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May 12, 2000

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P. O. Box 360  
Jefferson City, MO 65102

**RE: EC-99-553**

**FILED<sup>2</sup>**

MAY 12 2000

Missouri Public  
Service Commission

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and eight (8) conformed copies of a **INITIAL BRIEF OF THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION.**

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

Thank you for your attention to this matter.

Sincerely yours,

Lera L. Shemwell  
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LLS/jb  
Enclosure  
cc: Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

FILED<sup>2</sup>

MAY 12 2000

Missouri Public  
Service Commission

GS Technology Operating Company, )  
Inc., d/b/a GST Steel Company, )  
Complainant, )  
v. )  
Kansas City Power & Light Company, )  
Respondent. )

Case No. EC-99-553

**INITIAL BRIEF OF THE STAFF**  
**OF THE MISSOURI PUBLIC SERVICE COMMISSION**

COMES NOW the Staff of the Missouri Public Service Commission (Staff) and submits this Initial Brief in the above captioned case.

**INTRODUCTION**

This case comes before the Commission upon filing by GS Technologies Operating Company, Inc., d/b/a GST Steel Company (GST) of a Petition for an Investigation as to the Adequacy of Service Provided by Kansas City Power & Light Company (KCPL) and Request for Immediate Relief.

The Petition (hereinafter Complaint) of GST alleged that imprudent management by KCPL resulted in significantly higher charges for electric power for GST; that imprudent management was the cause of the Hawthorn 5 explosion that resulted in the higher costs; and that reduced maintenance on KCPL's system resulted in significant power disruptions.

GST is a Kansas City company that produces steel products, specifically grinding balls and rods for the mining industry.<sup>1</sup> GST uses electric arc furnaces in their production process, and as a result, GST is KCPL's largest single point retail customer.<sup>2</sup> GST and its predecessors have been operating under special contracts with KCPL for more than twenty years.<sup>3</sup> GST has been operating under its current Special Contract since 1994. The specific terms of the contract are highly confidential, but generally the contract allows GST to purchase power based on a certain formula, based on a set fixed cost and a variable cost of production, as opposed to GST taking power under tariffed rates.<sup>4</sup>

GST originally filed a Request for Emergency Relief and Investigation in Case No. ER-99-313,<sup>5</sup> the KCPL rate reduction case. In that case, KCPL waived "any objection that could be raised by it regarding the Commission Staff or Public Counsel providing assistance to GST in resolving issues related to GST's Special Contract with KCP&L, or in the Commission exercising its jurisdiction to review GST's arguments and evidence related to GST's Special Contract with KCPL."<sup>6</sup> In Case No. ER-99-313, the Commission denied GST's request for intervention and noted that "[I]f GST wishes to pursue this request further, its request must be refiled with the Commission appropriately."<sup>7</sup>

On May 11, 1999, GST filed a Petition for an Investigation as to the Adequacy of Service Provided by the Kansas City Power & Light Company and Request for Immediate Relief. On

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<sup>1</sup> Petition for an Investigation as to the Adequacy of Service Provided by the Kansas City Power & Light Company and Request for Immediate Relief, May 11, 1999.

<sup>2</sup> Lissik Rebuttal, Ex. 8 at 4.

<sup>3</sup> Lissik Rebuttal, Ex. 8, at 3.

<sup>4</sup> Proctor Rebuttal, Ex. 9, at 3.

<sup>5</sup> In the Matter of the Stipulation And Agreement Reducing the Annual Missouri Retail Electric Revenues of Kansas City Power & Light Company.

<sup>6</sup> Reply of Kansas City Power & Light to Response of GST Steel, filed by KCPL in Case No. ER-99-313 on March 1, 1999.

<sup>7</sup> Order Denying Intervention and Approving Stipulation and Agreement, Case No. ER-99-313, April 13, 1999.

May 18, 1999, KCPL filed its Answer and generally denied all of GST's allegations concerning the adequacy of service provided by KCPL.

