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May 12, 2000

FILED

MAY 12 2000

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 3660
Jefferson City, Missouri 65102

Missouri Public
Service Commission

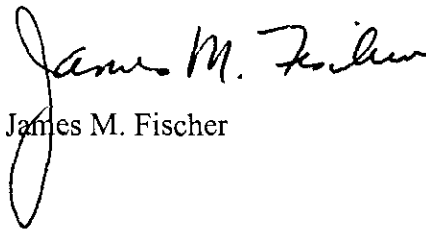
RE: *GS Technology Operating Company, Inc., d/b/a GST Steel Company v. Kansas City Power & Light Company*, Case No. EC-99-553

Dear Mr. Roberts:

Enclosed for filing in the above-referenced matter are the original of Kansas City Power & Light Company's Initial Brief (NP version), and an original and eight (8) copies of its Proposed Findings of Fact and Conclusions of Law. In addition, we have enclosed an original and eight (8) copies of the Initial Brief (HC version) for distribution to the Commissioners and Deputy Chief Regulatory Law Judge Kevin Thompson. A copy of the foregoing documents have been hand-delivered or mailed this date to parties of record.

Thank you for your attention to this matter.

Sincerely,



James M. Fischer

/jr
Enclosures

cc: Paul S. DeFord
James W. Brew
Dana K. Joyce
Steven Dottheim
Lera L. Shemwell
John B. Coffman

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

(STATE SEAL)

FILED

MAY 12 2000

Missouri Public
Service Commission

GS Technology Operating Company, Inc.,)
d/b/a GST STEEL COMPANY,)

Complainant,)

v.)

Case No. EC-99-553

KANSAS CITY POWER & LIGHT,)
COMPANY,)

Respondent.)

**KANSAS CITY POWER & LIGHT COMPANY'S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Issue Date: June __, 2000

Effective Date: June __, 2000

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED²

MAY 12 2000

Missouri Public
Service Commission

GS Technology Operating Company, Inc.)

d/b/a GST STEEL COMPANY,)

Complainant,)

v.)

Case No. EC-99-553

KANSAS CITY POWER & LIGHT,)

COMPANY,)

Respondent.)

APPEARANCES

Paul S. DeFord and Kurt U. Schaefer, Lathrop & Gage, L.C., 2345 Grand Boulevard, Suite 2800, Kansas City, Missouri, and James W. Brew, Brickfield, Burchette & Ritts, 1025 Thomas Jefferson Street, NW, 8th Floor, West Tower, Washington, D.C. 20007, for GS Technology Operating Company, Inc. d/b/a GST Steel Company.

James M. Fischer and Larry W. Dority, Fischer & Dority, P.C., 101 West McCarty Street-Suite 215, Jefferson City, Missouri, 65101 and Karl Zobrist and Timothy G. Swenson, Blackwell Sanders Peper Martin LLP, Two Pershing Square, 2300 Main Street, Suite 1000, Kansas City, Missouri 64108, and Gerald A. Reynolds, Law Department, Kansas City Power & Light Company, P.O. Box 418679, Kansas City, Missouri 64141-9679, for Kansas City Power & Light Company.

John Coffman, Deputy Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel.

Lera L. Shemwell, Assistant General Counsel, and Steven Dottheim, Deputy General Counsel, Missouri Public Service Commission, P.O. Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: Kevin A. Thompson, Deputy Chief Regulatory Law Judge

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REPORT AND ORDER

I. PROCEDURAL HISTORY

On May 11, 1999, GST Steel Company (GST) filed a petition with the Missouri Public Service Commission (Commission) against Kansas City Power & Light Company (KCPL). GST's petition prayed that the Commission "take immediate steps to protect GST from unjust and unreasonable charges for electric service." Specifically, GST requested the Commission (1) to prohibit KCPL from charging GST more for power than GST would have paid had KCPL's Hawthorn 5 generating plant not been indefinitely shut down; (2) to require KCPL to devote all insurance proceeds received with respect to the Hawthorn 5 shutdown to protect ratepayers from higher rates; and (3) to establish a formal investigation into the Hawthorn 5 incident and "the overall adequacy, reliability and prudence of KCPL's power supply[.]" Further, GST urged the Commission to do so without providing either prior notice or a hearing to KCPL. *Response of GST Steel Company*, at 4.

KCPL filed its reply to GST's request for immediate relief on May 18, 1999. GST filed its response to KCPL's reply on May 21, 1999. On June 1, 1999, the Commission denied GST's request for immediate relief. The Commission also held that it would not conduct its investigation of the boiler explosion at Hawthorn within the context of this case. The Commission indicated that it would establish a separate docket for that investigation.

On June 9, 1999, KCPL filed its Answer in which it generally denied GST's allegations, and moved for dismissal of the proceeding. Subsequently, on September 9, 1999, KCPL filed its Revised Answer, and continued to deny GST's allegations.

On June 11, 1999, a prehearing conference was held. The parties filed a joint proposed procedural schedule and preliminary statement of issues on June 18, 1999. The Commission adopted the procedural schedule proposed by the parties by its order issued on June 22, 1999.

On June 18, 1999, GST moved for interim relief and an expedited hearing. KCPL responded in opposition on June 28, 1999; the Staff of the Missouri Public Service Commission (Staff) responded on June 28, 1999, as well. The Commission denied GST's motion on July 9, 1999.

Beginning on July 2, 1999, numerous discovery motions were also filed by the parties. The Commission ruled upon these motions. However, due to the voluminous nature of the pleadings related to discovery, these matters will not be recited herein.

On July 29, 1999, and August 19, 1999, the Commission revised the procedural schedule. On September 13, 1999, the parties jointly moved that the procedural schedule be amended. That motion was also granted. On October 18, 1999, GST and KCPL jointly moved the Commission to amend the procedural schedule. The motion was granted on October 19, 1999.

On October 18, 1999, KCPL moved this Commission to limit the scope of the issues and discovery in this proceeding. On October 28, 1999, GST filed its response in opposition to KCPL's motion. Also on October 28, 1999, the Staff of the Missouri Public Service Commission (Commission Staff) filed its response to KCPL's motion. On November 8, 1999, KCPL filed its reply to GST's response. On November 19, 1999, the motion of KCPL to limit the scope of discovery and issues in this proceeding, filed on October 18, 1999, was denied.

