

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

FILED

MAY 12 2000

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

Missouri Public
Service Commission

Complainant,)

v.)

Case No. EC-99-553

Kansas City Power & Light Company,)

Respondent.)

INITIAL BRIEF
OF
KANSAS CITY POWER & LIGHT COMPANY

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May 12, 2000

****Denotes Highly Confidential Information****

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I. INTRODUCTION

Kansas City Power and Light Company (KCPL) respectfully submits the following Initial Brief to address the issues raised by GS Technology Operating Company, Inc. d/b/a GST Steel Company (GST) in this proceeding. As discussed below, GST has the burden of proof to support its allegations contained in its Complaint. Since GST has utterly failed to support its case with the evidence required by law, GST's Complaint should be dismissed. In addition, KCPL believes that GST has chosen the wrong forum to request the relief it is seeking in this case. The relief requested by GST is largely beyond the Commission's authority to grant. In any event, for the reasons stated herein, GST's Complaint should be dismissed and the relief requested should be denied.

II. ISSUES TO BE RESOLVED

The parties have identified certain specific issues to be resolved by the Commission.

KCPL's Initial Brief will address each issue in the order presented in the List of Issues filed 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?

From KCPL's perspective, this issue is the primary issue in the case. As KCPL witness Mr. Chris Giles explained in his testimony: "This case is about price. It is about the risks and rewards of variable or incremental cost pricing under the Special Contract versus cost-based tariff pricing, which is largely fixed. GST would like to enjoy the benefits of a variable price-based contract when prices are low and have all the protections of a cost-based tariff with fixed prices when prices are high. Alternatively, GST would actually prefer a substantially lower than tariff fixed price with no risk to GST of variation in price." (Ex. No. 12, p. 3).

GST wants to pay the lowest possible price for its electric service. This would help GST meet its competition in the domestic and international steel markets. While this is an understandable goal, it is also a goal that most of KCPL's other customers would like to achieve. However, KCPL cannot (in a settlement or otherwise) provide GST with electric service at a price that does not cover the incremental costs of providing such service to GST, and also provide some contribution to its joint and common costs. Otherwise, other KCPL ratepayers would be adversely affected. (Tr. 396).

The competent and substantial evidence in this proceeding demonstrates that the rates charged under the Special Contract continue to be "just and reasonable." Under the existing Special Contract, KCPL is recovering its incremental cost of providing service to GST as well as a minimal level of contribution to its joint and common costs. Therefore, KCPL believes that the

rates contained in the Special Contract are "just and reasonable." In addition, as discussed below, the evidence also demonstrates that KCPL has properly applied the contract rates to GST's electric usage throughout the term of the Special Contract. As a result, the Commission should find that the charges imposed under the GST/KCPL Special Contract have been "just and reasonable" over the period of the contract.

Explanation of the Special Contract

In 1994, the Commission approved the terms of the Special Contract in Case No. EO-95-67. (See Ex. No. 17). The parties have been operating under this contract ever since that time. As Dr. Proctor and Mr. Giles explain in their respective Rebuttal Testimony (see Ex. Nos. 8 and 12), there are two primary components of the contract. First, there is a fixed component. The Special Contract established a fixed nonvariable component for the entire term of the ** _____ **¹ year contract² (Tr. 369). Unlike other ratepayers, GST does not make a full contribution to KCPL's embedded costs. The fixed component contained in the Special Contract is not linked in any form or fashion to changes in KCPL's fixed costs of production.

The ** _____ ** per kwh adder was designed to ensure that GST's rates provide some minimal level of contribution to KCPL's joint and common costs. (Tr. 372). As explained by Dr. Proctor, the ** _____ ** per kwh adder was approved by the Commission Staff after taking into account GST's competitive situation in the steel markets:

** _____

1 Highly Confidential information is designated as ** _____ **, pursuant to the Protective Order.

2 The fixed component is made up of a fixed demand charge, a fixed delivery charge, and a fixed adder that is designed to provide contribution to KCPL's joint and common costs. (Ex. No. 12NP, p. 4) The majority of the fixed component is the ** _____ ** per kwh adder.

