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March 17, 2000

HAND DELIVERED

FILED²

MAR 17 2000

Missouri Public
Service Commission

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
Room 530
Truman State Office Building
Jefferson City Missouri 65101

Re: **GST Steel Company v. Kansas City Power & Light Company**
Case No. EC99-553

Dear Secretary Roberts:

Enclosed for filing in the above-referenced case please find:

1. An original and fourteen copies of the **public version** GST Steel Company's Memorandum of Law Addressing Questions Raised in the Order Concerning Show Cause Hearing.
2. Eight (8) separate sealed envelopes containing the **Highly Confidential version** of GST Steel Company's Memorandum of Law Addressing Questions Raised in the Order Concerning Show Cause Hearing.

The above are being filed pursuant to and under the Protective Order previously granted by the Commission.

Thank you in advance for your attention to this matter.

Sincerely,

LATHROP & GAGE L.C.

By:

Kurt U. Schaefer

KUS/jf
Enclosures
cc: All Parties of Record

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

FILED²

MAR 17 2000

Missouri Public
Service Commission

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

Case No. EC-99-553

**GST STEEL COMPANY'S
MEMORANDUM OF LAW ADDRESSING QUESTIONS
RAISED IN THE ORDER CONCERNING SHOW CAUSE HEARING**

In its Order Concerning Show Cause Hearing, dated February 17, 2000, the Missouri Public Service Commission ("Commission") directed the parties in this proceeding to file memoranda advising the Commission on the following questions of law:

A. Whether or not the Commission has jurisdiction over the Complaint filed herein by GS Technologies Operating Co., Inc., doing business as GST Steel Company, insofar as it concerns the reasonableness of the rates and charges made to GS Technologies Operating Co., Inc., doing business as GST Steel Company, by Kansas City Power and Light Company, inasmuch as it is not perfected pursuant to Section 386.901.1, RSMo.?

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

Short Answers to the Commission's Questions

A. Yes. The Commission has primary and exclusive jurisdiction over the parties and the subject matter of each of the issues raised by the Petition/Complaint¹ filed by GS Technologies Operating Co., Inc., doing business as GST Steel Company (hereinafter "GST"), on May 11, 1999.² The Petition/Complaint is, in all respects, sufficient.

B. Yes. The arbitration provisions contained in the Special Contract between GST and Kansas City Power and Light Company ("KCPL") are not applicable to the issues before the Commission in this proceeding, do not affect the Commission's jurisdiction over the issues raised in this proceeding, and do not in any way waive GST's entitlement to bring the instant Petition/Complaint before the Commission for disposition.

Background

1. By Order dated October 26, 1994,³ the Commission approved a Special Contract between GST and KCPL for electricity service. In granting this approval, the Commission agreed with the Commission Staff and the parties that the Special Contract was necessary to provide competitively priced power to GST's steelmaking operation, which consumes large

¹ See discussion below.

² As amended by GST's Motion to Amend by Interlineation, the First page of the Petition for an Investigation as to the Adequacy of Service Provided by Kansas City Power & Light Company and Request for Immediate Relief, filed February 20, 2000.

³ Order Approving Agreement and Tariff, Case No. EO-94-67.

amounts of electricity,⁴

2. Pursuant to the Special Contract,

The contract thus provides for cost-based rates to be charged to GST. It is not a market-based rate.

3. Throughout 1998, GST experienced numerous services disruptions due to KCPL equipment failures. GST also experienced material increases in the incremental energy costs charged by KCPL as a result of numerous forced outages at KCPL's generating units, including a steam pipe explosion in August 1998 that cause a three-month outage at KCPL's Hawthorn 5 coal-fired unit, one of its lower cost sources of generation. On February 17, 1998, accumulating natural gas caused an explosion in the boiler of Hawthorn unit 5 that reduced the 11-story boiler building to rubble.