On January 6, 2000, the Commission, *sua sponte*, issued its Order To Show Cause which scheduled a show cause hearing on January 18, 2000. GST and its counsel were ordered to appear and show cause why this matter ought not be dismissed, or why a complaint or report ought not be made to the Office of the Chief Disciplinary Counsel, or why some other appropriate sanction ought not be imposed on GST, or on its counsel of record, or both.

The show cause hearing was held on January 18, 2000, commencing at 1:30 p.m. On February 17, 2000, the Commission issued its Order Concerning Show Cause Hearing and ordered:

1. That GS Technology Operating Company, Inc., doing business as GST Steel Company, shall amend its Complaint to reveal its legal name and to show that GST Steel Company is its registered fictitious name and trade name.
2. That the style of this matter shall henceforth be "GS Technology Operating Company, Inc., doing business as GST Steel Company, v. Kansas City Power and Light Company."
3. That the parties shall file memoranda, not exceeding 30 pages, on or before 3:00 p.m. on March 17, 2000, advising the Commission on the following questions of law:

A. Whether or not the Commission has jurisdiction over the Complaint filed herein by GS Technology Operating Company, Inc., doing business as GST Steel Company, insofar as it concerns the reasonableness of the rates and charges made to GS Technology Operating Company, Inc., doing business as GST Steel Company, by Kansas City Power and Light Company, inasmuch as it is not perfected pursuant to Section 386.390.1, RSMo?

B. Whether or not the Commission has jurisdiction over the Complaint filed herein by GS Technology Operating Company, Inc., doing business as GST Steel Company, inasmuch the contract of the parties requires that disputes between them be resolved through arbitration?

The procedural schedule previously adopted was also amended. On February 22, 2000, GS Technology Operating Company, Inc., doing business as GST Steel Company (GST), filed its Motion to Compel Production of Documents, for Directed Findings Concerning Information

Controlled by KCPL, and for Interim Relief. Respondent KCPL responded on March 3, 2000. GST then replied to KCPL's response on March 13, 2000. On March 23, 2000, GST's motion was denied.

GST filed its Direct Testimony on November 17, 1999. KCPL and the Commission Staff filed their respective Rebuttal Testimony on February 28, 2000. A prehearing conference was convened on March 6, 2000. A Final List of Issues was filed on March 13, 2000. On March 17, 2000, the parties filed legal memoranda addressing the legal issues raised by the Commission in its Order Concerning Show Cause Hearing. Statements of Position were filed on April 13, 2000. Surrebuttal and Cross-surrebuttal testimony was filed by GST and the Commission Staff on April 6, 2000.

Evidentiary hearings were held on April 17 and 18, 2000. Initial Briefs were filed on May 12, 2000, and Reply Briefs were filed on May 24, 2000.

II. FINDINGS OF FACT

The Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in rendering this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

On March 13, 2000, the parties filed a Final List of Issues to be resolved by the Commission in this matter. Each issue identified by the parties will be addressed in the order contained in the Final List of Issues.

A. Have the Charges Imposed under the GST/KCPL Special Contract Been "Just and Reasonable" Over the Period of the Contract?

On September 6, 1994, KCPL filed a Special Contract (hereafter referred to as "Contract") between KCPL and GST. This Contract was filed under seal and the Commission established a protective order to protect the confidentiality of the information. On October 26, 1994, the Commission issued its Order Approving Agreement And Tariff in Case No. EO-95-67 which approved the Contract and a tariff filed by KCPL to reflect the Contract, to be effective on October 29, 1994. (Ex. No. 17).

Much of the information in this case related to the Contract has also been filed under seal. The Commission will treat this information as confidential in the Report & Order. However, portions of the confidential record will be discussed in a general manner to ensure that the Commission's Findings of Fact and Conclusions of Law are complete.

The first issue before the Commission is whether the charges imposed under the Contract have been and continue to be just and reasonable. Based upon the competent and substantial evidence on the whole record, the Commission finds that the rates contained in the Contract, including the formula for determining those rates, have been and continue to be just and reasonable.¹

The testimony submitted by KCPL (Giles Rebuttal, Ex. No. 12HC) and the Commission Staff (Proctor, Ex. No. 8HC) demonstrates that KCPL is recovering its incremental cost of providing service to GST as well as some minimal level of contribution to its joint and common costs under the Contract rates. Based upon this evidence, the Commission finds that the rates contained in the Contract are "just and reasonable." In addition, the evidence also demonstrates that KCPL has properly applied the contract rates to GST's electric usage throughout the life of the contract. As a result, the Commission finds that the charges imposed under the GST/KCPL Special Contract have been "just and reasonable" over the period of the contract.

The Commission approved the terms of the GST Contract in 1994 in Case No. EO-95-67. (See Ex. No. 17). The parties have been operating under this contract ever since that time. As Dr. Michael Proctor and Mr. Chris Giles explained in their testimony (Ex. Nos. 8HC and 12HC), there are two primary components of the contract. First, there is a fixed component. The Contract fixed GST's contribution to KCPL's embedded costs at a specific amount per kWh. *Id.* As explained by Dr. Proctor, the level of this adder was approved by the Commission Staff in Case No. EO-95-67 after taking into account GST's competitive situation in the steel markets. (Tr. 371; Ex. No. 8HC, p. 4-5). In addition, KCPL and GST have agreed that the adder per kwh will remain fixed for the term of the Contract. (Tr. 369). If KCPL adds a new power plant to

¹ For purposes of this issue, the Commission will not address GST's allegations regarding the Hawthorn explosion. These allegations will be addressed in later sections of this decision.

its system, for example, GST would not be required to pay any additional amount to cover that fixed or nonvariable cost. (Ex. No. 12, p. 4). Similarly, if the insurance premiums on insurance policies related to power plants go up, GST would not be required to pay any additional amount to cover that fixed cost. *Id.*

On the other hand, if KCPL loses a power plant due to retirement, an outage, or an explosion, the fixed component of GST's rate does not change. The fixed component is recovered through a fixed demand charge, fixed delivery charge, and the fixed adder per kwh. (Ex. No. 12NP, p. 4).