 ** (Tr. 371, Ex. No. 8HC, p. 4-5).

Accordingly, if KCPL adds a new power plant to its system, GST would not be required under the terms of the Special Contract to pay any additional amount to cover the increased fixed or nonvariable cost. (Ex. No. 12NP, p. 4). Similarly, if KCPL obtains additional insurance, as it did when it obtained the extra expense endorsement in 1994, GST would not be required to pay any additional amount to cover the increased 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 either. As the term implies, this component is fixed over the term of the ** _____ ** year contract no matter what happens to KCPL's nonvariable costs of production. The second component of the Special 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 Special Contract defines the variable component as fuel plus variable operations and maintenance expenses, 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, then 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 purchased power costs go up, then GST has agreed to pay a higher rate for that component of its service.

Contract Savings

Essentially, GST has entered into a bargain with KCPL that in exchange for the opportunity to pay rates that are less than generally available tariffs, GST accepted the risk related to KCPL's variable cost of production. This 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. In fact, Mr. Giles has calculated that GST has saved ** _____ ** as compared to the otherwise applicable tariffs. Ex. No. 12HC, Schedule CBG-3, p. 1, shows that GST saved ** _____ ** respectively, for the years 1994 through 1998. Even with the significant increase in the curtailment credit³ and the higher incremental hourly prices paid by GST under the Special Contract, GST paid ** _____ ** in 1999 under the Special Contract than it would have paid under the LPS tariff combined with curtailment credit of \$35 per kw summer season. (Ex. No. 12HC, pp. 8-9) GST witness Brian D. Smith indicated that he had no reason to disagree with these savings calculations. (Tr. 206).

Under the terms of the Special 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 Special Contract are too high, it may exercise its option to go to the tariffs. This was a safety net provision that was negotiated by GST's attorneys. It ensures that if the provisions of the Special Contract ever work to GST's disadvantage, GST could always go to the Commission-approved tariffs for service. To date, GST has not chosen to utilize this safety net provision. (Tr. 202). Dr. Proctor explained the major reason that GST has not availed itself of the option of

³ KCPL increased the curtailment credit in 1999 from \$16 per kw summer season to \$35 per kw summer season. (Ex No. 12NP, p. 8).

taking service under a regular rate schedule is

**

____ ** (Tr. 375; Ex. No. 8HC, p. 9). In fact, Dr. Proctor is not aware of any KCPL customer who is receiving electricity at a ** _____ ** overall average rate per kwh than GST. (Tr. 371).

Operation of the Special Contract

The Special Contract has been operating in the manner that was expected when the parties entered into the Contract in 1994. As explained by Dr. Proctor, there was always a risk to both GST and KCPL that the incremental costs of production would change. (Tr. 372):

Q. [Fischer]: Would it be correct to conclude from your testimony on that page that you believe the contract has been operating as you expected it would?

A. [Dr. Proctor]: That's correct.

Q. [Fischer]: Would you agree that there always was a risk to both GST and KCP&L that the incremental cost of production could change, either go up or down over the life of the contract?

A. [Dr. Proctor]: Yes, I would agree with that.

In summary, the prices under the Special Contract continue to be lower than KCPL's tariffed rates. According to Section 386.270, RSMo 1994,⁴ the tariffs approved by the Commission are presumed by law to be "just and reasonable." This fundamental tenet of the PSC Law indicates that GST is receiving service at substantially reduced prices than those presumed by law to be "just and reasonable." Since GST's contract rates continue to be less than if GST exercised its contractual right to take service under the tariffs (Tr. 375), it is difficult to understand how the contract rates are in any way unjust or unreasonable, unless they are not

⁴

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

providing sufficient contribution to the joint and common costs of KCPL, thereby potentially harming KCPL's other ratepayers.

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

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

KCPL has properly accounted for the insurance proceeds according to the accounting procedures mandated by the Uniform System of Accounts. (Ex. No. 15). As conceded by GST witness Steven Carver in his Surrebuttal Testimony (Ex. No. 2, p. 14), Mr. Carver's testimony criticizing KCPL's accounting practices contained in his Direct Testimony "reached an incorrect conclusion." *Id.* Therefore, 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?

The Commission 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 which is beyond the statutory authority of the Commission.

