

2C-99553*

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GST

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Judge Thompson	573-526-6010		

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TOTAL # OF PAGES: 4

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KC-720658-1

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EC-99-553*
GST v KCPL

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TO: Judge Thompson
Deputy Chief Regulatory Law Judge
Fax: (573) 526-6010

FROM: Counsel for KCPL

DATE: January 20, 2000

RE: GST'S Citations in its Response to Order to Show Cause

★ Permission to file
by FAX
and in letter form
granted by Judge Thompson
from the Bench.

DHR
10-20-00

Dear Judge Thompson:

As you requested at the Show Cause hearing conducted on January 18, 2000, Respondent Kansas City Power & Light Company offers the following response to Complainant GST Steel Company's ("GST") assertion in its Response to the Order to Show Cause that Missouri law holds that a fictitious entity has ("KCPL") the standing to petition the Missouri Public Service Commission ("Commission") for relief.

GST maintains that the Commission has jurisdiction over its Petition and that GST has the capacity to petition the Commission for relief because it is a properly registered business. See Response of GST Steel Company to Order to Show Cause, pp. 2-3. GST cites State ex rel. Schoenbacher v. Kelly, 408 S.W.2d 383 (Mo. App. 1966) and Sims v. Missouri Life Ins. Co., 23 S.W.2d 1075, 223 Mo. App. 1150 (Mo. App. 1930) as support for this position. However, neither case is remotely pertinent.

In State v. Kelly, the original plaintiff sought to enjoin the defendants from allegedly violating the restrictive covenants contained in their employment contracts. 408 S.W.2d at 385. A temporary restraining order was issued preventing the defendants from pursuing certain occupations within a particular geographical area. When the defendants failed to appear for their scheduled depositions, the plaintiff filed a motion to hold them in contempt. Id. The defendants filed a Writ of Prohibition, asserting, among other things, that the Court lacked subject matter jurisdiction over one of them because that defendant had no contract with the plaintiff. Id. at 386. That dispute centered on the fact that the Petition was brought by "Hans Coiffures International Inc." while the contract was made between the defendant and "Duke & Duchess Wigs and Toupees, Inc.," a fictitious entity. Id. The court noted that plaintiff "Hans Coiffures International, Inc.," the real party in interest, brought the petition and that the petition showed

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that the plaintiff conducted business in the name "Duke & Duchess Wigs and Toupees."¹ Thus, the court denied the Writ of Prohibition and held that the plaintiff was permitted to show it adopted the fictitious name for the purpose of entering its contract with the defendant because "[i]t is well established that a person can bind himself in contract by another than his true name." *Id.* at 387. KCPL does not question GST's capacity to carry on business or to enter contracts. However, this case is simply irrelevant to GST's erroneous assertion that it has standing to petition the Commission for relief.

The *Sims* case is similarly irrelevant to GST's contention that it has standing to petition the Commission for relief. In *Sims* the plaintiff claimed that the defendant paid the benefits of a life insurance policy to the wrong person. 235 S.W. 2d at 1076. The proceeds were payable to "Annie Sims, wife" who resided at a particular address. The initial claimant was a woman identified as Annie Bell Sims who had been living with the decedent at the address named on the policy, and she collected the benefit. However, Mr. Sims had been lawfully married to another woman (the plaintiff and second claimant) 20 years prior to issuance of the policy. After they separated (but never divorced), Mr. Sims began living with the initial claimant. The initial claimant's real name was Annie Bell Charleston, though she was known in their neighborhood as Annie Sims. *Id.* at 1077. In this context the court stated that the fact that the plaintiff/second claimant was the only "real" Annie Sims did not definitively demonstrate who Mr. Sims intended the benefits to go to: "We say this for the reason that a person may adopt or assume a different name from his true one, and may even carry on business and make contracts under his fictitious name." *Id.* at 1078. Again, this holding is not relevant to GST's assertion that it has standing to petition the Commission for relief.

Finally, Staff suggests that KCPL may be estopped from denying GST's corporate existence and, thus, from alleging the Commission does not possess jurisdiction over GST, a nonexistent corporate entity, and relies on *Berkel & Co. Contractors, Inc. v. JEM Dev. Corp.*, 740 S.W. 2d 683 (Mo. App. S.D. 1987) as support. KCPL respectfully disagrees with this assessment. *Berkel* involved breach of contract and quantum meruit claims. After a jury verdict for the plaintiff, the trial court issued a judgment notwithstanding the verdict in favor of the defendant because the plaintiff failed to prove its legal existence as a corporation. *Id.* at 684. The appellate court reversed and remanded because "[i]t is a well-settled principle that where one contracts with a body assuming to act as a corporation or by a name distinctly implying corporate existence, both parties in a suit upon contract are usually estopped from denying

¹ In contrast, GSTOC did not bring its petition against KCPL. GST Steel Company, the fictitious entity, did.

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corporate existence."² Id. at 686 (emphasis added). Unlike the Berkel case, GST brought the current petition against KCPL alleging inadequacy and unreliability of service—not as a contract action. Moreover, unlike the Berkel case, the issue of GST's corporate existence arose well before the case has been fully litigated. Thus the Berkel holding does not preclude or affect KCPL's ability to assert that the Commission should dismiss GST's petition for lack of jurisdiction.

Respectfully submitted,



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² Additionally, it is important to examine the two cases that the Berkel court cites as support for this proposition. The first, Bader Automotive and Industrial Supply Co. v. Green, 533 S.W.2d 695, 699 (Mo. App. 1976) involves a contract entered into by a corporation which was subsequently formed. The action was brought in the name of a properly formed corporation rather than in the fictitious name of a corporation. In the second case, Schneider v. Best Truck Lines, Inc., 472 S.W.2d 655, 659 (Mo. App. 1971), the corporate existence of the defendant was in question. In Schneider the defendant had been a corporation and admitted this in its Answer, although it had actually forfeited its charter. Thus, the Berkel case, and the cases cited therein, are further distinguishable from the instant case. In Berkel, Bader Automotive, and Schneider the actions were brought or defended in the proper name of a true corporate entity. In the instant action, GST has never been a corporate entity.