On June 6, 1999, the Commission denied GST's request for immediate relief, because, among other things, there was no immediate threat to public safety. At the same time, the Commission directed an expedited response to the complaint, set a prehearing conference and ordered filing of a procedural schedule. On June 18, 1999, the Parties filed a joint proposed procedural schedule with a hearing date in December 1999.

On June 28, 1999, Staff responded to GST's request for an expedited proceeding and also filed suggestions concerning some interim approaches that might meet the GST's and KCPL's needs. On July 7, 1999, KCPL made a filing rejecting all of Staff's suggestions.

Months of contentious discovery and amendments to the procedural schedule followed. On November 17, 1999, GST filed its direct case. On January 6, 2000, the Commission issued its Order to Show Cause, asking whether the case should be dismissed and why sanctions should not be imposed against GST for alleging in its Complaint that "GST is a corporation duly authorized to conduct business in the State of Missouri."<sup>8</sup> The Show Cause hearing was held on January 18, 2000. On February 17, 2000, the Commission issued its order, that among other things, required GST to amend its complaint to reveal its legal name.<sup>9</sup> In that same order the Commission issued a new procedural schedule.

Rebuttal testimony was filed on February 28, 2000 and Surrebuttal and Cross-surrebuttal testimony was filed on April 6, 2000. The evidentiary hearing was held on April 17-19, 2000.

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<sup>8</sup> Order to Show Cause, Jan. 6, 2000.

<sup>9</sup> Order Concerning Show Cause Hearing, Feb. 17, 2000.

### ISSUES FOR COMMISSION DECISION

Following are the issues presented by the Parties for determination by the Commission. These issues are set forth in the order submitted in the Final List of Issues filed by the Parties on March 13, 2000.

**a. Have the charges imposed under the GST/KCPL Special Contract been “just and reasonable” over the period of the contract?**

To the extent that the charges have followed the pricing set out in the terms of the Special Contract, the charges that KCPL has made to GST have been just and reasonable. Since the Special Contract was approved by the Commission,<sup>10</sup> the charges under the contract would be presumed to be just and reasonable, as an approved rate is presumed to be just and reasonable.

Missouri statutes provide that the Commission has the duty to ensure that charges made for electric power are just and reasonable. Section 393.130.1 RSMo 1994, prohibits a utility from making charges that are unjust or unreasonable. If the Commission were to find that KCPL has acted imprudently with respect to the Hawthorn 5 boiler explosion, inclusion of the cost of replacement power in a rate case, or in charges to GST, would not be just and reasonable even though those charges, in the case of GST, were determined in conformance with the contract provisions.

This question raises the issue that the Commission addressed in its Show Cause order concerning whether GST has perfected its complaint under the statutory requirements.<sup>11</sup> The statute requires, among other things, that a complaint as to the reasonableness of rates or charges be signed by: (1) the Office of the Public Counsel (2) a public official, such as the mayor, or public officials, such as a majority of the city council, or (3) be made by twenty-five (25) or

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<sup>10</sup> Re: A Special Contract by Kansas City Power & Light Company, Case No. EO- 95-67.

<sup>11</sup> Section 386.390. 1 RSMo (1994).

more consumers or prospective consumers or purchasers. As the Commission correctly stated “GST has not perfected its Complaint by any of these three alternative methods.”<sup>12</sup>

The Commission has dismissed other cases because of the lack of perfection of a complaint under Section 383.390.1 RSMo.<sup>13</sup> The Court has also addressed this statutory requirement and noted “Section 386.390 . . . limits those who may complain to the ‘mayor,’ ‘president, or chairman of the board of aldermen,’ . . . ‘or twenty-five consumers.’” The court noted that [t]he exception therein pertains specifically to rates and limits those who may complain . . .” to the Commission about the justness or reasonableness of rates.<sup>14</sup>

KCPL suggested in its Statement of Position on the issues,<sup>15</sup> and in its Counsel’s opening statement,<sup>16</sup> that the Commission might find that the Special Contract rates are too low and are, therefore, unjust and unreasonable. In this complaint case, the Commission does not have jurisdiction to consider whether the actual rates under the contract are just and reasonable.