In GST's "Petition for an Investigation as to the Adequacy of Service Provided by the Kansas City Power & Light Company and Request for Immediate Relief" at 2, GST requests that the Commission give it relief that it characterized as "...the equitable implementation of its contract." The "equitable implementation of its contract" would require the Commission to sit in

equity to construe and enforce the contract. A Commission order that prohibits KCPL from charging the rates required by the Special Contract would require the Commission to exercise equitable powers to reform the Special Contract. Likewise, a Commission order that requires KCPL to use its insurance proceeds to lower GST's bills would require construction, enforcement and reformation of the contract. Further, GST apparently wishes a refund for costs it claims KCPL improperly billed to it under the Special Contract. The Commission does not have the power to do any of these things. As the Commission has already recognized in this proceeding, the relief requested by GST is beyond the authority of the Commission.

In its November 2, 1999, Order Regarding Kansas City Power and Light Company's First Motion to Compel Discovery, the Commission clearly 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).

The Commission's analysis of its role and statutory authority is consistent with Missouri case law. After a rate design case, the Commission has the power to prospectively place GST on a new tariff if it finds that the rates being paid by GST are "unjust and unreasonable," and that no existing tariff is appropriate for GST. However, GST failed to provide any evidence that there is no tariff adequate for GST's usage characteristics. (Ex. No. 12NP, pp. 7-8) But the Commission is without power to enforce or construe contracts or to promulgate an order requiring a pecuniary reparation or refund. Thus, the Commission may not provide for "the equitable implementation of (GST's) contract," nor can it rewrite, enforce or construe GST's contract to provide that GST will only be obligated to pay an amount to KCPL determined as if Hawthorn 5 were in operation, nor can it 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, it cannot order any refunds under a contract.

It is clear that the Commission has the power to place GST on a tariff rate. This even includes the power of the Commission to void a contract that it has previously approved. "The Public Service Commission has full authority to investigate complaints about rates or service and can make orders to remedy the situation for the future...." May Dep't Stores Co. v. Union Elec. Light & Power Co., 107 S.W. 2d 41, 58 (Mo. 1937). See also Kansas City Power & Light Co. v. Midland Realty Co., 93 S.W. 2d 954 (Mo. 1936). The Commission has recognized this power in this case, "The Commission is authorized, after hearing, to set just and reasonable prospective

rates.” Order Regarding Kansas City Power and Light Company’s First Motion to Compel Discovery at p. 8. However, the Commission can neither declare nor enforce equity or the law. The Missouri Supreme Court has made this abundantly clear.

In Board of Pub. 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 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. To alter the contract between KCPL and GST would require the Commission to sit in equity and grant the equitable remedy reformation of the contract. Not only can the Commission not sit in equity but in the Commission’s own words, “The Commission is without authority ... to alter their special contract.” Order Regarding Kansas City Power and Light Company’s First Motion to Compel Discovery at p. 8.

Similarly, but specifically dealing with the power of the Commission to order a utility to pay a refund or damages to a customer, the Missouri Supreme Court wrote, “The Public Service Commission is an administrative body only, and not a court, and hence the commission has no power to exercise or perform a judicial function, or to promulgate an order requiring a pecuniary reparation or refund.” Straube v. Bowing Green Gas Co., 227 SW. 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 Commission may not do. State ex rel. Utility Consumers Council of Missouri v. Pub. Serv. Comm’n, 585 S.W.2d 41 (Mo. banc 1979) The Commission has acknowledged this limitation in this case in its

Order Regarding Kansas City Power and Light Company's First Motion to Compel Discovery, at 8, where the Commission stated: "The Commission is without authority to award money to either GST or KCPL...."

"Since the Public Service Commission is not a court, it can neither enforce, construe nor annul contracts...." May Department Stores Co., at 49 (Mo. 1937). 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 over 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). See also Gaines v. Gibbs, 709 S.W.2d 541 (Mo.App. 1986).

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.

In light of the cited cases and the Commission's own orders in this case, it is clear that the Commission is without the authority to order the "the equitable implementation" of the Special Contract by requiring KCPL to re-calculate GST's bill using hypothetical costs as if Hawthorn 5 had not been lost, or by requiring KCPL to credit GST for replacement power insurance proceeds that KCPL received following the explosion.

