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ROBERT G. SCHEMENAUER

M. DIANNE DRAINER
Vice Chair

Missouri Public Service Commission

POST OFFICE BOX 360
JEFFERSON CITY, MISSOURI 65102
573-751-3234
573-751-1847 (Fax Number)
<http://www.ecodev.state.mo.us/psc/>

March 17, 2000

BRIAN D. KINKADE
Executive Director

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Director, Research and Public Affairs

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Director, Utility Operations

ROBERT SCHALLENBERG
Director, Utility Services

DONNA M. KOLILIS
Director, Administration

DALE HARDY ROBERTS
Secretary/Chief Regulatory Law Judge

DANA K. JOYCE
General Counsel

FILED²

MAR 17 2000

Missouri Public
Service Commission

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

RE: Case No. EC-99-553 - Kansas City Power & Light Company

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and the appropriate number of conformed copies of the **MEMORANDUM OF THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION IN RESPONSE TO THE ORDER REGARDING SHOW CAUSE HEARING.**

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,

Lora L. Shemwell
Assistant General Counsel
(573) 751-7431
(573) 751-9285 (Fax)

LLS:sw
Enclosure
cc: Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED²

MAR 17 2000

Missouri Public
Service Commission

GS Technology Operating Company, Inc.,)
doing business as GST Steel Company,)

Complainant,)

v.)

Case No. EC-99-553

Kansas City Power & Light Company,)

Respondent.)

MEMORANDUM OF THE STAFF

OF THE MISSOURI PUBLIC SERVICE COMMISSION

IN RESPONSE TO THE ORDER REGARDING SHOW CAUSE HEARING

COMES NOW the Staff of the Missouri Public Service Commission and in response to the Order Concerning Show Cause Hearing, states as follows:

The Commission ordered Parties to this case to file Memoranda on two issues concerning Commission jurisdiction. A brief history of GST's attempts to bring this matter to the attention of the Commission may be useful. GST filed a Request for Emergency Relief and Investigation in Case No. ER-99-313,¹ the KCPL rate reduction case. In that case, KCP&L 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

¹ In the Matter of the Stipulation And Agreement Reducing the Annual Missouri Retail Electric Revenues of Kansas City Power & Light Company.

Commission exercising its jurisdiction to review GST's arguments and evidence related to GST's Special Contract with KCPL."²

Of course, no party may waive subject matter jurisdiction, but KCPL has specifically waived any other objection that it might have concerning the Commission's jurisdiction to "review GST's arguments and evidence related to GST's Special Contract."³ For KCPL to raise objections now would seem disingenuous.

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."⁴ Subsequently GST filed its Petition for an Investigation as to the Adequacy of Service Provided by the Kansas City Power & Light Company and Request for Immediate Relief. GST did not call its petition a complaint, but the Commission has determined that this Petition is a complaint by GST.⁵

In that order the Commission also posed two questions to be answered by the parties.

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 & Light Company, inasmuch as it is not perfected pursuant to Section 386.390.1 RSMo?

² Reply of Kansas City Power & Light to Response of GST Steel, filed by KCPL in Case No. ER-99-313 on March 1, 1999.

³ *Id.*

⁴ Order Denying Intervention and Approving Stipulation and Agreement, Case No. ER-99-313, April 13, 1999.

⁵ Order Concerning Show Cause Hearing, February 17, 2000.

Section 386.390. 1 RSMo (1994) provides that "complaint may be made . . . by any corporation or person . . . by petition or complaint in writing, setting forth any act or thing . . . 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 or telephone corporation, unless the same be signed by 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 or telephone service."

This statutory provision 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 more consumers or prospective consumers or purchasers. The GST filing in this case, so far as it may be making a claim concerning the justness or reasonableness of rates, does not meet this criteria. As the Commission correctly stated " GST has not perfected its Complaint by any of these three alternative methods."⁶

The Commission has dismissed other cases because of the lack of perfection of a complaint under Section 383.390.1 RSMo.⁷ 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

⁶ Order Concerning Show Cause Hearing, February 17, 2000.