4. KCPL announced that it would not seek rate relief to recover replacement energy costs associated with the destruction of Hawthorn 5 from consumers. Notwithstanding those statements, KCPL charges to GST, from the date of the explosion, have reflected the increased costs of more expensive energy resources KCPL has relied upon, primarily energy purchases during peak periods, to replace Hawthorn's output.

5. In February 1999, GST filed an application to intervene and a request for a hearing in Case No. ER-99-313, which concerned a stipulation and agreement proposing to

⁴ GST's facilities use an electric arc furnace to melt recycled scrap steel. The molten steel is cast into rods, grinding media (balls) and other steel products.

reduce KCPL's annual Missouri electric revenues.⁵ In a subsequent pleading in February 1999, GST explained that the proposed stipulation and agreement could impede its due process, statutory and contractual rights to challenge KCPL charges under the Special Contract that have become unjust and unreasonable. In a pleading dated March 1, 1999, KCPL waived any objection it may have raised to the Commission exercising its jurisdiction to review GST's arguments and evidence relating to GST's Special Contract with KCPL.⁶

6. On March 15, GST filed a Request for Emergency Relief and Investigation. GST requested that the Commission take immediate steps to protect GST from exposure to unjust and unreasonable charges for electric service. GST further requested that the Commission investigate the prudence and reliability of KCPL's operation of its generating units and transmission and distribution system, including the recent explosion at KCPL's Hawthorn Generating Unit No. 5. Pointing to KCPL's mounting reliability problems, and KCPL's lack of focus on the issue of reliability, GST requested that the Commission investigate the causes of the Hawthorn incident and take action to ensure that the causes of the Hawthorn explosion are not repeated. GST also requested that the Commission prohibit KCPL from passing through to its customers, either directly or indirectly, replacement power costs rising from KCPL's imprudence pertaining to the Hawthorn explosion. GST asked that the Commission investigate the reliability problems plaguing the operation of the remainder of KCPL's system to determine whether KCPL also has been imprudent and negligent in the operation of other components of the system. GST asked the Commission to require KCPL to remove Hawthorn from its rate base during its period of reconstruction because the facility is not "used" and "useful," and that the Commission deny

⁵ Application to Intervene of GST Steel Company, in Case No. ER-99-313, dated February 2, 1999.

⁶ See Order Denying Intervention and Approving Stipulation and Agreement, Case No. ER-99-313, dated April 13, 1999, *mimeo* at 5.

recovery to KCPL of all costs associated with Hawthorn's reconstruction attributable to KCPL's failure to utilize prudent utility practices.

7. On April 13, 1999, the Commission issued an Order denying GST's application to intervene and approving the rate stipulation. In that Order, the Commission suggested that GST file its requests for investigation of KCPL's practices and for appropriate relief in a separate docket.⁷

8. On May 11, 1999, GST filed a Petition asking the Commission to investigate the adequacy of service provided by KCPL to GST. Petition for an Investigation as to the Adequacy of Service Provided by Kansas City Power & Light Company and Request for Immediate Relief. In this Petition, GST described the problems it had experienced with KCPL's service disruptions, the declining performance of the utility's generating plants, and the effect of these problems, including the destruction of the Hawthorn unit, on GST's production of steel and the cost of electricity included in the prices charged by KCPL. The Petition requested that the Commission direct KCPL to recalculate GST's electric bills to remove the effect of replacement energy costs that KCPL imprudently incurred.

9. The Commission docketed this matter as Case No. EC-99-553 and, on its own initiative, re-captioned the matter as "GS Technology Operating Co., Inc., doing business as GST Steel Company, Complainant, v. Kansas City Power & Light Company, Respondent." In the course of events prior to hearing, the Commission issued its Show Cause Order, dated January 6, 2000, which instructed the parties to appear before the Commission to address a number of discovery and procedural issues that are detailed in that Order. Included among those issues were questions concerning Commission jurisdiction over the GST Petition.

⁷ See April 13, 1999 Order in Case No. ER-99-313, mimeo, at 6.