The Commission does have 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). Of course, under the Special Contract GST can itself choose to receive its electric service pursuant to a Commission-approved

tariff, or can choose to be placed on the lowest rate which KCPL charges any customer receiving similar service. (Ex No. 12HC, Schedule CBG-1, p. 12; Tr. 202).

Even if the Commission had the authority to grant GST's request for a refund based upon the replacement power insurance policy, 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 under traditional regulatory principles because the terms of the Special Contract governs GST's rights. (Ex No. 8NP, pp. 7-11). As explained by Dr. Proctor, "First, whatever GST Steel is entitled to receive from KCPL is determined by the conditions set out in the existing Agreement. There are no specific conditions in the Agreement related to sharing insurance compensation that KCPL might receive because of unit outages." (Id. at 9)(See also Tr. 172 and 176) Likewise, KCPL's insurance policy itself does not include any provision that would entitle any customer, including GST, to receive the insurance proceeds. (Tr. 186)

In summary, the Commission should find that it does not have the authority to order KCPL to pay GST insurance proceeds received by KCPL as a result of the explosion of the Hawthorn plant. Even if the Commission had such legal authority, based upon the competent and substantial evidence in the record, the Commission should find it is not reasonable or appropriate to award GST insurance proceeds that KCPL has received under its 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 Special Contract, using hypothetical costs of production, assuming that the

Hawthorn explosion had not occurred. As discussed above, the Commission does not have the statutory authority to order KCPL to award damages or grant equitable relief to GST. In addition, the Special Contract, as conceded by GST witness Smith during cross-examination, has no provision for the recalculation of the bill based upon hypothetical production costs. (Tr. 211). GST's request amounts to a request for the awarding of damages, or other equitable relief. GST witness Smith himself characterized the purpose of his calculations contained in his testimony as determining GST's "damages." (Tr., 206, 208):

- Q. [Dority]: Would it be correct to conclude that GST believes that this Commission should order that GST be awarded
** _____ ** in addition to the ** _____ ** of
savings that GST has already obtained by taking electric
service under the contract?
- A. [Smith]: Well, I wouldn't exactly agree with that because I don't
consider the ** _____ ** savings as that. It's a price
arrived at by comparing what they were actually billed
under one arrangement to another arrangement.
- Q. [Dority]: But what you are asking and what your testimony would
reflect is that the - whatever that dollar amount is, the
** _____ ** or this ** _____ **
as you've expressed it a few moments ago would be in
addition to that amount; is that correct?
- A. [Smith]: **I'm saying that they suffered damages of**
** _____ **.

(Tr. 208). (emphasis added)

Since the Commission has no authority to award monetary damages or other equitable relief, the Commission should dismiss GST's request for relief in this proceeding.

1. Hawthorn Explosion

Even if the Commission had the legal authority to give GST the relief it requests, it would not be reasonable or appropriate to recalculate the GST bills since KCPL has followed the

provisions of the Special Contract in billing GST. GST does not dispute this fact. However, GST has requested that the Commission order a retroactive ** _____ ** adjustment to its bill based upon the unsubstantiated allegation that KCPL was imprudent in connection with the explosion of the Hawthorn plant on February 17, 1999. As explained below, GST has failed to meet its burden of proof on this issue. It would therefore be unlawful, unreasonable and an abuse of discretion for the Commission to grant GST's request to recalculate its bills, even if it were otherwise within the Commission's authority.

2. GST has failed to meet its burden of proof to show that KCPL was imprudent in the operation of the Hawthorn 5 Unit

In this proceeding, GST, as the Complainant, has the burden of proof. Missouri law requires GST to demonstrate with competent and substantial evidence that its allegations are true. GST has alleged that KCPL has acted imprudently with regard to the explosion that occurred at the Hawthorn plant on February 17, 1999. However, GST has failed to meet its burden of proof, and, therefore, GST's allegations related to the Hawthorn explosion should be dismissed.

As Deputy Chief Regulatory Law Judge Kevin Thompson correctly observed at the conclusion of the hearings conducted on April 17 and 18, 2000:

I am concerned that there have been no fact witnesses in this case. There have been many, many experts who may have all been fine experts, but I have not heard any fact witnesses. So you may want to address yourself to the questions as to whether there is a sufficient record to support the Commission in making a finding of fact with respect to the various facts that you would like us to find, if I have stated that in a way that makes sense.

