

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

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

Complainant,)

v.)

Case No. EC-99-553

Kansas City Power & Light Company,)

Respondent.)

REPLY BRIEF ON REMAND
OF
KANSAS CITY POWER & LIGHT COMPANY

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June 1, 2004

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I. INTRODUCTION

In its Initial Brief, Kansas City Power and Light Company (KCPL) discussed at length the issues raised by GS Technology Operating Company, Inc. d/b/a GST Steel Company (GST) in this proceeding. As held by the Missouri Court of Appeals in State ex rel. GS Technologies Operating Co., Inc. d/b/a GST Steel Company v. The Public Service Commission, 116 S.W.3d 680 (Mo.App. 2003) and discussed below, GST has the burden of proof to support its allegations contained in its Complaint. Since GST has 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. While most of GST's arguments were

adequately anticipated and addressed in KCPL's Initial Brief on Remand, a few points need to be clarified and elaborated upon in this Reply Brief.

II. ISSUES TO BE RESOLVED

A. Have The Charges Imposed under the GST/KCPL Special Contract Been "Just and Reasonable" Over the Period of the Contract?

Contrary to the suggestions of GST in its Supplemental Initial Brief on Remand at 6-9, the Commission has already found that the prices being paid by GST are substantially lower than the "just and reasonable" rates approved by the Commission for tariffed services, and that GST's rates were at all times just and reasonable. (Ex. No. 12, p. 3; Report & Order, pp. 31-32). The Commission stated:

The Commission concludes, that throughout the pertinent period, KCPL's charges to GST for electric service have been just and reasonable. The charges were properly and correctly calculated under the special contract, which was freely negotiated by the parties and approved by the Commission. That contract was designed by the parties to afford GST the lowest possible rates for electric service. By virtue of its variable component, which rose and fell as KCPL's incremental costs of production rose and fell, the special contract necessarily carried with it a certain degree of risk. As Staff expert Dr. Michael S. Proctor testified, the parties apportioned these risks when they negotiated their special contract. While GST has not enjoyed rates as low as it evidently hope for, it has enjoyed rates lower than any of KCPL's tariffed rates. Thus, the Commission concludes that GST has not show that it has been overcharged by KCPL for electric service. (Report & Order, pp. 31-32)

Nothing contained in GST's Supplemental Initial Brief on Remand has shown that the Commission's findings and conclusions regarding the "justness and reasonableness" of GST's rates were in any way in error. The Commission should therefore re-affirm its original findings of fact and conclusions on this point.

Staff witness Michael Proctor testified that Staff is not aware of any customer paying a lower overall average rate than GST. (Tr. 371) GST has paid **_____** less to KCPL in the years 1994-99 than it would have paid if it had taken its electric service under the "just and reasonable" rates approved by the Commission. Ex. No. 12HC, Schedule CBG-3, p. 1, shows that GST saved **_____** respectively, for the years 1994 through 1998. These average savings amount to a **__** percent discount below the tariff rate schedules. (Ex No. 12HC, p. 3) Even in 1999 when there was a significant increase in the curtailment credit paid under the tariffs¹ and higher purchased power costs due to the loss of Hawthorn, GST paid **_____** 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). Since GST's contract rates continue to be less than if GST paid for its electric service under the Commission-approved tariffs (Tr. 375), it is difficult to understand how the contract rates are in any way "unjust or unreasonable."

GST complains, however, that KCPL analysis is "a classic 'apples and oranges' comparison that does not begin to show whether KCPL's prices to GST, relative to what is required under the Special Contract, have been just and reasonable." (GST Supplemental Brief on remand, p. 14). This is simply not the case. The tariffed rates established by this Commission (which GST had the option to take under the Special Contract) are presumed to be "just and reasonable." See Section 386.270. The fact that GST paid substantially less than the tariffed rates which are "just and reasonable" as a matter of law is conclusive evidence that the prices paid by GST during this period were not "unjust" or "unreasonable," as GST now claims.

¹ KCPL increased the curtailment credit in 1999 from \$16 per kw summer season to \$35 per kw summer season. (Ex No. 12NP, p. 8).