10. At the Show Cause Hearing, held on January 18, 2000, counsel for GST explained that GST was an aggrieved person that properly petitioned the Commission in its business name for an investigation and requested appropriate relief that is within the scope of the Commission's jurisdiction.⁸ In its statements, the Commission Staff similarly maintained that GST had properly filed a petition for relief that the Commission has authority to address.⁹

11. In its Order Concerning Show Cause Hearing, dated February 17, 2000, the Commission determined:

At the hearing on the Show Cause Order, GST and Staff of the Commission took the position that GST had filed a petition, not a complaint at all. Contrary to the assertions of GST and Staff, GST did file a complaint. Section 386.390.1, R.S.Mo., provides:

Complaint may be made ... by ... any 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....

Under the statute, "petition" is a synonym of "complaint." However, the Commission's rules regarding complaints do not require either the use of the complainant's legal name or the attachment of a certificate from the Secretary of State. See Rule 4 CSR 240-2.070. Thus GST's complaint was sufficient under the Commission's practice rules.

Order Concerning Show Cause Hearing at p. 4 (omissions and emphasis in original). The Commission's Order subsequently raised the jurisdictional questions as to the sufficiency of the complaint and the applicability of the arbitration provisions of the Special Contract.

12. As to the sufficiency of the complaint, the Order opined that GST had not perfected its complaint by any of the three alternative methods prescribed in Section 386.389.1 for challenging the reasonableness of a utility's rates. Order at 6. The Order further queried

⁸ See remarks of Paul S. DeFord, Show Cause hearing (TR 43-47, 50-51).

⁹ See remarks of Lera Shemwell (TR 50-51).

whether perfection pursuant to Section 386.390.1 is required where a customer challenges the prudence of a utility's actions. Show Cause Order at 7.

13. As to the terms of the Special Contract, the Commission asked whether the provision requiring certain disputes to be resolved by arbitration has the effect of waiving GST's right to bring this complaint. Order at 7.

Summary of Argument

The Commission has plenary rate and supervisory authority over KCPL and the electric service it provides to GST. The Commission approved the Special Contract pursuant to the exercise of that authority, which KCPL and GST acknowledged in the Contract, and the Commission has continuing jurisdiction over the prices, terms and conditions of electric service provided by KCPL pursuant to the Special Contract. Thus, the Commission possesses both subject matter jurisdiction and jurisdiction over the parties in this proceeding. The Commission cannot waive or delegate its jurisdiction.

Second, GST is an aggrieved party that properly filed its request for relief as a Petition for an investigation. Whether docketed as a petition or a complaint, the Commission has jurisdiction over the parties and issues in this proceeding. As the Commission observed in its Show Cause Order, any person may file a complaint as to any action or inaction of an electric utility. Certainly, any person may complain that a utility has acted in an unsafe, unreasonable and imprudent manner and, as a direct result, blew up a low-cost source of generation. For the Commission to have jurisdiction over such a complaint, a person is not required even to show that it has a pecuniary interest at stake. Where, as here, the customer has been billed millions of dollars for imprudently incurred replacement power costs, the customer not only has justiciable issues to be heard by the Commission, it has a pressing need for resolution of its claims.

Third, as the Commission knows, the Special Contract places GST in a special circumstance in that there are no similarly situated customers. In cases where customers are individually affected by utility overbillings, *e.g.*, due to improper rate classification, the Commission unquestionably possesses, and has exercised, jurisdiction to address such complaints and order billing recalculations even though the subject matter of those complaints focus on the reasonableness of the utility's rates or charges to the customer.