(Tr. 503-04).

KCPL wholeheartedly agrees with Judge Thompson's observation, especially with regard to GST's allegation that KCPL has acted imprudently with regard to the Hawthorn Incident. GST has failed to provide the Commission with any fact witnesses that can testify from personal knowledge regarding the facts surrounding the Hawthorn Incident. As a result, GST has placed the Commission in the position of rendering Findings of Fact on complex factual issues for which GST has failed to submit competent and substantial evidence.

The Commission Staff also has independently reviewed GST's allegations and evidence in this proceeding. Based upon this independent review, the Commission Staff witness Dr. Eve Lissik has testified that she was not convinced that GST has provided enough evidence to substantiate their claims regarding the Hawthorn explosion.

- Q. [Commissioner Murray]: In regard to the Hawthorn plant, did you hear Mr. Ward's testimony?
- A. [Dr. Lissik]: Yes. I did.
- Q. [Commissioner Murray]: And did you read his testimony?
- A. [Dr. Lissik]: Yes, I have.
- Q. [Commissioner Murray]: Well, let me ask it this way. Did you find persuasive evidence in the testimony that was presented to show that KCP&L had provided evidence that there was – provided enough evidence to substantiate their claims regarding the Hawthorn explosion?
- A. [Dr. Lissik]: KCPL or GST?
- Q. [Commissioner Murray]: GST.
- A. [Dr. Lissik]: **After reviewing GST's testimony and listening to Mr. Ward's testimony, personally I still have questions . . .**

Q. [Commissioner Murray]: Okay, but from the testimony that was presented, what we have on the record here, I can assume that means you're not yet convinced?

A. [Dr. Lissik]: That's correct.

(Tr. 328-29)(emphasis added)

- a. GST's "investigation" of the Hawthorn Incident is totally inadequate for the Commission to rely upon in its Findings of Fact in this proceeding.

In this proceeding, GST has presented the testimony of Mr. Jerry Ward, which discusses his theories regarding the events that occurred at the Hawthorn plant on February 16 and 17, 1999. However, his entire 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). Although he bases his opinions on the provisional statements provided by KCPL's employees, Mr. Ward did not discuss any aspect of the Hawthorn Incident with any of these KCPL employees. (Tr. 242). Nor has Mr. Ward discussed the chain of events that preceded the Hawthorn Incident with: (1) other 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).

Mr. Ward conducted his "investigation" by spending six (6) hours at the Hawthorn site reviewing KCPL's documents related to the Hawthorn Incident prior to filing his Direct Testimony. (Tr. 245-46). Subsequently, he returned to the Hawthorn plant and spent five (5) additional hours conducting his "investigation" before filing his Surrebuttal Testimony. (Tr. 247-48). During his "investigation" at the Hawthorn plant, Mr. Ward spent his time (*i.e.*, eleven (11) hours in total) reviewing thousands of pages of 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 at the Hawthorn plant (or anywhere else) interviewing eye witnesses to the explosion. (Tr. 248). As a result, Mr. Ward's statements regarding the Hawthorn Incident are based solely 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).

During cross-examination, Mr. Ward candidly summed up his efforts to verify the facts contained in the witness statements upon which he relied:

Q. [Fischer]: Did you take any steps to determine if the information you're relying on is still valid?

A. [Ward]: **I read the statements. That's the extent of my discussions about it with these people.**

(Tr. 243). (emphasis added)

b. **The Commission should not rely upon GST's conclusions regarding the Hawthorn Incident since its investigator has no previous experience investigating power plant explosions and has misinterpreted documents related to the Hawthorn Incident.**

Mr. Jerry Ward, GST's investigator of the Hawthorn Incident, candidly admitted 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.

Q. [Fischer]: I'm not sure I understood your answer. Did you say you consider yourself to be an expert in the formal methods of investigating power plant explosions?

A. [Ward]:

In explosions per se, I said no, I've not investigated an explosion.

(Tr. 237-38).

In addition, Mr. Ward 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 this general studies degree, Mr. Ward did not major in any subject, but 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). As a result, Mr. Ward has no educational background or professional experience to qualify him as an expert in the investigation of power plant explosions.

