	4, 5 & 6
1135852	00837904	May 16, 2007	5 & 12
1164989	00854202	July 20, 2007	4
1164991	00854203	July 20, 2007	14,15, 18 & 25
1200604	00880773	December 18, 2007	2 & 21
1199180	00882176	November 20, 2007	15, 18 & 19
1299813	00958216	September 18, 2008	4, 5, 9, 17, 29, 36 & 50
1300980	00958218	September 18, 2008	2 & 11
11301027	00978781	October 20, 2008	17
1314876	00978787	November 10, 2008	5, 6, 8 & 17
1339931	00997181	December 17, 2008	32, 33 & 47
1347479	00999014	January 20, 2009	4
1347475	00999017	January 20, 2009	4, 9, 31, 57, 59, 61 & 62
901182	00799185	October 9, 2006	2, 3, 4, 5 & 6
1021136	00799205	October 12, 2006	4
288114	00799673	October 19, 2006	3,4,5,6,7,8,9,10,11,12,13,14,15 & 16
KCPL Statement	00801193	October 31, 2006	1, 2 & 3
288982	00801613	November 7, 2006	3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 & 20
907419	00802065	November 7, 2006	2, 3 & 4
1031325	00803458	November 14, 2006	4 & 5
920711	00813720	January 11, 2007	2, 3, 4 & 5
296956	00819838	February 13, 2007	5, 6, 7, 8, 9, 10,11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 & 26
KCPL Statement	00824718	March 1, 2007	2 & 3
931837	00827246	March 13, 2007	1
931824	00829114	March 13, 2007	2, 3, 4 & 5
937516	00833317	April 10, 2007	2, 3, 4, 5, 6, 7, 8 & 9
303703	00836364	May 13, 2007	3
303700	00836639	May 13, 2007	3
1134886	00837902	May 16, 2007	17, 23 & 28
14727	00854293	July 13, 2007	1 & 2
14774	00867526	October 15, 2007	1
Check Request	00962782	October 28, 2008	2