Fourth, the limitation in the statute that 25 customers are needed to file a complaint against the reasonableness of a utility's rates is not applicable here. The "rate" applicable in this context is the Special Contract rather than a tariffed rate, and GST is not challenging the Special Contract. GST has maintained from the outset that it is not seeking a Commission Order to amend, modify or reform the Contract. It 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 approved the pricing formula in the GST Special Contract with KCPL, but it has not approved any of the cost inputs into that formula. The Commission previously has determined, and properly so, that the costs used in calculating charges to GST are subject to its regulatory scrutiny. Under the terms of the Special Contract, GST willingly assumed the risks and rewards of price variations caused by factors such as unusually severe or mild weather conditions. GST, however, never assumed the risk of KCPL's imprudence. KCPL owes GST the same due care in the operation of generation, transmission and distribution facilities that it owes all other customers. If KCPL has failed to operate them in a reasonable and prudent manner, the utility may not recover excessive costs that are the result of its imprudence in the calculation of prices to GST. The relief that GST requests is a necessary product of KCPL

imprudence. The Commission, thus, has a perfected "petition or complaint" before it and has jurisdiction over all matters in which GST has requested relief.

Moreover, in this case, GST's concerns were first raised in a KCPL rate docket. Rather than delay implementation of the stipulated rate reduction, the Commission instructed GST to raise those concerns in another forum. Having deferred consideration of GST's claims to another docket, the Commission cannot now take an unreasonably narrow view of its jurisdiction to avoid a hearing on GST's concerns altogether.

Finally, the arbitration provisions of the Special Contract pertain to potential contractual areas of dispute where a party otherwise would seek relief from a court of law. This circumstance is not applicable here. The Commission has primary and exclusive jurisdiction over the adequacy of service and prudence issues raised in this proceeding. Moreover, the approved Special Contract expressly preserves Commission jurisdiction and GST's rights to file this request for relief. This reservation prevails over any other provision of the contract, including those pertaining to arbitration of disputes. The presence of those provisions in the contract does not waive GST's entitlement to bring this petition/complaint before the Commission.

1. The Petition/Complaint Filed by GST is Sufficient to Establish Commission Jurisdiction Over the Issues Raised and the Relief Requested

A. Section 386.390.1 Entitles Any Customer to Ask the Commission to Investigate Any Aspect of Utility Service

Like any administrative agency, the Commission is a creature of statute. Missouri law, however, gives the Commission plenary rate and supervisory authority over public utilities. See Sections 386, 250, and 393.130, RSMo. The bedrock purpose of the act, and the overall scheme

of public utility regulation is to protect consumers from the excesses of the monopoly powers of public utilities. May Department Stores Co. v. Union Electric Light & Power Co., 107 S.W.2d 41, 48, 341 Mo. 299 (1937). The Commission needs to interpret its jurisdictional scope consistent with the express provisions of the law and to such further extent as the law may require, be it express or implied, to carry out the basic purpose of the act. See Section 386.250.7, RSMo.

Consistent with that fundamental purpose, the Commission's process and procedure is, by design, liberally viewed to be consumer accessible. Every aspect of a public utility's character of service, operating practices, and treatment of its customers is subject to Commission scrutiny. Under Section 386.390.1, any person, even if they have no pecuniary interest involved, can bring a complaint to the Commission concerning anything a utility has done or failed to do in the course of providing utility service. State ex rel. Consumers Public Service Co. v. Public Service Commission, 180 S.W.2d 40, 352 Mo. 905 (1944).

GST, which is a KCPL customer that has been materially and adversely affected by KCPL's operational problems, unquestionably is entitled to petition the Commission to investigate the utility's practices and order appropriate relief. Moreover, the Commission's jurisdiction in this regard is undisputed. For example, KCPL acknowledged in its most recent pleading to the Commission:

With regard to GST's request for an investigation into the adequacy of KCPL's service, the Commission has the authority to ensure that KCPL's service is safe and adequate. *See* Section 393.130.¹⁰

There is little doubt that GST's petition/complaint properly asked the Commission to examine the reasonableness of the company's actions and the effects of the destruction of Hawthorn on

¹⁰ KCPL Response to GST Steel Company's Motion to Compel Production of Documents, for Directed Findings Concerning Information Controlled by KCPL, and for Interim Relief, dated March 3, 2000, at p. 19.