Notwithstanding his lack of experience in the investigation of power plant explosions, he has made sweeping allegations and conclusions that KCPL was imprudent in its operation of Hawthorn 5 Unit on February 16 and 17, 1999. (Ex. Nos. 5 and 6). The Commission should dismiss these allegations and conclusions on the basis that there is no competent and substantial evidence in the record to support such claims.

Although Mr. Ward claims that "[t]here really are no facts in dispute" (Ex. No. 6, p. 17), the record in this proceeding would indicate otherwise. For example, Mr. Ward claims that:

The cycling of a wastewater sump while a clogged sewer line was under repair caused the wastewater to flood in the Hawthorn control room on February 16, 1999.

Id. However, during cross-examination, Mr. Ward exhibited considerable uncertainty regarding this conclusion. Apparently, Mr. Ward's conclusion was based solely upon his understanding of

a statement from Mr. McLin, rather than his own independent judgment, on the cause of the flood.

Q. [Fischer]: Sir, in your testimony, are you suggesting that the sump pump, which would be the grinder pump, came on and that caused there to be a flood in the control room restroom of Hawthorn 5?

A. [Ward]: I'm only suggesting what Mr. McLin said in his statement.

Q. [Fischer]: So if Mr. McLin's statement is wrong, then you would be wrong; is that right?

A. [Ward]: **I would be wrong to the extent that that's where it came from** . . . (Tr. 258)(emphasis added)

During his review of documents at the Hawthorn site, Mr. Ward reviewed Exhibit No. 19, which is a description of the Hawthorn Sanitary Sewer System. (Tr. 253, 260). This exhibit clearly states that a check valve⁵ was installed in the system to prevent backflow into the Hawthorn 5 restroom: "A check valve was installed upstream of the point of intersection to prevent backflow into the H5 [Hawthorn 5] control room restroom." (Ex. No. 19). Exhibit No. 19 also referred to a printed map designated as HC/200/60/EO159,⁶ which showed a graphic depiction of the Hawthorn Sanitary Sewer System. (Tr. 255). Although Mr. Ward had apparently not taken time to review this map during his visit to the Hawthorn plant (Tr. 256), he acknowledged during cross-examination that it clearly showed a four-inch check valve between the sump pumps and the Hawthorn restroom:

Q. [Fischer]: Okay. Let's look at this detail of this area right here, which is blown up on this map over here on the left-hand side.

⁵ Mr. Ward testified that a check valve is a device that is placed in a piping system so that the flow of fluids will go in only one direction. It is designed to close and prevent a backflow of fluid in a piping system. (Tr. 251).

⁶ This map was marked for identification as Exhibit No. 20, but not admitted into the record. (Tr. 255, 288).

Does that indicate to you as an engineer or a person that's familiar with engineering that there is a four-inch check valve between the point where the discharge comes in and the Hawthorn restroom?

A. [Ward]: The control room restroom, yes, it does. (Tr. 258-59).

Mr. Ward also acknowledged during cross-examination that with a check valve in a sewer line, there should not be any water backup from the sewer line into the restroom, even if the sump pumps came on and pumped water in the wrong direction, assuming the check valve was operating properly. (Tr. 251, 259). However, based upon his limited investigation, Mr. Ward was unable to testify whether or not the check valve was operating on February 16, 1999. (Tr. 259). As a result, Mr. Ward acknowledged that it was possible that wastewater did not come from the sewer line at all, but could have come from an entirely different location. (Tr. 261).

Again, based upon someone else's statement, 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).

Q. [Fischer]: Do you know if those outside maintenance contractors had anything to do with the water that came into the control room on February 16?

A. [Ward]: They had to do with it to the extent that they had removed a toilet from the control room restroom. That was indicated in the statements. Beyond that, I'm not certain.