The second component of the Contract rate is a variable or incremental component. It is designed to recover the variable or incremental costs of production. This component of the rate changes depending upon what happens to KCPL's variable costs of production. The Contract defines the variable component as fuel plus variable operations and maintenance expense, including purchased power. (Ex. No. 12NP, p. 4). If KCPL's fuel costs go down, then GST's rates would reflect those reduced variable costs. Or, if KCPL is able to purchase less expensive power on the open market, GST's rates will go down to reflect those lower variable costs. On the other hand, if KCPL's variable cost of production, its fuel costs or its purchase power costs, go up, then GST has agreed to pay a higher rate for that component of its service.

After reviewing the Contract (Ex No. 12HC, Schedule CBG-1) and the related evidence in this proceeding, the Commission finds that GST has voluntarily entered into the Contract with KCPL that essentially provides that in return for the opportunity to pay rates that are less than generally available tariffs, GST accepted part of the risk related to KCPL's variable cost of production. The Commission finds that this Contract was a freely negotiated contract that continues to produce, on an annual basis, rates for GST that are substantially less than the tariff

rates that GST would otherwise pay. Mr. Giles has calculated that GST has saved substantial amounts under the Contract from 1994 to 1999, as compared to the amounts GST would have paid under the otherwise applicable tariffs. Even with the significant increase in the curtailment credit and the higher incremental hourly prices paid by GST under the Contract, GST paid substantially less in 1999 under the Contract than the amount GST would have paid under the LPS tariff combined with KCPL's existing curtailment credit. (Ex. No. 12NP, Schedule CBG-3, p. 1). GST witness Brian D. Smith testified that he had no reason to disagree with KCPL's calculations. (Tr. 206).

Under the terms of the Contract, GST itself has a contractual right to choose to take service under KCPL's tariffs. (Tr. 202). At any time that GST believes that its prices under the Contract are too high, it may exercise its right to go to the tariffs. This contractual provision ensures that if the provisions of the Contract ever work to GST's disadvantage, GST may exercise its contractual right to take electric service under the Commission-approved tariffs in Missouri. To date, GST has not chosen to exercise its contractual right under this provision. (Tr. 202).

Based upon the evidence submitted in this proceeding, the Commission finds that GST's overall cost is less under the Contract than under the regular rate schedule that would otherwise apply to GST's electric usage. (Tr. 375; Ex. No. 8HC, p. 10).

Operation of the Contract

The evidence in the record indicates that the Contract has been operating in the manner that was expected when the parties entered into the Contract in 1994. (Tr. 372) The prices under the Contract continue to be lower than KCPL's tariffed rates. According to Section 386.270, the tariffs approved by the Commission are presumed by law to be lawful rates. Since GST's

contract rates continue to be less than if GST exercised its contractual right to take service under the tariffs (Tr. 375), the Commission finds that the contract rates are not in any way unjust or unreasonable.

Based upon the competent and substantial evidence in the record, the Commission finds that the charges imposed in the GST Contract have been and continue to be "just and reasonable" over the life of the Contract.

B. Has KCPL Properly Accounted for the Insurance Proceeds That It Has Received As A Result of the Hawthorn Incident?

GST initially alleged that KCPL had not properly accounted for certain insurance proceeds it has received as a result of the Hawthorn explosion. (Ex. No. 1) In response, KCPL filed the Rebuttal Testimony of Christine Davidson which disputed this contention. (Ex. No. 15) In the Surrebuttal Testimony of GST witness Steven C. Carver, GST abandoned its original criticism of KCPL's accounting of the insurance proceeds. (Ex. No. 2, p. 14) Mr. Carver's testimony indicates that GST had "reached an incorrect conclusion." *Id.* Based upon the representations of the parties, the Commission finds that this is no longer an issue to be resolved by the Commission. (Tr. 163).

C. Does the Commission Have the Authority to Order KCPL to Pay GST Insurance Proceeds Received By KCPL As A Result of the Explosion of the Hawthorn Plant? If So, Is It Reasonable and Appropriate to Do So?

Based upon the legal arguments of counsel in this proceeding, the Commission concludes that it does not have the statutory authority to require KCPL to pay GST insurance proceeds received by KCPL as a result of the explosion of the Hawthorn plant. Such action would be the same as awarding GST monetary damages or equitable relief which is beyond the statutory authority of the Commission. Even if the Commission had the legal authority to order

KCPL to pay GST insurance proceeds received by KCPL as a result of the explosion of the Hawthorn plant, the Commission finds, based upon the competent and substantial evidence in the record, that it would not be reasonable or appropriate to do so.

Legal Authority

In its November 2, 1999, "Order Regarding Kansas City Power and Light Company's First Motion to Compel Discovery," the Commission enunciated its role in this proceeding and the nature of its authority:

The Public Service Commission "is purely a creature of statute" and its "powers are limited to those conferred by the [Missouri] statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted." State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41, 47 (Mo. banc 1979); State ex rel. City of West Plains v. Public Service Commission, 310 S.W.2d 925, 928 (Mo. banc 1958). While the Commission properly exercises "quasi judicial powers" that are "incidental and necessary to the proper discharge" of its administrative functions, its adjudicative authority is not plenary. State Tax Commission v. Administrative Hearing Commission, 641 S.W.2d 69, 75 (Mo. 1982), quoting Liechty v. Kansas City Bridge Co., 162 S.W.2d 275, 279 (Mo. 1942). "Agency adjudicative power extends only to the ascertainment of facts and the application of existing law thereto in order to resolve issues within the given area of agency expertise." State Tax Commission, supra.

The Public Service Commission Act is a remedial statute and thus subject to liberal construction; however, "neither convenience, expediency or necessity are proper matters for consideration in the determination of whether or not an act of the commission is authorized by the statute." Id., quoting State ex rel. Kansas City v. Public Service Commission, 301 Mo. 179, 257 S.W. 462 (banc 1923). The Commission is without authority to award money to either GST or KCPL, American Petroleum Exchange v. Public Service Commission, 172 S.W.2d 952, 955 (Mo. 1943), or to alter their special contract. May Department Stores Co. v. Union Electric Light & Power Co., 341 Mo. 299, 107 S.W.2d 41, (Mo. 1937).