According to GST's Supplemental Brief on Remand, "GST has not challenged the reasonableness of the pricing formula approved by the Commission. The formula is reasonable; it is the purchase power data KCPL has included in the pricing model that is unjust and unreasonable." (GST Supp. Br. on Remand at 6-7) However, GST has not identified what specific data in the pricing model GST has deemed to be "unjust and unreasonable." Is GST suggesting that KCPL's purchase of power at the prices prevailing in the marketplace is somehow "unjust or unreasonable"? If this is the case, then GST is merely complaining that KCPL's incremental costs are higher than what it had hoped they would be. As explained by Staff witness Dr. Michael 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.

Perhaps more importantly, Dr. Proctor has testified that "it does not appear that **____

_____**" (Ex No. 8HC, p. 5) In other words, even with the higher incremental costs that have occurred in 1999, GST was still receiving its electricity in the range of the prices anticipated when GST and KCPL signed the Special Contract!

Apparently, GST believes the Commission should review each and every input into the pricing formula to determine if each input is "just and reasonable." In addition, GST apparently

believes that the Commission's review of all inputs should be done on a retrospective basis. The Commission should not go down this slippery slope. It would be extremely burdensome and difficult for the Commission to evaluate every purchased power contract, KCPL's daily performance regarding its generation units, and KCPL's other incremental operations and maintenance expenditures during the term of the Contract. However, this is the exercise that GST seems to be requesting that the Commission initiate in this proceeding. The Commission should decline GST's suggestion. The Commission should instead look at the overall result of the pricing formula contained in the Contract to determine if the rates that GST is paying are just and reasonable. Under this standard, it appears that GST's rates are "just and reasonable" and among the lowest prices in KCPL's service area.

GST wants the Commission to declare that since there was an accident at the Hawthorn plant, any purchased power costs above the embedded cost of generation of the Hawthorn plant are per se "unjust and unreasonable." This is nonsense. KCPL has purchased power on the open market paying the prevailing market prices for that purchased power. There is nothing "unjust and unreasonable" about KCPL fulfilling its obligation to serve its customers by purchasing power at the prevailing market rates.

GST also asserts that KCPL was imprudent in allowing the Hawthorn accident to occur, and that GST has been damaged because GST's rates are based upon KCPL's incremental costs which have increased. As discussed below, GST has failed to prove that KCPL was imprudent in connection with the Hawthorn Incident. However, assuming *arguendo* that GST had met its burden to prove its allegations (which it has not), then GST would have a claim for damages against KCPL. However, all parties (including GST) have now agreed that the Commission does

not have the statutory authority to award GST monetary damages. If this is GST's real complaint, then GST has chosen the wrong forum for requesting relief.

GST has erroneously claimed that "The Commission Has the Authority to Order KCPL to Recalculate GST's Bills Under the Special Contract." (GST Supp. Br. on Remand at 15) GST is confusing the Commission's authority to determine the "overcharges" resulting from the application of the wrong rate schedule by a public utility, with a court's authority to award damages to a customer that has been damaged by a public utility.

However, contrary to the position asserted by GST in its Supplemental Brief on Remand, the Commission has already rejected the GST position that the Commission may direct KCPL to recalculate its charges to GST:

The Commission cannot direct KCPL to recalculate its charges to GST for electrical service already rendered, or to be rendered, as though some portion of that electricity had been generated by Hawthorn 5 at a lower cost. That would constitute a species of equitable relief and this Commission cannot do equity. *See Soars v. Soars-Lovelace, Inc.*, 142 S.W.2d 866, 871 (Mo. 1940). Likewise, the Commission cannot direct KCPL to recalculate its charges to GST for electrical service already rendered, or to be rendered, using insurance proceeds received with respect to the Hawthorn 5 explosion to reduce the cost of replacement power. *American Petroleum Exchange, supra*. With respect to charges already paid for service already rendered, the Commission is authorized to determine that GST has been overcharged; GST may then seek a remedy in the courts. *State ex rel. Kansas City Power & Light Company v. Buzard*, 350 Mo. 763, 168 S.W.2d 1044 (1943); *State ex rel. Inter-City Beverage Co., Inc. v. Missouri Public Service Commission*, 972 S.W.2d 397, 972 (Mo. App., W.D. 1998).