Q. [Fischer]: You're not certain if they may have caused the flood that resulted in water in the control room?

A. [Ward]: **I'm not certain. I'm just relying on your operators' statements.** (Tr. 263). (emphasis added)

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 upon a misunderstanding of KCPL's Safety Manual and its hold procedures. Mr. Ward was under the erroneous impression that KCPL's hold procedures require that KCPL personnel take entire systems out of service while repairs were going on somewhere else on the premises, even though no workers were working on those systems. (Tr. 275). However, KCPL's hold procedures are not designed for this purpose. They are designed for worker protection when a system could become unexpectedly "alive" and place workers in a zone of danger. (Tr. 266-67). Unfortunately, Mr. Ward did not take the time to ask anyone at KCPL whether or not there were any workers working on the sump pumps or gas lines on February 16 or 17, 1999. (Tr. 268-69, 275). Nor did he discuss with any KCPL personnel the reason that holds were not placed on these systems. (Tr. 269). As a result, Mr. Ward did not know the reason(s) that hold procedures were not employed on the sump pumps or the gas lines. (Tr. 269). Instead, Mr. Ward has jumped to the erroneous conclusion that KCPL violated its own hold procedures, based upon his own understanding of a KCPL Safety Manual. (Tr. 273-74).

In conclusion, the Commission should place little weight upon Mr. Ward's evidence or his conclusions in this proceeding. Based upon the inadequate and incomplete investigation conducted by Mr. Ward, the Commission should conclude 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 should, therefore, find 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, even if it otherwise had the legal authority to grant GST's requested relief.

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

GST has made serious allegations regarding KCPL's ability to operate and maintain its generation units in a reasonable and prudent manner. As pointed out by the Commission's Staff, however, GST has failed to provide the Commission with "basic facts" needed to judge the validity of its claims. (Ex. 9, p.11.)

GST witness Jerry Ward attempted to support GST's serious allegations by merely 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 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 frankly admitted that he was not an expert in evaluating or benchmarking the performance of public utilities. (Tr. 231) As a result, Mr. Ward would not be qualified or otherwise in a position to render an expert opinion regarding KCPL's performance relative to other public utilities.

1. KCPL's Generating Units Are Operating Within Acceptable Limits

Even though GST has not supported its allegations with competent and substantial evidence, KCPL has taken these allegations related to its operation of its generation units very seriously. 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 numerous consulting projects where she has independently 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, she has 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.

More specifically, Ms. Eldridge has concluded: "When considering equivalent availability factor and forced outage rate, KCPL units have performed above the industry average in the early 1990's and trended toward the industry average (as expected) in recent years." (Ex No. 11, p. 4) When considering operating and maintenance costs, including fuel, Ms. Eldridge explained: "KCPL costs are quite low and trending downward as is the industry average." (Id.) In fact, Iatan was a recipient of the Electric Utility Cost Group fossil productivity committee's 1999 Top 5 Lowest Busbar Award for the five-year period from 1993 to 1997. (Id.) With regard to forced outages, Ms. Eldridge found that "the number of outages experienced by KCPL units is no different than the number of significant outages experienced at the KCPL peer units." (Id.) Overall, Ms. Eldridge found no performance criteria where KCPL fell short of industry standards. (Id.)

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)

In order to support its allegations, GST relies heavily on outages that occurred in 1997 and 1998. (Ex. 5, Exhibit 5.) In 1997, the only significant outage experienced by KCPL occurred at its La Cygne 2 generating unit. (Ex. 11, p. 38) GST's own witness testified that in determining whether KCPL's practices caused a particular outage "it is important to look at specifics." (Tr. 408-09.) GST has claimed that KCPL has mismanaged its generation assets, yet it took no steps to determine if KCPL's actions caused the outages that occurred in 1997 and 1998. (Tr. 405-09.) 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) GST did not attempt to determine whether KCPL was responsible for the 1997 outage at La Cygne 2. (Tr. 405-06.) In 1998, the only significant outage experienced by KCPL occurred at its Hawthorn 5 generating unit. (Ex. 11, p. 38) As discussed in Mr. Ward's testimony, KCPL was told by its vendor that a high pressure steam pipe was seamless. In fact, the plant drawings that were provided to KCPL indicated that the steam pipe was seamless. (Ex. 5, p.10.) GST has admitted that it knows of no investigative report prepared by federal or state agencies that concludes that KCPL's practices caused the outages the occurred in La Cygne 2 in 1997 and Hawthorn 5 in 1998. As stated earlier, these two outages are the only outages that occurred in 1997 and 1998. GST has not presented any evidence that supports its allegation that imprudent practices 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 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.)