GST's contract. The Commission has determined, on three separate occasions, that KCPL's actions relative to the Hawthorn incident are:

1. relevant to GST's issues of service adequacy;¹¹
2. directly relevant to the issue of KCPL's charges to GST;¹²
3. relevant to GST's theory of service unreliability due to poor maintenance practices;¹³
4. relevant to GST theory that the prices it pays for service under its special contract are not just and reasonable in view of KCPL's imprudent management practices;¹⁴
5. "necessarily within the scope of the present proceeding."¹⁵

KCPL similarly has acknowledged that the Commission has the authority to investigate the Hawthorn boiler explosion (citing Section 393.140(2)).¹⁶

B. The Commission Previously Has Confirmed the Sufficiency of GST's Petition/Complaint

The Commission has confirmed the sufficiency of GST's complaint and its jurisdiction over such matters in prior rulings in this docket. In its Order issued on August 19, 1999, the Commission stated the scope of this action as follows:

GST's complaint addresses both the adequacy and reliability of the electric service provided by KCPL and whether or not KCPL's charges to GST for that service are just and reasonable. The Commission is authorized, at Section

¹¹ Order Regarding GST Steel Company's First Motion to Compel Discovery and Amending the Procedural Schedule, dated July 29, 1999, p. 7.

¹² *Id.*

¹³ Order Regarding KCPL's Motion for Clarification, Reconsideration and Rehearing of the Commission's Order of July 29, 1999, and Regarding GST Steel Company's Second Motion to Compel Discovery, dated August 19, 1999, p. 8.

¹⁴ *Id.*

¹⁵ Order Regarding KCPL's Motion to Limit the Scope of Discovery and Issues, dated November 16, 1999, (denying KCPL's effort to exclude Hawthorn-related issues from the proceeding) (*mimeo* at 4).

¹⁶ *Id.* at 19.

393.130.1, RSMo 1994, to consider such matters and GST is authorized to make complaint.¹⁷

The Commission also has previously determined that the issues in this docket include KCPL power generation and distribution matters and the Hawthorn explosion “insofar as they directly impact the two issues of the adequacy of KCPL’s service to GST and the pricing of KCPL’s service to GST.”¹⁸ As to each of these matters, GST’s Petition/Complaint is sufficient in all respects and the Commission has jurisdiction to address those matters and order appropriate relief.

Further, all matters upon which a complaint may be raised may be joined in one hearing. Section 386.390.2; *State ex rel Consumers Public Service Co. v. Public Service Commission*, 180 S.W.2d 40, 352 Mo. 905 (1944). Thus, in this proceeding, the Commission has jurisdiction over all matters properly raised in GST’s complaint, as well as any additional matters the Commission may deem pertinent.

C. The Commission has Jurisdiction to Grant the Relief GST Requests

GST is entitled to bring a complaint concerning the reasonableness of KCPL’s actions as they relate to GST under the Special Contract, the Commission has determined that it has jurisdiction to address these issues, and the Commission has properly docketed those matters for hearing. The next step in the analysis is to consider whether the Commission has jurisdiction powerless to grant any relief to GST with respect to costs KCPL includes in electricity prices under that contract, or if it is powerless in that regard. There is no legal or rational basis for finding that the Commission’s authority is toothless in that regard, and there is persuasive

¹⁷ Order dated August 19, 1999, at p. 8.

¹⁸ Order dated August 19, 1999; quoted with approval in Order dated November 16, 1999.

precedent for determining that the Commission possesses the authority to grant the relief regarding pricing under the contract that GST has requested.