After further review of the arguments of counsel, the Commission reaffirms its earlier analysis of its role and statutory authority. In this proceeding, GST has requested that the Commission provide for the "equitable implementation of its contract" with KCPL. (GST Petition, p. 2) The Commission may not provide for monetary damages or equitable relief. The Commission does not have the authority to rewrite, enforce or construe GST's contract to provide that GST would only be obligated to pay an amount to KCPL determined as if Hawthorn 5 were in operation. The Commission also concludes that it cannot rewrite, enforce or construe GST's contract to provide that GST would only be obligated to pay an amount to KCPL less any insurance proceeds. Further, the Commission concludes that it cannot order any refunds under a Contract.

The Commission can neither declare nor enforce equity or the law. The Missouri Supreme Court has made this abundantly clear. In Board of Public Works of Rolla v. Sho-Me Power Corp., 244 S.W.2d 55, 59 (Mo. banc 1951), the Missouri Supreme Court, sitting *en banc*, wrote, "The Public Service Commission is not a court and has no power to declare or enforce any principle of law or equity." The Commission has already concurred in this position in this case: "The Commission is an administrative agency, a creature of statute, and cannot do equity...The Commission can only do what it is expressly authorized to do by statute." Order Denying Reconsideration at p. 5 (August 19, 1999). To alter the contract between KCPL and GST would require the Commission to sit in equity and grant the equitable remedy of reformation of the contract. Not only can the Commission not sit in equity. The Commission is without authority to alter the Contract between GST and KCPL. See Order Regarding Kansas City Power and Light Company's First Motion to Compel Discovery at p. 8 (November 2, 1999).

The Missouri Supreme Court has also held that the Commission has no authority to promulgate an order requiring a pecuniary reparation or refund. Straube v. Bowing Green Gas Co., 227 S.W.2d 666, 668 (Mo. 1950). See also Katz Dug Co. v. Kansas City Power & Light Co., 303 S.W.2d 672 (Mo. App. 1957). Requiring a refund or a credit would amount to retroactive rate-making which the courts have stated is beyond the statutory authority of the Commission. State ex rel. Utility Consumers Council of Missouri v. Public Serv. Comm'n, 585 S.W.2d 41 (Mo. banc 1979) The Commission has already acknowledged this limitation in this case in its Order Regarding Kansas City Power and Light Company's First Motion to Compel Discovery, at p. 8, where the Commission stated: "The Commission is without authority to award money to either GST or KCPL...."

According to the courts, the Commission has no power to enforce or construe contracts or order a refund even if based on a rate schedule: "The Commission does have exclusive jurisdiction of all utility rates, but when a controversy arises over the construction of a contract or of a rate schedule upon which a contract is based, and a claim of overcharge is made, only the courts can require an accounting or render a judgment for the overcharge." Wilshire Const. Co. v. Union Elec. Co. 463 S.W.2d 903, 905 (Mo. 1971).

The Wilshire court also addressed the contention that the Commission could enter a money judgement that could then be enforced in the courts. The Court wrote, "The Public Service Commission cannot enforce, construe nor annul contracts nor can it enter a money judgement." Wilshire, at 905. This same issue was dealt with more recently in Gaines v. Gibbs, 709 S.W.2d 541, 544 (Mo.App.1986): "When a controversy arises over the construction of a contract or a rate schedule on which a contract is based, and a claim of overcharge is made, only the courts can require an accounting or render judgement for the overcharge."

In light of the cited cases, the Commission finds and concludes that the Commission is without the authority to grant the relief requested by GST in this proceeding.

The Commission has the power to void the contract and place GST on an existing tariff. Gaines v. Gibbs, 709 S.W.2d 541, 543 (Mo.App.1986) Based upon the evidence in this proceeding, the Commission believes the contract continues to be just and reasonable. Therefore, the Commission will not void the Contract. The Commission notes, however, that GST can itself choose to receive its electric service pursuant to a Commission-approved tariff in the event it determines it would be beneficial for it to do so. (Ex No. 12HC, Schedule CBG-1, p. 12; Tr. 202).

Reasonableness of GST's Request For A Credit of Insurance Proceeds

Even if the Commission had the authority to grant GST's request for a refund based upon the replacement power insurance policy, the Commission finds that it would not be reasonable or appropriate for the Commission to make such a finding. As Dr. Proctor has testified, GST is simply not entitled to receive any of the insurance proceeds. (Ex No. 8HC, pp. 7-11). The Commission agrees with Dr. Proctor on this point.

In addition, the Commission finds that there are no specific provisions in the Contract related to sharing insurance proceeds that KCPL might receive because of unit outages. (Id. at 9)(See also Tr. 172 and 176) The Commission also finds that KCPL's insurance policy itself does not include any provision that would entitle any customer, including GST, to receive the insurance proceeds. (Tr. 186) Based upon the competent and substantial evidence in this record, the Commission finds that it is not reasonable or appropriate to award GST insurance proceeds that KCPL has received under its replacement power insurance policy.

D. Does the Commission Have the Authority to Order KCPL to Recalculate GST's Bills Under the Contract? If So, How Should Those Bills Be Recalculated (i.e., by using KCPL's incremental costs as if Hawthorn continued to operate)? Is It Reasonable and Appropriate To Do So?

In this proceeding, GST has requested that the Commission order KCPL to recalculate GST's bills under the Contract, using hypothetical costs of production, assuming that the Hawthorn explosion had not occurred. As discussed above, the Commission has concluded that it does not have the statutory authority to award damages or grant equitable relief to GST. In addition, the Commission finds that the Contract has no provision for the recalculation of GST's bills, based upon the use of hypothetical production costs. (Tr. 211). The Commission finds that GST's request that it order KCPL to recalculate GST's bills using KCPL's incremental costs as if Hawthorn had continued to operate, amounts to a request for the awarding of damages, or other equitable relief. Since the Commission has no authority to award monetary damages or other equitable relief, the Commission will not grant GST's request for relief in this proceeding.