Staff did not merely conclude that GST has failed to prove its case. After carefully weighing 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 Ms. Eldridge's analysis. While GST presented the Surrebuttal Testimony of Scott Norwood (Ex. No. 7), it is important to note that he did not present any independent analysis regarding the overall performance of KCPL's generating units. Mr. Norwood merely focused on significant outages that occurred at two of KCPL's generating units, while ignoring the superior performance of KCPL's other units.

After reviewing the record in this proceeding, the Commission should conclude 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 should conclude 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?

1. GST Has Failed To Present Any Competent and Substantial Evidence Regarding KCPL's Distribution System.

GST also alleged that KCPL has failed to operate and maintain its distribution and transmission facilities in a reasonable and prudent manner. In support of its claims, GST filed the Direct Testimony of Jerry N. Ward. (Ex. 5, pp.8-10.) As stated in the Direct Testimony of KCPL witness Michael E. Bier, "Mr. Ward's [direct] 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 complaint as Exhibit G." (Ex. 14, pp. 1-2.); See KCPL's Motion to Strike Portions of the Direct Testimony of Jerry N. Ward Filed on Behalf of GST Steel Company (Filed April 11, 2000).

When GST attempted to "relay" the factual allegations contained in Mr. Lewonski's statement through Mr. Ward's testimony, it effectively deprived KCPL of the opportunity to test Mr. Lewonski's factual allegations through cross-examination. Based upon these concerns, the Commission ruled that it 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 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.) Despite this admonition, GST failed to present any fact witnesses regarding the

reliability of KCPL's distribution system. Accordingly, GST has failed to provide the Commission with a factual basis on which to rule in GST's favor.

2. KCPL Has Invested More Than \$1 Million To Improve GST's Service And Has Resolved The Distribution Reliability Complaints Raised By GST In This Proceeding.

KCPL has invested in excess of \$1 million in upgrades to that portion of its distribution system that serves GST. (Ex. 14, p. 4.) Mr. Bier's Rebuttal Testimony lists in detail the nature of these improvements. (*Id.* at 8) Mr. Bier clearly demonstrates that KCPL has taken steps to improve the reliability of the electric service that GST receives. These improvements are a part of an overall plan that has been underway since 1996. (*Id.*) His testimony also demonstrates the inaccurate and misleading statements contained in Mr. Lewonski's affidavit. (Ex. No. 14) Perhaps more importantly, 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) From KCPL's perspective, it appears that the question of the reliability of KCPL's distribution and transmission system has now been resolved. GST's allegation that KCPL's distribution system is unreliable is also belied by the fact that, with the exception of GST, no other KCPL customer has complained of reliability problems to Staff. (Tr. 323)

In summary, the Commission should find 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. Indeed, those concerns were resolved even before GST filed its Complaint in this proceeding.

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

There is no competent and substantial evidence in the record that would justify the expenditure of Staff resources to formally investigate the operation and maintenance of KCPL's generation, transmission, or 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, it would be an injudicious use of resources to open another docket to again review the evidence related to KCPL's operation of its generation, transmission and distribution facilities.

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?

As the Complainant in this proceeding, GST has the burden of proof to demonstrate to the Commission that its allegations are true. GST filed this Complaint in February 1999, and KCPL has responded to each and every allegation, and demonstrated that GST's allegations have no merit. Both GST and KCPL believe that the case should be decided based upon the existing record in this proceeding. (Tr. 133) Under these circumstances, it would be unreasonable and an

abuse of discretion for the Commission to delay the decision in this Complaint proceeding pending the outcome of a review of the Hawthorn Incident.

Conclusion

For the reasons stated herein, KCPL respectfully requests that the Commission dismiss the Petition filed by GST and adopt the recommendations of KCPL contained herein.

Respectfully submitted,



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CERTIFICATE OF SERVICE

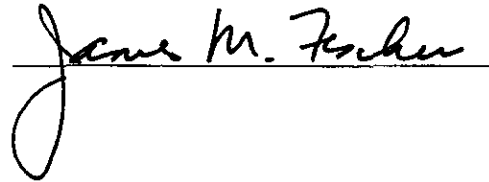
I do hereby certify that a true and correct copy of the foregoing Initial Brief has been hand-delivered or mailed, First Class mail, postage prepaid, this 12th day of May 2000, to:

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A handwritten signature in cursive script, reading "James M. Fischer", is written over a horizontal line.

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