The concern, noted in the Commission's Order to Show Cause, is that, for purposes pertinent here, Section 386.390.1 requires at least 25 customers to join in a complaint as to the reasonableness of a utility's rates.¹⁹ Show Cause Order at 6. The Commission correctly noted, however, that Section 390.1 has been interpreted to allow complaints by individual customers alleging that they have been charged the wrong rate. Show Cause Order at 7, citing, State ex rel. Laundry, Inc. v. Public Service Comm'n, 327 Mo. 93, 103-104, 34 S.W.2d 37, 41 (1931). In fact, it is settled that a single customer, or a small group of customers (but less than 25) may bring a complaint that a utility has charged them the wrong rate, and that the Commission has jurisdiction to hear the complaint, to order the customers to be placed on the correct rate, and to order rebilling to correct overcharges in historic bills. Inter-City Beverage Co. v. Kansas City Power & Light Co., 889 S.W.2d 875, 877 (Mo. App. W.D. 1994); State ex rel KCPL v. Buzard, 168, S.W.2d 1044, 350 Mo. 763 (1993). In effect, an individual customer may not challenge the reasonableness of tariffed rates, but they most assuredly may complain that a utility's implementation of its rate schedules has been unjust and unreasonable as to that customer. In such instances, utility overcharges are customer specific, and Section 386.390.1 provides a forum for customers to seek relief with the Commission. No other interpretation of Section 386.390.1 would be consistent with the letter or intent of the statute.

Similar circumstances apply in this instance concerning the impact of KCPL imprudence on the prices charged to GST. GST's "rate" is the formula established by the Special Contract.

¹⁹ Section 386.390 requires complaints as to the reasonableness of a utility's rates be:

1. signed by public counsel or the mayor or the president of the local legislative body within which an alleged violation occurred; or
2. signed by at least 25 consumers, or prospective consumers of the utility.

GST is not challenging the contract. From GST's perspective, the contract is just and reasonable. GST's petition, however, challenges KCPL's implementation of that contract insofar as the utility has included, and continues to include, imprudently incurred costs in its calculation of prices charged to GST under the contract.

While the Commission approved the rate formula in the Special Contract, it has not reviewed or approved the specific inputs into the prices KCPL charges GST. The Commission correctly determined that it possesses continuing jurisdiction over the contract.²⁰ KCPL has conceded that it owes GST, as it owes all customers, a duty of operating its facilities in a reasonable and prudent manner. This standard of care is reflected in the "List of Issues and Order of Witness Examination" filed with the Commission on March 13, 2000, in this proceeding, which was drafted by KCPL and approved by the other parties.

The Show Cause Order suggested that, like the improper rate classification cases, perfection of a complaint as to GST's pricing questions may be unnecessary when the issues in the complaint turn on prudence (Show Cause Order, p. 7). Indeed, no other perspective on the Commission's jurisdiction would be rational. The Commission has an overriding statutory duty to prevent an electric utility from collecting any unjust or unreasonable charge. Section 393.130.1, RSMo. This obligation is as applicable to an incremental cost-based customer-specific contract approved by the Commission as it is to generally applicable tariffed rates.

The Commission needs to interpret its jurisdiction under Section 386.390.1 to be consistent with its duty under Section 393.130. A basic canon of construction is that a statute should be interpreted so as not to render one part inoperative, and to avoid a result contrary to the

²⁰ See Order dated July 29, 1999.

apparent intent of the legislature. Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237 (1985); Certified Color Mfrs. Ass'n v. Mathews, 543 F.2d 284, 296 (D.C. Cir. 1976).

Any ambiguities should be resolved in a manner designed to give effect to all parts of the statute. Noble v. Marshall, 650 F.2d 1058, 1061 (9th Cir. 1981). By all means, a statute should not be construed in a way that emasculates one of its provisions. Bridgeport Hydraulic Co. v. Council on Water Co. Lands of State of Conn., 453 F.Supp. 942, 949 (D.C.Conn., 1977); affirmed 439 U.S. 999 (1977).

It is unjust and unreasonable for a utility to assign a customer to an incorrect, higher cost, rate schedule because the Commission did not authorize the utility to charge the costs included in the more expensive rate to that customer. It similarly is unjust and unreasonable for KCPL to include imprudently incurred costs in its calculation of incremental costs charged to a customer pursuant to a formula in a special contract because the Commission did not authorize KCPL to include unreasonable and excessive costs in its calculation of those prices. In both instances, the nature of the complaint, though customer specific, falls within the basic thrust of Section 386.390.1, which encourages customer complaints to be brought before the Commission. The 25-customer requirement as to complaints aimed at the overall reasonableness of a utility's rates plainly is aimed at limiting general rate case dockets. It was never intended to frustrate the basic intent of Section 386.390.1 or to cut off Commission authority to redress the impacts of utility mismanagement. GST's Petition/Complaint is in all respects sufficient, and the Commission has authority to provide the relief GST requests.