Hawthorn Explosion

Based upon the competent and substantial evidence in the record, the Commission also finds that it would not be reasonable or appropriate to order KCPL to recalculate the GST bills, assuming that the Hawthorn explosion had not occurred. GST has requested that the Commission order a retroactive adjustment to its bill based upon the theory that KCPL was imprudent in connection with the explosion of the Hawthorn plant on February 17, 1999. As explained below, the Commission has found and concluded that GST has failed to meet its burden of proof on this issue.

In this proceeding, GST has the burden of proof to demonstrate with competent and substantial evidence that its allegations are true. GST has alleged that KCPL's imprudence

caused the explosion at the Hawthorn plant on February 17, 1999. However, for the reasons stated herein, the Commission has found and concluded that GST has failed to meet its burden of proof.

GST did not produce any witnesses in this proceeding who have first hand knowledge of the events that occurred on February 16 and 17, 1999, at the Hawthorn plant. The Commission is therefore concerned that GST has not provided a factual basis or other competent and substantial evidence to make adequate findings of fact regarding the actual events surrounding the Hawthorn Incident.

In this proceeding, GST has presented the testimony of Mr. Jerry Ward in which he discusses his theories regarding the events that occurred at the Hawthorn plant on February 16 and 17, 1999. Mr. Ward's testimony is based upon his interpretation of statements that were written by various KCPL employees and other persons within days of the Hawthorn Incident. (Tr. 243). Mr. Ward did not discuss the Hawthorn Incident with any of the persons upon whom he is relying to base his opinions about those events. (Tr. 242). Nor has Mr. Ward discussed the chain of events that preceded the Hawthorn Incident with: (1) KCPL personnel who are familiar with the facts surrounding the incident (Tr. 242); (2) the insurance carriers' investigators who are investigating the facts (Tr. 244); or (3) Commission Staff investigators who are also investigating the incident (Tr. 245).

According to Mr. Ward's testimony, he conducted his investigation by reviewing KCPL's documents related to the Hawthorn Incident. (Tr. 245-46). During his investigation at the Hawthorn plant, Mr. Ward spent approximately eleven (11) hours reviewing documents that were assembled by KCPL in its Master File Index related to the Hawthorn investigation, and maps and other records related to the Hawthorn plant. (Tr. 246-47). He did not spend any time

going through the rubble left after the explosion. (Tr. 248). Nor did Mr. Ward spend any time interviewing eye witnesses to the explosion. (Tr. 248). As a result, Mr. Ward's statements regarding the Hawthorn Incident are based upon his understanding of the documents that he reviewed in his relatively short time at the Hawthorn plant, rather than any personal interviews with eye witnesses or any forensic or physical investigation of the plant site itself. (Tr. 249).

Mr. Ward also testified that he does not consider himself to be an expert in the methods of investigating power plant explosions since he has never previously investigated a power plant explosion. (Tr. 237-38) In addition, Mr. Ward has testified that he has no previous educational background in the methods of investigating power plant explosions. (Tr. 239-40). He received his degree in Distributed Studies from Iowa State University. Under his degree, Mr. Ward received five minors in English, Government, Naval Science, Math, and Physics. (Tr. 239, 279). He is not a licensed Professional Engineer in Missouri or any other state. (Tr. 241). Nor was he trained to investigate power plant explosions while he served in the Navy. (Tr. 240). Mr. Ward also has never worked as a Claims Investigator for any insurer of power plants. (Tr. 241). Based upon Mr. Ward's testimony, the Commission finds and concludes that Mr. Ward has no educational background or professional experience to qualify him as an expert in the investigation of power plant explosions. As a result, the Commission will not rely upon Mr. Ward's conclusions related to the Hawthorn explosion.

In addition, the Commission is not convinced that Mr. Ward has adequately investigated the Hawthorn Incident or properly identified the cause of the explosion. During cross-examination, several of Mr. Ward's theories were shown to be flawed. For example, Mr. Ward's analysis of the flood in the Hawthorn control room on February 16, 1999, appears to the Commission to be based upon incomplete or perhaps erroneous facts. Mr. Ward's conclusions

were based solely upon his understanding of statements from KCPL's operators, rather than his own independent judgment, on the cause of the flood. (Tr. 258). Mr. Ward testified that if the KCPL operators were incorrect in their analysis of the cause of the flood, he would also be incorrect since he was relying solely upon their statements. (Tr. 258).

Mr. Ward also alleged that KCPL employees caused the flood in the Hawthorn 5 control room. (Ex. No. 6, p. 10). However, Mr. Ward acknowledged that there were outside maintenance contractors working on the sewer lines on February 16, 1999. (Tr. 263). During cross-examination, Mr. Ward admitted that he was not certain whether KCPL employees or the outside maintenance contractors caused the flood on that day. (Tr. 262-63).

Mr. Ward also alleged that "KCPL failed to place a necessary hold on the sump pump while the plumbing repairs were underway," and that KCPL violated its own safety procedures in that it failed to re-establish holds on the main gas line to the boiler after restart of the Hawthorn unit was aborted on February 16, 1999. (Ex. No. 6, p. 17-18). Mr. Ward's conclusions were based solely upon his understanding of KCPL's Safety Manual and its hold procedures. Mr. Ward did not interview KCPL employees to determine whether or not there were any workers working on the sump pumps or gas lines on February 16 or 17, 1999, that would require a hold procedure to be utilized. (Tr. 268-69, 275). Nor did he discuss with any KCPL personnel the reason that hold procedures were not utilized on these systems. (Tr. 269). Mr. Ward testified that he did not know the reason that hold procedures were not employed by KCPL. (Tr. 269)

The Commission Staff has also independently reviewed GST's allegations and evidence in the proceeding. Commission Staff witness Dr. Eve Lissik has testified that she was not convinced that GST has provided enough evidence to substantiate GST's allegations regarding the Hawthorn explosion. (Tr. 328-29)

Based upon the record of this proceeding, the Commission gives little weight to Mr. Ward's evidence or his conclusions regarding the events at the Hawthorn plant on February 16 and 17, 1999. The Commission concludes that there is no competent and substantial evidence to find that KCPL acted imprudently or unreasonably in its actions related to the Hawthorn Incident. As a result, GST has failed to meet its burden of proof on this issue. The Commission finds that GST is not entitled to any award of monetary damages, equitable relief, the recalculation of GST's bills based upon hypothetical costs of production, or any other relief in this proceeding.