⁷ The Commission dismissed over forty telephone complaints because of lack of "perfection" of the complaint. See ex. TC-93-58.

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.⁸ The Commission could dismiss any portion of the complaint as it relates to the justness and reasonableness of rates and charges. GST however, specifically states that it is not challenging the justness and reasonableness of its rates under the Special Contract.

3. GST is a special contract customer because no tariff is adequate for GST’s unique load and usage requirements. GST is not seeking to improve or alter its Agreement with KCPL. GST is a captive customer of KCPL, and its rate is a regulated rate, just like any other rate, including tariffed rates. GST is simply seeking the equitable implementation of its contract and is attempting to ensure that it is not subject to unjust and unreasonable charges.⁹

Under these statutory complaint provisions, any corporation may file a complaint with the Commission concerning any other thing that it claims is in violation of the law or Commission rules. GST seems to be alleging that it is being overcharged under the rates of the Special Contract. The Commission has not dismissed the complaints of individuals or individual corporations complaining about overcharges under a tariffed rate because there was fewer than twenty-five complainants.¹⁰ It would seem that GST’s complaint about overcharges under its Special Contract would be a similar situation to a complaint about overcharges under a tariffed rate.

In *Inter-City Beverage* several industrial and commercial customers of KCPL filed a class action in Jackson County Circuit Court. In that case, KCPL argued that the circuit court did not have jurisdiction because “availability and applicability of rates and services [is] a matter exclusively conferred upon the MPSC.”¹¹ The Western District Court of Appeals noted in that

⁸ *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20, 26 (Mo. App. 1973).

⁹ Petition for an Investigation as to the Adequacy of Service Provided by the Kansas City Power & Light Company and Request for Immediate Relief at p. 2.

¹⁰ *State ex rel Inter-City Beverage*, 889 S.W.2d 875, 885 (Mo. App. 1994)

¹¹ *Id.* at 398

case that the "parties do not request a decision as to which provision should determine the tariff, but rather they seek a ruling as to which tribunal should make that decision: the MPSC or the circuit court." The Court continued:

Our Supreme Court has determined that the regulation and fixing of rates or charges for public utilities, and the classification of the users or consumers to whom the rates are chargeable is the function of the MPSC. *Id.* In *Buzard*, the Puritan Compressed Gas Corp. sought a refund from the KCP & L for amounts paid for its electric service, contending that its electric bill should have been calculated using the lower of the two rate schedules filed with and approved by the MPSC instead of the higher rate. *Id.*, 168 S.W.2d at 1045. KCP & L challenged the jurisdiction of the circuit court arguing that the availability and applicability of rates and services was a matter exclusively conferred upon the MPSC. *Id.* The respondent contended that the court had jurisdiction because the claim was for overcharges for part of one year and for the prior years and a determination as to which of two rates in question were applicable to the plaintiff. *Id.*, 168 S.W.2d at 1047. The Supreme Court reviewed the relevant statutes, which for our purposes remain the same today, and held that the MPSC had exclusive jurisdiction to determine which of two approved rates should be charged to the customer. *Id.*

Chapters 386 and 393, RSMo 1986 & Supp.1993, set forth the scheme by which the MPSC is granted the exclusive jurisdiction to determine, in the first instance, the interpretation of the lawful rate applicable to the service provided to the customer. *See also*, *DeMaranville v. Fee Fee Trunk Sewer, Inc.*, 573 S.W.2d 674 (Mo.App.1978), in which the court held that the first step to obtaining a decision must be before the MPSC.

Staff suggests that based on these cases, the Commission has jurisdiction primary and exclusive jurisdiction, to investigate claims of "overcharges" either under a published rate or under a Special Contract. In so far as GST is making a claim concerning "overcharges," the Commission has jurisdiction.