Based on the *Inter-City Beverage*<sup>17</sup> and *DeMaranville v. Fee Fee Trunk Sewer*<sup>18</sup> cases, the Commission does have jurisdiction to investigate claims of “overcharges” either under a published rate or, as in the instant case, under a special contract. In so far as GST is making a claim concerning “overcharges” due to imprudent management by KCPL, the Commission has jurisdiction to determine the validity of that complaint.

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<sup>12</sup> Order Concerning Show Cause Hearing, February 17, 2000.

<sup>13</sup> The Commission dismissed over forty telephone complaints because of lack of “perfection” of the complaint. *See ex. TC-93-58*.

<sup>14</sup> State ex rel. Jackson County v. Public Service Commission, 532 S.W.2d 20, 26 (Mo. App. 1973).

<sup>15</sup> Kansas City Power & Light Company’s Statement of Position, at 2. (filed April 12, 2000).

<sup>16</sup> *Tr.* at 143, lines 12-18.

<sup>17</sup> Inter-City Beverage Co., Inc. v. Kansas City Power & Light Co., 889 S.W.2d 875 (Mo. App. W.D. 1994).

<sup>18</sup> DeMaranville v. Fee Fee Trunk Sewer, Inc., 573 S.W.2d 674, 676 (Mo. App. 1978), *citing* May Department Stores Co. v. Union Electric L. & P. Co., 107 S.W.2d 41 (1937).

GST has consistently denied that it is asking the Commission to alter the contract or to find that the rate as agreed in the contract is unjust or unreasonable. GST bases its claim on the theory that KCPL was managing its facilities in an imprudent manner and that KCPL's imprudence resulted in the explosion of the Hawthorn plant. GST further alleges that the loss of the Hawthorn 5 generating unit has resulted in overcharges for electric power to GST.

**b. Has KCPL properly accounted for the insurance proceeds that it has received as a result of the Hawthorn incident?**

The Staff has not made any analysis concerning assignment of insurance proceeds to any particular account(s) of the Uniform Systems of Accounts. According to testimony by GST witness Steven C. Carver, GST no longer takes issue with KCPL's accounting for the insurance proceeds.<sup>19</sup>

**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 5 plant? If so, is it reasonable and appropriate to do so?**

The Commission has already determined that it does not have the authority to award equitable relief, and ordering KCPL to pay insurance proceeds would generally be considered an equitable remedy. In its August 19, 1999 *Order Denying Reconsideration*, the Commission stated: "[t]he Commission is an administrative agency, a creature of statute, and cannot do equity."

Even if the Commission had the authority to order equitable relief, Staff does not believe that it would be appropriate to do so because the fixed portion of the GST contract is not based on KCPL's cost of service, but on other considerations.<sup>20</sup> This leads to the Staff's conclusion that since GST did not contribute directly to the cost of insurance premiums, GST is not entitled

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<sup>19</sup> Tr. 163, lines 13-14.

<sup>20</sup> Proctor Rebuttal, Ex. 8, p 9.

to share in the benefit. As Dr. Proctor noted “[GST] is asking that benefits given to regular tariff customers be given to GST Steel, which is paying a discounted rate through a special contract.

This would be poor policy for the Commission to establish”<sup>21</sup>

Even if it were the case that the fixed portion contributes to KCPL’s overall cost of service, GST is unable to quantify how much of a contribution its payments under the contract make to the cost of insurance.<sup>22</sup> In addition, Staff would note that the Special Contract does not include any specific provisions for sharing with or payments to GST of insurance proceeds for replacement power or any mention of insurance.<sup>23</sup>

**d. Does the Commission have the authority to order KCPL to recalculate GST’s bills under the contract? If so, 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?**

The Commission does have the authority to order KCPL to recalculate the bills. The answer to second part of the question, that asks “should the bills be recalculated” depends on what the Commission intends to do with that information. The Commission has already stated the fact that it does not have authority to award equitable relief. The purpose of having KCPL recalculate the bills would be to determine the extent of the damage that GST has suffered if KCPL were found to have been imprudent, and that GST might be awarded by a court that does have the authority to award equitable relief.