The Commission has the authority to determine if the public utility has applied the wrong rate schedule to the customer, and the "overcharges" that have resulted from applying the wrong rate. This was the situation in the cases cited by the Staff in its Initial Brief. *LaHoma Paige v. Kansas City Power & Light Co.*, 27 Mo.P.S.C.(N.S.) 363 (1985); *Inter-City Beverage Co., Inc. v. Kansas City Power & Light Co.*, 889 S.W.2d 875 (Mo.App. 1994); *DeMaranville v. Fee Fee*

Sewer Co., 573 S.W.2d 674, 676 (Mo.App. 1978) In DeMaranville, the Court described the Commission's authority in an "overcharge" case as follows:

When a utility has two approved rates of service and renders service to a consumer charging the higher rate, the consumer may file a complaint before the Public Service Commission to determine the proper classification. State ex rel. Kansas City Power & Light Co. v. Buzard, 350 Mo. 763, 168 S.W.2d 1044 (banc 1943). A circuit court has no jurisdiction to consider the plaintiff's action for recovery until the Commission makes its decision regarding the rates and classification. Matters within the jurisdiction of the Public Service Commission must first be determined by it in every instance before the courts have jurisdiction to make judgments in the controversy. State ex rel. Hoffman v. Public Serv. Com'n, 530 S.W.2d 434 (Mo.App.1975; Katz Drug v. Kansas City Power and Light Co., 303 S.W.2d 672, 679 (Mo.App.1957). In the present case, plaintiffs filed the proper complaint to the Commission pursuant to the provisions of 386.390 RSMo. (Supp.1978), and the Commission concluded that Fee Fee's tariff classification of condominium service was unjust, unreasonable and unduly discriminatory. Yet, only the courts can enforce a Public Service Commission decision. The Commission has no jurisdiction to promulgate an order requiring a pecuniary reparation or refund. Wilshire Const. Co. v. Union Elec. Co., 463 S.W.2d 903 (Mo.1971); State v. Buzard, supra; State ex rel. Laundry, Inc. v. Public Service Commission, 327 Mo. 93, 34 S.W.2d 37 (1931). And in order to recover by appropriate action in the circuit court, the plaintiffs must plead and prove facts which demonstrate: (1) the lawfully established rate applicable to their classification of service; and (2) that more than the lawful rate has been collected. May Department Stores Co. v. Union Electric L. & P. Co., 341 Mo. 299, 107 S.W.2d 41 (1937).

Contrary to the allegations of GST, this case does not involve "overcharges." GST has not alleged that KCPL has applied the wrong rate schedule to its electric usage. GST's claims that it has been damaged by KCPL's actions or inactions in connection with the Hawthorn Incident. This request for monetary damages is not a claim that the Commission can lawfully address.

Based upon the competent and substantial evidence in the record, the Commission should reject GST's contention that the rates under the Special Contract are "unjust and unreasonable." Instead the Commission should re-affirm that the charges imposed in the GST Contract have been "just and reasonable" over the term of the Special Contract.

B. GST Has Failed To Meet Its Burden Of Proof To Show That KCPL Was Imprudent In The Operation Of The Hawthorn 5 Unit

In its Opinion, the Missouri Court of Appeals found that the Commission did not act arbitrarily and capriciously or abuse its discretion in deciding to give "little weight" to the testimony of GST's expert. The Court of Appeals also found that the Commission did not err in placing the burden of proof on GST to prove imprudence by KCPL. In addition, the Court found that the Commission did not err in deciding it was without power to determine whether KCPL should use insurance proceeds to offset the cost of replacement power in calculating GST's rate under KCPL and GST's contract. These portions of the Commission's Report and Order were affirmed by the Court of Appeals and, therefore, no further action is required by the Commission on these points.