E. Has KCPL Operated and Maintained Its Generation Units in a Reasonable and Prudent Manner?

GST has alleged that KCPL has not operated and maintained its generation units in a reasonable and prudent manner. After reviewing the competent and substantial evidence in the whole record in this proceeding, the Commission has concluded that GST has failed to meet its burden of proof to support its allegations related to the operation of KCPL's generation units. Furthermore, based upon the competent and substantial evidence presented by KCPL and the Commission Staff, the Commission has concluded that KCPL has been operating and maintaining its generation facilities in a reasonable and prudent manner.

GST witness Jerry Ward attempted to support GST's allegations by attaching to his testimony two pages from an article in Electric Light which purported to rank various utilities, according to their operating performance. (Ex No. 5, ex. 6). However, Mr. Ward testified that he had not discussed the article with the author, and had no knowledge of the methodology used to rank the public utilities. (Tr. 229-31) More importantly, Mr. Ward testified that he was not an expert in evaluating or benchmarking the performance of public utilities. (Tr. 231) As a result,

the Commission believes that Mr. Ward is not qualified or otherwise in a position to render an expert opinion regarding KCPL's performance relative to other public utilities.

In this proceeding, KCPL presented the testimony of Monika Eldridge, an independent outside consultant and Professional Engineer, who has compared the performance of each of KCPL's plants to a peer group of units that are similar in design, vintage, and size. Her background includes consulting projects where she has evaluated the performance of various utilities against their peers in the industry, and analyzed trends in the industry. Based upon her study of KCPL's performance, Ms. Eldridge concluded that KCPL has met or exceeded industry standards when considering accepted performance criteria, including equivalent availability factors, forced outage rates, operating and maintenance cost standards, fuel costs, and significant outage incidents. (Ex No. 11, pp.4-5)

The Commission Staff also reviewed information related to KCPL's performance. Staff witness Dr. Eve Lissik has concluded that KCPL's generating units have been operating at an equivalent availability factor of around 80%. According Dr. Lissik "This information, coupled with the relatively high capacity factors of its baseload units. . . leads me to believe that as a whole, KCPL's generating units are operating within acceptable limits." (Ex No. 10, p. 6)

The Commission finds and concludes that GST has not presented competent and substantial evidence that supports its allegation that imprudent practices of KCPL caused the outages in 1997 and 1998, or during any other time frame.

Staff performed its own independent analysis of KCPL's generating units to determine whether the facts supported GST's allegation of declining unit availability, by analyzing: (1) net peak demand, (2) capacity factor, and (3) percent of time off line. Staff witness Dr. Lissik stated (Ex. No. 9, pp. 11-12):

An indication of declining unit availability could appear in these data as a decrease in net peak demand, a decrease in capacity factor or an increase in percent of time each unit is off line, over time. Staff found none of these indications. The only concern the Staff had was in increase in the percent of time Hawthorn 5 was off line in 1998. However, in that same year the unit's capacity factor was higher than in all previous years except 1997. (Emphasis supplied.)

After reviewing the information provided by both KCPL and GST, Staff concluded that:

Even though the Hawthorn 5 unit is currently unavailable because of the boiler explosion that occurred in February of 1999, and even though the availability of some of KCPL's baseload generation is below that of its peers, KCPL's generating units have been operating at an equivalent availability of around 80%. This information, coupled with the relatively high capacity factors of its baseload units ... leads me to believe that as a whole, KCPL's generating units are operating within acceptable limits.... (Ex. No. 10, p. 6)

Staff's conclusion that KCPL's generating units are operating within acceptable limits is consistent with KCPL's evidence on this issue.

GST presented the Surrebuttal Testimony of Scott Norwood (Ex. No. 7) to respond to KCPL's testimony. However, Mr. Norwood did not present an independent analysis regarding the overall performance of KCPL's generating units. Mr. Norwood focused on significant outages that occurred at two of KCPL's generating units, while minimizing the overall performance of KCPL's units. Mr. Norwood in his surrebuttal testimony relies heavily on two outages that occurred in 1997 and 1998. (Ex. No. 5, Exhibit 5.) In 1997, the only significant outage experienced by KCPL occurred at its La Cygne 2 generating unit. (Ex. 11, p. 38) As discussed in Ms. Eldridge's rebuttal testimony, bearing problems caused the outage that occurred at La Cygne 2 in 1997. (Ex. 11, p. 38) Mr. Norwood did not present any competent and

substantial evidence that KCPL's actions were in any way imprudent in operating or maintaining the La Cygne 2 unit in 1997.

In 1998, the only significant outage experienced by KCPL occurred at its Hawthorn 5 generating unit. (Ex. 11, p. 38) The evidence in this proceeding indicates that a rupture occurred at a seam of a high pressure steam pipe. KCPL had been told by its vendor that the high pressure steam pipe was seamless. In addition, the plant drawings that were provided to KCPL indicated that the steam pipe was seamless. (Ex. 5, p.10.) Based upon this evidence, the Commission concludes that there is no competent and substantial evidence in the record that demonstrates that KCPL was imprudent in operating or maintaining Hawthorn 5 in 1998.

After reviewing the record in this proceeding, the Commission concludes that GST has failed to meet its burden of proof to support its allegations of imprudence related to the operation of KCPL's generation units. Furthermore, based upon the competent and substantial evidence presented by KCPL and the Commission Staff, the Commission concludes that KCPL has been operating and maintaining its generation facilities in a reasonable and prudent manner.

F. Has KCPL Operated and Maintained Its Distribution and Transmission Facilities in a Reasonable and Prudent Manner?

GST also alleged that KCPL has failed to operate and maintain its distribution and transmission facilities in a reasonable and prudent manner. As explained below, the Commission has found and concluded that GST has failed to meet its burden of proof to support its allegations on this issue. Based upon the competent and substantial evidence in the record, the Commission has concluded that KCPL has invested at least \$1 million in its efforts to resolve GST's reliability concerns. As a result of these efforts, the evidence indicates that these reliability issues have been largely resolved.