Staff would also note that that the Commission has statutory authority to authorize the Staff¹² to investigate the rates¹³ or the methods used by any corporation in "manufacturing,

¹² Section 386.240 RSMo (1994).

¹³ 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. . . ."

distributing, or supplying gas or electricity for light, heat or power and in transmitting the same. . . .¹⁴ The Commission may raise these issues on its own motion or may investigate as a result of complaint under those grants of authority, where there is no requirement for signature by an elected official or twenty-five consumers.

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 [as] the contract of the parties requires that disputes between them be resolved through arbitration.

In rebuttal testimony Staff posed the question of how differences are to be resolved in light of the contract provisions regarding disputes or differences. Staff suggested that there are provisions governing dispute resolution that the parties to the contract are not using to resolve their differences. (Proctor Rebuttal at 6, 7). Dr. Proctor noted that the parties apparently have not been able to solve their differences in the manner specified in the contract.

Since the effect of the contract provisions on the parties to the contract may be dependant on the intent of the parties, whether or not the arbitration provision is binding on the parties is something that the parties to the contract should probably address first, and to which the Staff may respond.

However, Staff would suggest that generally the right to arbitrate given by a contract may be waived, and that such waiver may be express or implied from conduct.¹⁵ Since neither party has acted to enforce the dispute resolution provisions of the contract, Staff might assume that both parties by their conduct have acted to waive the provision and proceed with the case at the Commission.

¹⁴ Section 393.140.2 (1994).

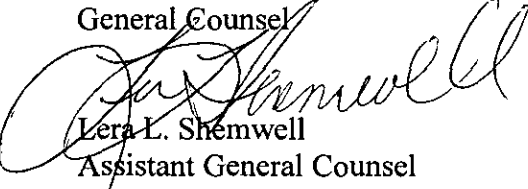
¹⁵ Reis v. Peabody Coal Co., 935 S.W.2d 625 (Mo. App. 1996); Berhorst v. J.L. Mason of Missouri, Inc., 764 S.W.2d 659 (Mo. App. 1988).

Having said that, Staff would note that it does not believe that these clauses affect Commission jurisdiction over the Special Contract or the Petition for Investigation filed by GST. Staff would point to the section of the Special Contract that addresses Commission jurisdiction and the intent of the parties to the contract concerning Commission jurisdiction.

WHEREFORE Staff submits the above comments in response to the Commission's Order Concerning Show Cause hearing and requests the opportunity to respond to the filings by the other parties to this case.

Respectfully submitted,

DANA K. JOYCE
General Counsel

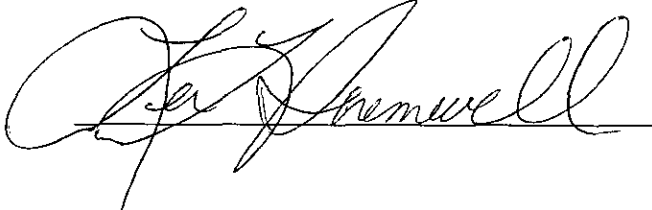


Lera L. Shemwell
Assistant General Counsel
Missouri Bar No. 43792

Attorneys for the Staff of the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 751-7431 (Telephone)
(573) 751-9285 (Fax)

Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 17th day of March 2000.



**Service List For
Case No. EC-99-553
March 17, 2000**

Office of the Public Counsel
P.O. Box 7800
Jefferson City, MO 65102

Paul S. DeFord
Lathrop & Gage
2345 Grand Boulevard, Suite 2500
Kansas City, MO 64108

Gerald Reynolds
Kansas City Power & Light Company
1201 Walnut, P.O. Box 418679
Kansas City, MO 64141-9679

James W. Brew
Brickfield, Burchette & Ritts, P.C.
1025 Thomas Jefferson Street, NW, 8th Floor
Washington, DC 20007

James M. Fischer
101 West McCarty Street, Suite 215
Jefferson City, MO 65101