However, the Court of Appeals found that the Commission erred in its consideration of evidence presented through GST's expert on its theory of imprudence relating to how KCPL responded to the flooding that occurred at the Hawthorn plant on February 17, 1999. The Court of Appeals found that while the Commission certainly had the discretion to accord "little weight" to GST's expert testimony, its decision to accord the testimony "little weight" was based on a mischaracterization of the extent of KCPL's objection to the testimony, and a resulting conclusion that no substantive evidence was introduced to support the expert's opinion

testimony. The cause was remanded to the Commission to reconsider the testimony of GST's expert witness, including the attachments to the testimony that were admitted without objection, and to make findings on the evidence regarding GST's theory that KCPL should have responded to the flooding at the Hawthorn plant by placing a hold on the Hawthorn power plant's gas supply valve.

After reconsidering all the admitted evidence, including the attachments to Mr. Ward's testimony, the Commission should re-affirm its findings of fact and conclusions of law, and for the reasons stated herein, continue to afford the testimony of Mr. Ward "little weight" as they relate to the Hawthorn Explosion.

1. Hawthorn Explosion

Apparently, GST continues to believe in this remand proceeding that it merely must allege "imprudence" without providing competent and substantial evidence to support its allegations to make a "prima facie" case. This position flies in the face of fundamental due process of law, and elementary rules of practice and procedure before the Missouri Public Service Commission in Complaint proceedings. The Commission has always held that the Complainant, as the moving party, has the burden of proof to prove its allegations. See Tel-Central of Jefferson City, Missouri v. United Telephone Co., 29 Mo.P.S.C. (N.S.) 584 (May 12, 1989)("Tel-Central has elected to proceed by complaint and by so doing assumes the burden of proof and the risk of nonpersuasion."). See also CyberTel Cellular Telephone Co. v. Southwestern Bell Telephone Co., 94 PUR4th 120 (January 12, 1988)("The Commission determines that CyberTel has not met its burden of proof to show that the rates in question are unjustly and unreasonably applied."); Summers v. Laclede Gas Company, 23 Mo.P.S.C. (N.S.) 533 (July 15, 1980)("Where Complainant does not sustain the burden of proof, the complaint

will be dismissed.”); Staff of the Missouri Public Service Commission v. Union Electric Co., 29 Mo.P.S.C. (N.S.) 305 (The Commission held that Staff and Public Counsel, as Complainants, had the burden of proof).

Similarly, Section 386.430 places the burden of proof on the adverse party in any trials, actions, suits or proceeding arising under the provisions of Chapter 386:

In all trials, actions, suits and proceedings arising under the provisions of this chapter or growing out of the exercise of the authority and powers granted herein to the commission, the burden of proof shall be upon the party adverse to such commission or seeking to set aside any determination, requirement, direction or order of said commission, to show by clear and satisfactory evidence that the determination, requirement, direction or order of the commission complained of is unreasonable or unlawful as the case may be.

In GST’s discussion of the issues related to the Hawthorn explosion, GST has chosen to make many of its various arguments without any citation to the evidence in the record to support its positions. (GST Br. on Remand. at 4-6, 8-9). In fact, GST does very little to demonstrate any factual basis for Mr. Ward’s theories, including citation to the various attachments to his testimony which presumably were the source documents that were of the subject of its appeal. GST’s approach to the evidence has done little to alleviate the expressed concerns of Deputy Chief Regulatory Law Judge Kevin Thompson:

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 provide sufficient evidence to make the requisite findings of fact on the underlying factual issues of the case.

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 remand proceeding, GST continues to rely principally upon 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 and continue to give his testimony little weight in this proceeding.

C. The Commission Should Reject GST's Second Imprudence Theory That KCPL Failed To Follow Its Safety Procedures By Failing To Place A "Hold" On the Gas Valves.

In its Report & Order in this proceeding, the Commission carefully reviewed and rejected Mr. Ward's first theory of imprudence related to placing a "hold" on the sump pump:

Additionally, Mr. Ward was not able to exclude other possible causes of the wastewater backup, which causes were not due to any negligence attributable to

KCPL. For example, confronted with a drawing showing the presence of a check valve between the Hawthorn 5 restroom and the sump pump that he considered to be the likely cause of the wastewater backup, Mr. Ward stated,

The fact that there was a check valve installed is not particularly significant since either it was not working or the piping system that's installed there is installed differently from the description of the drawing. I have no way of knowing.