The Commission has no jurisdiction to promulgate an order requiring a pecuniary reparation or refund.<sup>24</sup> In order to recover by appropriate action in the circuit court, a complainant must plead and prove facts which demonstrate: (1) the lawfully established rate

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<sup>21</sup> Proctor Rebuttal, Ex. 8, p. 11.

<sup>22</sup> Carver Surrebuttal, Ex. 2, p. 5, lines 22-23.

<sup>23</sup> Proctor Rebuttal, Ex. 8HC, pp. 9-10.



applicable to their business; and (2) that more than the lawful rate has been collected. The same requirements would likely apply to GST's pleading requirements in circuit court. The Commission might order KCPL to make such a calculation since KCPL, not GST, has the model to make the calculation, so that GST could quantify the excess charges. If the Commission were to determine that KCPL was imprudent and responsible for the Hawthorn 5 explosion, so that the cost of replacement power should not be included in GST's bill, even though the Commission could not enforce such an order, it might choose to order KCPL to make the calculation, and to provide it to the Commission, Staff, Public Counsel, and GST, under seal, for the purposes of quantifying the effect of the outage of Hawthorn 5 on GST, since only KCPL has the model to make the calculation. With that calculation, GST would have the facts necessary for a circuit court pleading.

In the LaHoma Paige case,<sup>25</sup> the Commission considered a claim of overcharges against KCPL. The Commission determined that KCPL had overcharged, but the Commission declined to direct KCPL to make a service calculation. Claimant's husband, Satchell Paige, had applied for service in the 1950's. LaHoma Paige (Claimant) determined sometime in 1983 that she was being charged the commercial rate at her home in Kansas City. KCPL had been charging the commercial rate on her home at least since 1969, apparently based on a belief that the home was a boarding house.<sup>26</sup> The Commission found that KCPL should not have been charging the commercial rate and that KCPL had overcharged Claimant from 1969 until 1983. The Commission also found that, since it could not award any type of damages, to require KCPL to

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<sup>24</sup> DeMaranville v. Fee Fee Trunk Sewer, Inc., 573 S.W.2d 674, 676(Mo. App. 1978) citing Wilshire Const. Co. v. Union Elec. Co., 463 S.W.2d 903 (Mo. 1971); State v. Buzard, supra; State ex rel. Laundry, Inc. v. Public Service Commission, 327 Mo. 93, 34 S.W.2d 37 (1931).

<sup>25</sup> LaHoma Paige, 2626 E. 28<sup>th</sup> Street, Kansas City, Missouri, 64128, Complainant, v. Kansas City Power \* Light Company, 1330 Baltimore Avenue, Kansas City, Missouri 64105, Respondent, 27 Mo. P.S.C. (N.S.) 363, 369 (1985).

<sup>26</sup> *Id.* at 366.

produce a service record calculation was inappropriate. The Commission authorized Claimant to seek recovery of the overcharges in circuit court.<sup>27</sup>

**e. Has KCPL operated and maintained its generation units in a reasonable and prudent manner?**

GST asserts, and Staff agrees that the equivalent availability factor<sup>28</sup> of KCPL's units has declined during a time that the overall unit availability of most utilities was increasing.<sup>29</sup> Staff witness Eve A. Lissik testified in this case that, although GST Steel's allegations of the declining availability and reliability of KCPL's generating units are very serious, the Staff's review of the testimony and data responses, as well as publicly available information, shows that, generally, KCPL is achieving an acceptable equivalent availability factor.<sup>30</sup>

The Commission has opened a separate case in which the Staff is conducting its own investigation into the cause(s) of the Hawthorn 5 boiler explosion. An evaluation of KCPL's operation and maintenance of that unit is a central part of the investigation and will be addressed in Staff's final report to the Commission. Staff has formed no conclusions, as yet, concerning the prudence or imprudence of KCPL's actions relative to the explosion.

**f. Has KCPL operated and maintained its distribution and transmission facilities in a reasonable and prudent manner?**

The Staff has taken no position on this issue in any relevant, pending or recent case. However, based on the testimony filed by both parties, and oral testimony of KCPL witness Michael E. Bier, it appears that GST has had problems with the transmission and distribution systems that serve it, and that KCPL has corrected most, if not all, of the problems.<sup>31</sup>

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<sup>27</sup> *Id.* at 369.