D. The Filing of GST's Petition Outside of a General Rate Setting is Consistent with the Commission's Direction to GST

As noted in paragraphs numbered 5-7 in the "Background" section above, GST sought to raise its concerns as to the adequacy of KCPL's service, the effect of KCPL's imprudent

operating practices on GST's electricity prices and related issues in the KCPL rate settlement docket, ER-99-313. In denying GST's application for intervention and requests for relief, the Commission effectively instructed GST to file a Petition or Complaint to establish a docket to address GST's concerns on a separate track from the general rate case. This, of course, is precisely what GST sought to accomplish in the Petition for Investigation filed in May 1999.

The Commission must recognize that if it takes an unreasonably narrow view of its jurisdiction in this docket, it will deny GST its due process rights to be heard. GST did not understand the Commission's Order in Case No. ER99-313 to intend to deny GST a hearing on these issues altogether. GST took the Commission's docketing of the Petition in this proceeding to be consistent with its intent to provide for a full hearing on GST's concerns without delaying the general rate reduction promised by the rate settlement.

II. The Arbitration Provisions of the Special Contract Do Not Affect Commission Jurisdiction

There are two provisions in the Special Contract that are relevant to the Commission's inquiry as to the effect of the dispute resolution section of the Contract. The first is obviously Section 7.5 Dispute Resolutions. The full text of that Section states as follows:

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 arbiter(s) may be entered in any court having jurisdiction thereof.

On its face, the import of this provision would seem to require any or all disputes between the parties concerning the contract to be settled by arbitration. That, in fact, is not the case. While it is possible that many types of disputes that could arise from the parties' interpretation or actions under the Contract could be resolved through arbitration and enforced by

courts, the issues presented in this case fall within the primary and exclusive jurisdiction of the Commission. As previously indicated, the Commission has primary and exclusive jurisdiction over the safety and adequacy of the provision of electric services as well as the justness and reasonableness of the charges for those services. GST has properly raised issues concerning whether KCPL has operated its facilities and otherwise behaved in a prudent manner. Further, GST has contended that imprudently incurred costs cannot lawfully be recovered from customers. The Commission is the only entity with both the authority and expertise to resolve the subject dispute.

The second provision in the Special Contract relevant to the Commission's inquiry is set forth in Section 7.2. That Section provides as follows:

Commission Authority. This agreement is in all respects made subject to the jurisdiction and authority of the Commission. Notwithstanding any other provisions of this agreement, nothing in this agreement shall be construed as divesting or attempting to divest the Commission or other regulatory agency or body or any party hereto of any of its rights, jurisdiction, power or authority vested in it by law or provided in any governmental regulatory act or law.

The plain language of this Section evidences the parties' intent not to waive any of their rights or disturb in any way the Commission's authority over the Contract or the parties. Further, it expressly supersedes any other provision in the Contract. It must, therefore, be concluded that the Commission's jurisdiction has been properly invoked in this case.

CONCLUSION

For the reasons stated herein, GST urges the Commission to find that it possesses jurisdiction over the issues raised in GST's Petition/Complaint in all respects, including the areas raised by the jurisdictional questions posed in its Order Concerning Show Cause Hearing.

Respectfully submitted,

LATHROP & GAGE, L.C.

By:



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**ATTORNEYS FOR GST STEEL
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, postage prepaid, to all counsel of record as shown on the following service list this 17th day of March, 2000.

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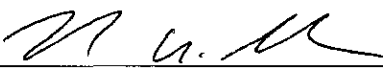
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