While not significant to Mr. Ward in terms of his theory of the cause of the explosion, the check valve is necessarily legally significant in assigning blame for the explosion. For example, if the contractor who built Hawthorn 5 failed to actually install the check valve, the results of that failure would likely be attributable to the negligence of the contractor and not to KCPL. If the check valve was installed, but failed to operate properly, the results of that failure would likely be attributable to the negligence of the manufacturer of the check valve and not to KCPL.

Likewise, Mr. Ward's opinion that KCPL employees caused the backup, and thus the explosion, by failing to place a "hold" on the wastewater sump pump is not persuasive. Mr. Ward admitted that outside maintenance contractors were present at Hawthorn 5 on February 16, 1999, engaged in attempting to clear the clogged sewer line. Mr. Ward was unable to conclusively exclude their activities as a link in the chain of causation leading to the wastewater back-up. Cross-examination of Mr. Ward with respect to KCPL's safety procedures suggested that a "hold" on the sump pump was not required where it was not itself under repair and a check valve separated it from the portion of line that was actually under repair.

For the purposes of this case, the Commission concludes that GST has failed to show that imprudence on the part of KCPL employees caused the explosion at Hawthorn 5 on February 17, 1999.

As a second theory of imprudence (which the Court of Appeals has directed that the Commission address on remand), Mr. Ward also alleged 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). The Commission should reach the same conclusion on this theory as it has already reached on the first theory related to the "hold" on the sump pump.

Mr. Ward's conclusions were again 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 either 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 the gas valves. (Tr. 269). As a result, Mr. Ward did not know the reason(s) that hold procedures were not employed on the gas valves. (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).

On cross-examination by KCPL, Mr. Ward admitted that no work was being done on the main gas supply lines, but claimed that, in his opinion, the fact that work was being done on the burner management system required placement of a hold on the main gas supply valve. (Tr. 275-77). On cross-examination of Mr. Ward as to whether he would open the main circuit breaker at his home if he needed to change a light bulb, Mr. Ward admitted he would not do that. (Tr. 277-78). He admitted that he would not find it necessary to put a hold on the electrical system of the entire house just to change a light bulb. (Id.). He agreed that by not opening the main circuit breaker at his home, lights could be safely used in other rooms of the house while one light bulb was being changed. (Id.).

Based on the entirety of the evidence, the Commission should find that GST has failed to meet its burden of proof to show that KCPL's safety rules required placing a hold on the main gas supply valve while the burner management system was under repair. Further, the Commission should find that Mr. Ward's personal opinion in that regard relies almost entirely on hindsight, and not on evidence or indications that such a precaution was required or necessary during the time the burner management system was being checked out, and before the boiler was to be placed back in service. What is un-deniable, and does not rely on any expert opinion testimony from either side, is that all of the employees who were working in the plant the night of the explosion felt that they were operating in a reasonable and safe manner in attempting to clear the burner management system for return to service. None of those employees felt it was necessary to take the precaution of closing the main gas supply valve, and they were the ones whose lives were in peril if any danger was reasonably apparent to an ordinarily careful and prudent person in the circumstances present at that time. From what appears in the witnesses' statements, it appears the employees relied upon the burner management system that they thought would protect both the boiler and themselves from an unintended entrance of gas into the boiler. The Commission should not now second-guess and condemn the actions of the operators and technicians who were hard at work the night of February 16, 1999, attempting to repair and restore operation of the Hawthorn 5 boiler.

In summary, 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 not sufficient 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.

Conclusion

For the reasons stated herein, KCPL respectfully requests that the Commission again dismiss the Petition filed by GST, re-affirm its original findings of fact and conclusions contained in its original Report & Order, 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 on Remand has been emailed, hand-delivered or mailed, First Class mail, postage prepaid, this 1st day of June, 2004, to:

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