<sup>28</sup> Equivalent availability is the percentage of time the plant is available at full capacity to generate power. (Tr. 303).

<sup>29</sup> Lissik Cross Surrebuttal, Ex. 10, p. 3.

<sup>30</sup> Lissik Cross Surrebuttal, Ex. 10, p. 6.

<sup>31</sup> Tr. 495-499.

**g. Should the Commission order a formal investigation into the operation and maintenance of KCPL's generation, transmission and distribution facilities?**

The Commission has statutory authority to direct the Staff<sup>32</sup> to investigate the rates<sup>33</sup> or the methods used by any corporation in "manufacturing, distributing, or supplying gas or electricity for light, heat or power and in transmitting the same. . . ."<sup>34</sup> The Commission may raise these issues on its own motion or may investigate as a result of a complaint made to it.

Based on the evidence presented by GST and KCPL concerning the operation of KCPL's other baseload generation (Montrose, Iatan, La Cygne and Wolf Creek), it appears that KCPL's overall system is currently operating within acceptable limits.<sup>35</sup>

Therefore, Staff is not recommending a formal investigation at this time. As Staff witness Eve Lissik stated: "based on the equivalent availability factors of KCPL generating units and the high capacity factors, Staff does not see an immediate problem with the generating units, again setting aside Hawthorn 5."<sup>36</sup>

**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?**

Staff has recommended that the Commission may wish to delay any decision in this case regarding the Hawthorn 5 boiler explosion pending the outcome of the Staff's independent and final report on the incident at Hawthorn 5. It is possible that additional information may be developed that would aid the Commission in its decision concerning whether or not KCPL was imprudent in its operation of Hawthorn 5, and whether that imprudence resulted in the

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<sup>32</sup> Section 386.240 RSMo (1994).

<sup>33</sup> Under Section 393.130.1 electrical corporations "shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made . . . by such electrical corporation shall be just and reasonable. . . ."

<sup>34</sup> Section 393.140.2 (1994).

<sup>35</sup> Tr. 304-305, lines 22-25, 1-4.

<sup>36</sup> (Tr. 323, lines 1-6).

explosion.<sup>37</sup> Neither KCPL nor GST agrees with Staff that the Commission should delay a decision in this case.

**i. Are there sufficient facts before the Commission for it to make a decision?**

At the end of the hearing, the presiding Judge raised the issue of the lack of "fact witnesses" in the case and asked whether that affected the ability of the Commission to make a decision in the case.

One of the issues raised by this question is whether expert testimony alone is sufficient competent and substantial evidence for the Commission to make a decision. Judicial review of Commission decisions asks whether the decision is based on competent and substantial evidence on the record as a whole and whether the decisions are lawful.

First, the courts have held that the opinion of a qualified expert may amount to substantial and competent evidence.<sup>38</sup> The Commission is free to believe or not believe the testimony of an expert.<sup>39</sup> However, if the Commission believes the expert and has the facts on which the expert testified, that is sufficient.

This court is not unmindful that conclusions may not be substituted for the proof of facts. *Rickard v. Rickard*, 428 S.W.2d 919, 928 (Mo.App.1968). Mr. Barry's testimony goes somewhat beyond merely relating the facts in proving the existence and terms of the agreement and makes conclusions of such. The Commission, however, because of its unique nature does not have to apply the technical rules of evidence "with the same force and vigor as in an action brought in a court of law." *State ex rel. Potashnick Truck Service, Inc. v. Public Service Commission*, 129 S.W.2d 69, 74 (Mo.App.1939), *See Hilke v. Firemen's Retirement System of St. Louis*, 441 S.W.2d 730, 732-733 (Mo.App.1969). The Commission had the facts upon which Mr. Barry apparently made his conclusory statements and there is no indication

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<sup>37</sup> Tr. 323, lines 21-25.

<sup>38</sup> *State ex rel. General Tel. Co. of Midwest v. Public Service Commission*, 537 S.W.2d 655, 663 (Mo. App. 1976) *citing* 2 Am.Jur.2d, Adm. Law, s 395, p. 201 (1962).