In support of its claims, GST filed the Direct Testimony of Jerry N. Ward. (Ex. 5, pp.8-10.) Mr. Ward's testimony regarding the reliability of KCPL's distribution system is based entirely on Mr. Ronald Lewonski's affidavit, which is attached to the GST's Petition as Exhibit G. (Ex. 14, pp. 1-2) Regulatory Law Judge Thompson has already ruled that the Commission would treat Mr. Ward's use of Mr. Lewonski's affidavit as "simply the basis of the opinion offered by Mr. Ward." (Tr. 225.) Regulatory Law Judge Thompson further ruled at the hearing that "[t]o the extent that those facts [concerning KCPL's distribution system] are important to [GST's] case, they need to be in testimony presented by a witness who's going to be here." (Tr. 225.) GST failed to present any fact witnesses regarding the reliability of KCPL's distribution system. Accordingly, GST has failed to provide the Commission with any factual basis to support its allegations.

KCPL's evidence indicates that KCPL has invested at least \$1 million in upgrades to that portion of its distribution system that serves GST. (Ex. 14, p. 4.) Mr. Michael Bier's Rebuttal Testimony lists in detail the nature of these improvements. (Id. at 8) These improvements are a part of an overall plan that has been underway since 1996. (Id.) Mr. Bier testified that: "Most, if not all, of the reliability issues identified in Mr. Ward's testimony were resolved prior to the date GST filed its complaint case with the Missouri Public Service Commission." (Ex. No. 14, p. 6) GST did not file testimony disagreeing with Mr. Bier's statement. (Tr. 236-37) Based upon the evidence in the record, the Commission finds that GST's concerns regarding the reliability of KCPL's distribution and transmission system have been largely resolved.

Based upon the competent and substantial evidence in the record, the Commission finds that GST has failed to meet its burden of proof to support its allegations that KCPL has failed to operate and maintain its distribution and transmission system in a reasonable and prudent

manner. In fact, the competent and substantial evidence in the record demonstrates that KCPL has invested heavily in its efforts to resolve GST's concerns, and that these concerns were largely resolved before the filing of GST's Petition in this matter.

G. Should the Commission Order a Formal Staff Investigation Into the Operation and Maintenance of KCPL's Generation, Transmission, and Distribution Facilities?

Dr. Eve Lissik has testified that KCPL is currently operating and maintaining its existing generation units in an acceptable manner. (Tr. 300-01). In response to Commissioner Murray's question, she also testified that the Commission Staff would not file an independent recommendation that the Commission open an investigation into KCPL's operation and maintenance practices. (Tr. 323).

Given the record in this proceeding and the Commission's findings discussed above, the Commission believes it is unnecessary to open another docket to review the evidence related to KCPL's operation of its generation, transmission and distribution facilities. The Commission believes that there is no evidence in this proceeding that demonstrates that KCPL is not adequately operating and maintaining its generation, transmission and distribution facilities. Therefore, the Commission will not open a new docket regarding this issue. In the event there is evidence in the future that KCPL is not adequately operating and maintaining its facilities, the Commission Staff or Public Counsel may request the opening of a formal docket to review the matter.

H. Should the Commission Delay Any Decision in This Case Pending the Outcome of the Staff's Independent and Final Report of the Boiler Explosion at Hawthorn 5?

Both GST and KCPL have argued that this case should be decided based upon the existing record in this proceeding, and all parties have rested their respective cases. (Tr. 133, 500) The Commission is issuing its decision on this case based upon the record presented herein, as required by law. The Commission will review the results of the investigation of the explosion of Hawthorn 5 in Case No. ES-99-581 when the investigation is completed. However, it will not keep the record in this proceeding open, pending the outcome of any other proceeding.

III. CONCLUSIONS OF LAW

The Missouri Public Service Commission has arrived at the following conclusions.

Respondent Kansas City Power & Light Company is an "electrical corporation" and "public utility" under the jurisdiction of the Missouri Public Service Commission, pursuant to Section 386.020(15) and (42), Cum.Supp. 1999.

In its February 17, 2000, Order Concerning Show Cause Hearing, the Commission requested the parties to address certain legal questions related to the need to perfect rate complaints under Section 386.390.1, and whether the Commission had jurisdiction of this matter in light of the Arbitration Clause contained in the KCPL/GST Contract that is the subject of this proceeding. On March 17, 2000, the parties filed legal memoranda addressing these questions.

The Commission has requested legal analysis and argument regarding whether GST may bring a complaint regarding the reasonableness of rates without having met the prerequisites of Section 386.390.1², which states:

² All statutory references are to Revised Statutes of Missouri 1994, unless otherwise noted.

Complaint may be made by the commission of its own motion, or by the public counsel or any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility, in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission; provided, that no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, sewer, or telephone corporation, unless the same be signed by the public counsel or the mayor or the president or chairman of the board of aldermen or a majority of the council, commission or other legislative body of any city, town, village or county, within which the alleged violation occurred, or not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of such gas, electricity, water, sewer or telephone service. (emphasis added)

KCPL has argued that any rate complaint requires perfection by one of the methods contained in Section 386.390.1. Based upon the Commission's previous interpretations of Section 386.390.1, KCPL believes it is clear that perfection is required for any complaint directed to the reasonableness of a public utility's rates, including the rates complained of by GST in this proceeding. KCPL cites the Commission decisions in forty-four (44) separate complaint proceedings brought by AT&T involving the rates of various local exchange companies. In each case, the Commission came to the conclusion that Section 386.390.1 required that the complainant perfect its complaint by having at least twenty-five (25) customers sign the complaint involving the rates of a public utility.³ In each of these orders, the Commission reached the conclusion that the Complaint was required to be dismissed for failure to meet the prerequisites of Section 386.390.1.