<sup>39</sup> *State ex rel. Midwest Gas Users' Ass'n v. Public Service Comm'n*, 976 S.W.2d 485, 495 (Mo. App. W.D. 1998).

from the PSC's order that its decision was directly based upon the conclusions of Mr. Barry.

State ex rel. American Tel. & Tel. Co. v. Public Service Comm'n, 701 S.W.2d 745, (Mo.App. W.D. 1985)

The conclusions of an expert are not sufficient to form the basis for a Commission decision, but the testimony taken as a whole with the supporting facts is considered by the courts to be sufficient substantial and competent evidence upon which the Commission could base its decision.

An expert's opinion must be based upon facts actually established.<sup>40</sup> The question of sufficiency of facts to support admission of an expert's opinion is a question of law for the Commission.<sup>41</sup> Whether or not an expert witness has gathered sufficient competent and evidence to support his opinion is a matter for the Commission to decide in determining the weight to accord that witness. Section 490.065(3) RSMo says that

The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.

The question concerning the sufficiency of the facts presented in a Commission case to support findings of fact in an order was addressed in the *A.P. Green*<sup>42</sup> case. The court held that the applicable test for the sufficiency of findings of fact is:

The most reasonable and practical standard is to require that findings of fact be sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence.

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<sup>40</sup> Brandt v. Csaki, 937 S.W.2d 268 (Mo. App. W.D. 1996) citing Bilderback v. Skil Corp., 856 S.W.2d 73, 75 (Mo. App.1993).

<sup>41</sup> *Id.* citing Holtgrave v. Hoffman, 716 S.W.2d 332, 335 (Mo. App. 1986). Section 490.056 RSMo 1994.

<sup>42</sup> State ex rel. A.P. Green Ref. v. Public Service Comm'n, 752 S.W.2d 835 (Mo. App. 1988).

State ex rel. A.P. Green Ref., v. Public Service Comm'n., 752 S.W.2d 835, 838(Mo. App. 1988)

The Commission in that case was "confronted with a choice of one of two theories for allocation of costs."<sup>43</sup> The Commission accepted the proposal of the Staff and upon review the circuit court found that the testimony of the staff witness, Dr. Proctor was opinion only.

The court of appeals reversed, noting the studies that Dr. Proctor had done in writing his testimony, and found that, because of the studies, Dr. Proctor's testimony was based on facts and was not solely opinion. This case illustrates the point that the Commission may rely on the facts used by experts in developing their testimony to make its findings of fact.

### CONCLUSION

In this complaint case, Staff has taken the position that it is GST's responsibility to prove its case, and KCPL's responsibility to defend its actions and to demonstrate that GST's charges are inaccurate or unfounded. Staff has concluded that while GST's allegations are very serious, the charge that KCPL is imprudently managing its facilities as a whole has not been demonstrated conclusively. Staff's evaluation of the information presented in this case is that overall KCPL's equivalent availability factor is in acceptable limits and Staff is not recommending that the Commission order an investigation at this time. If the trend of declining EAFs continues, further investigation may be warranted.

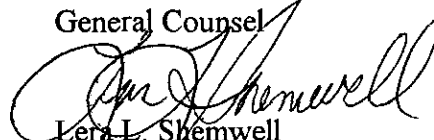
Staff has recommended that the Commission defer its decision concerning the Hawthorn explosion until such time as the Staff has completed its own investigation into the incident, as there may be additional facts to aid the Commission in its decision.

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<sup>43</sup> *Id.*

Respectfully submitted,

DANA K. JOYCE  
General Counsel

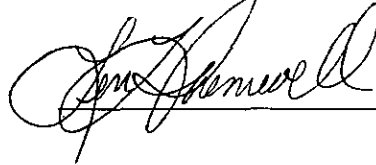


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### Certificate of Service

I hereby certify that copies of the foregoing have been mailed, faxed, or hand-delivered to all counsel of record as shown on the attached service list this 12th day of May, 2000.



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**May 12, 2000**

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