³ See Order Granting Motion To Dismiss, Case Nos. TC-93-58, TC-93-59, TC-93-60, TC-93-61, TC-93-62, TC-93-63, TC-93-64, TC-93-65, TC-93-66, TC-93-67, TC-93-68, TC-93-69, TC-93-70, TC-93-71, TC-93-72, TC-93-73, TC-93-74, TC-93-75, TC-93-76, TC-93-77, TC-93-78, TC-93-79, TC-93-80, TC-93-81, TC-93-82, TC-93-83, TC-93-84, TC-93-85, TC-93-86, TC-93-87, TC-93-88, TC-93-89, TC-93-90, TC-93-91, TC-93-92, TC-93-93, TC-93-94, TC-93-95, TC-93-96, TC-93-97, TC-93-98, TC-93-99, TC-93-100 TC-93-101.3.

KCPL also argues that the Commission again interpreted Section 386.390.1 in a 1997 case involving a rate complaint brought by MCI Telecommunications Corporation and a number of other interexchange telecommunications companies against Southwestern Bell Telephone Company.⁴ The Commission dismissed the complaint for failure to meet the statutory requirement of Section 386.390.1: "The Commission must conclude that this complaint as to the reasonableness of SWBT's rates was not filed by a party who has standing to file such a complaint under section 386.390." Report & Order, p. 10, MCI v. Southwestern Bell Tel. Co., Case No. TC-97-303 (September 16, 1997).

GST has argued that the statutory limitation that twenty-five (25) customers are needed to file a complaint against the reasonableness of a utility's rates is not applicable in this case. According to GST, the "rate" applicable in this context is the Special Contract rather than a tariffed rate, and GST is not challenging the Special Contract. (GST Suggestions, p. 8) According to GST, GST's Petition is asking the Commission to order KCPL to remove imprudently incurred replacement power costs from its calculation of the incremental costs upon which KCPL's prices to GST are based.

The Commission Staff agrees that Section 386.390.1 requires perfection before any rate complaint is brought against a public utility. However, the Commission Staff notes that the Commission has not dismissed the complaints of individuals or individual corporations complaining about "overcharges" under a tariffed rate because there were fewer than twenty-five complainants. According to the Commission Staff, GST's Complaint regarding "overcharges"

⁴ Report & Order, MCI v. Southwestern Bell Tel. Co., Case No. TC-97-303 (September 16, 1997)

under its Special Contract would be similar to a complaint about overcharges under a tariffed rate.

In its Order Concerning Show Cause Hearing, the Commission concluded that GST has not perfected its Complaint by any of these three alternative methods contained in Section 386.390.1. The Commission concluded that, if such perfection is, in fact, required, then the Commission lacks subject matter jurisdiction over the portion of GST's complaint directed to the reasonableness of KCPL's rates, and must dismiss that issue." (Order, pp.6-7) After having heard the argument and evidence in this matter, the Commission has concluded that GST's Petition is largely a complaint about the rates that KCPL is charging GST under its Contract. However, in light of the other findings of fact and conclusions of law contained herein, the Commission finds it is unnecessary to decide whether GST's Petition must be perfected according to the methods contained in Section 386.390.1

Arbitration Clause

The Contract between KCPL and GST contains an arbitration provision. Section 7.5 of the contract reads as follows:

Dispute Resolution. Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

The Commission requested argument regarding whether this arbitration clause divested the Commission of its jurisdiction to hear this matter. GST and KCPL agree that the arbitration clause does not affect the Commission's jurisdiction. In fact, Section 7.2 of the contract

specifically states that the contract neither attempts to or does divest the Commission of jurisdiction.

Commission Authority. This Agreement is in all respects made subject to the jurisdiction and authority of the Commission. **Notwithstanding any other provisions in this Agreement, nothing in the Agreement shall be construed as divesting or attempting to divest the Commission ...of its ...jurisdiction....**(Emphasis added.)

The Commission therefore concludes that the Arbitration Clause contained in the Contract does not affect its jurisdiction in this matter.

As explained in the discussion of its legal authority relating to Issues C and D herein, the Commission may not provide for monetary damages or equitable relief to GST. The Commission has concluded that it cannot rewrite, enforce or construe the Contract to provide that GST would only be obligated to pay an amount to KCPL less any insurance proceeds. The Commission does not have the authority to rewrite, enforce or construe the Contract to provide that GST would only be obligated to pay an amount to KCPL determined as if Hawthorn 5 were in operation. Further, the Commission concludes that it cannot order any refunds under the Contract.

Based upon the competent and substantial evidence in this record, the Commission found that the Complainant has failed to meet its burden of proof in this proceeding. More specifically, the Commission has found that the Complainant has failed to meet its burden of proof to show that the contract rates are in any way unjust or unreasonable or that KCPL has improperly applied those rates to GST. Second, the Commission has found that it is not reasonable or appropriate to award GST insurance proceeds that KCPL has received under its replacement power insurance policy. Third, the Commission has found that there is no competent and substantial evidence in this record to demonstrate that KCPL acted imprudently

or unreasonably in its actions related to the Hawthorn Incident on February 17, 1999. Fourth, the Commission has found that GST has failed to meet its burden of proof to support its allegations that KCPL has operated its generation, transmission or distribution facilities in an unreasonable or imprudent manner. Based upon the competent and substantial evidence taken as a whole, the Commission has concluded that KCPL has been operating its generation, transmission and distribution facilities in an acceptable manner, consistent with standards maintained generally in the electric industry.

In this case, the Complainant has not shown that the Respondent acted unjustly, unreasonably, discriminatorily, unduly preferentially or in any way in violation of any provision of law, rule, order or decision of the Commission. Therefore, the Commission finds and concludes that this case should be dismissed in its entirety.

V. ORDERED SECTIONS

IT IS THEREFORE ORDERED:

1. That Case No. EC-99-553 be, and hereby is, dismissed.
2. That any objections or motions not specifically ruled on in Case No. EC-99-553 are hereby overruled or denied.
3. That this order shall become effective on June __, 2000.
4. That this case shall be closed on June __, 2000.

BY THE COMMISSION

**Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge**

(SEAL)

_____, CC.,
concur and certify compliance with the
provisions of Section 536.080,
RSMo 1994.

Dated at Jefferson City, Missouri,
on this ____ day of June, 1999.