

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
JEFFERSON CITY
November 2, 1999**

CASE NO: EC-99-553

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

General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Paul S. DeFord, Esq.
Lathrop & Gage, L.C.
2345 Grand Boulevard, Ste 2800
Kansas City, MO 64108

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

William G. Riggins
Kansas City Power & Light Company
P.O. Box 418679
Kansas City, MO 64141

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

Enclosed find certified copy of an ORDER in the above-numbered case(s).

Sincerely,



**Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge**

Uncertified Copy:

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

GST Steel Company,)	
)	
Complainant,)	
)	
v.)	<u>Case No. EC-99-553</u>
)	
Kansas City Power & Light Company,)	
)	
Respondent.)	

**ORDER REGARDING KANSAS CITY POWER AND LIGHT
COMPANY'S FIRST MOTION TO COMPEL DISCOVERY**

Introduction:

On May 11, 1999, GST Steel Company (GST) filed a complaint with the Missouri Public Service Commission against Kansas City Power & Light Company (KCPL). In its Complaint, GST contends that imprudent management by KCPL, manifested particularly in the form of poor maintenance practices, has caused significantly higher electricity prices for GST in that repeated outages of KCPL generation facilities has led KCPL to purchase necessary power from other suppliers. GST also complains that KCPL's alleged poor maintenance practices have resulted in a loss of reliability in the power furnished to GST. GST asserts that its production processes have been repeatedly disrupted by power failures of one sort or another.

On July 2, 1999, GST filed its First Motion to Compel, which the Commission sustained by Order issued July 29, 1999. On July 23, 1999,

61

GST filed its Second Motion to Compel, which the Commission largely sustained by Order issued August 19, 1999. KCPL filed its First Motion to Compel on August 31, 1999. Initially, the Commission sustained the motion in full, by Order issued September 21, 1999, because GST did not respond to it. However, the Commission vacated that portion of its Order of September 21, 1999, on October 19, 1999, when it became clear that GST had never received KCPL's First Motion to Compel.

GST filed its Reply to KCPL's First Motion to Compel on October 4, 1999. KCPL timely filed its Response to GST's Reply on October 21, 1999, and the motion to compel is now ripe for ruling.

Discussion:

Attached as an exhibit to KCPL's First Motion to Compel is a copy of GST's responsive letter of August 16, 1999. In this letter - single-spaced and 7 pages long - GST states detailed and specific objections to KCPL's data requests.

Discovery is available in cases before the Commission on the same basis as in civil cases in circuit court.¹ 4 CSR 240-2.090(1). The same time limits and sanctions apply. *Id.*; and see St. ex rel. Arkansas Power & Light Co. v. Missouri Public Service Commission, 736 S.W.2d 457, 460 (Mo. App., W.D. 1987) ("This court holds the PSC may impose sanctions pursuant to Rule 61.01."). The scope of discovery in proceedings before the Commission is the same as in civil cases generally under

¹The Commission was authorized to provide for interrogatories by rule even before Chapter 536 was amended to make that option generally available to administrative agencies. See St. ex rel. Southwestern Bell Tel. Co. v. Public Service Commission, 645 S.W.2d 44, 50-51 (Mo. App., W.D. 1983).

Rule 56.01(b)(1), Mo. R. Civ. Pro. Thus, parties may freely make use of depositions, written interrogatories, requests for production, and requests for admissions, in the same manner and for the same purposes as in circuit court.

However, in practice, discovery in Commission proceedings differs in certain respects from discovery under the civil rules. In addition to the traditional instruments of civil discovery, parties before the Commission may employ the data request. A data request is "an informal written request for documents or information, which may be transmitted directly between agents or employees of the commission, public counsel or other parties to a proceeding before the commission." 4 CSR 240-2.090(2). Responses to data requests are due within 20 days of receipt of the request, but need not be made under oath nor in any particular format. *Id.* Objections are due within 10 days of the receipt of the request. *Id.* Sanctions for non-cooperation are the same as those applicable to other forms of discovery. *Id.*

Turning to the matter at hand, we see that the parties have both treated KCPL's Interrogatories and Requests for Production of Documents as data requests rather than as interrogatories under Rule 57.01 or Requests for Production of Documents under Rule 58.01. Thus, for example, KCPL has requested copies of documents from GST, a request that cannot be made under either Rule 57.01 or 57.02. State ex rel. Krigbaum v. Lemon, 854 S.W.2d 72, 73 (Mo. App., E.D. 1993); State ex rel. Crawford v. Moody, 477 S.W.2d 438, 440 (Mo. App., S.D. 1972). GST, in turn, responded with a 10-day objection letter under Commission Rule 4 CSR

240-2.090(2) rather than by serving objections in pleading form within 30 days of service under Rules 57.01(a) and 58.01(b), Mo. R. Civ. Pro., made applicable to Commission proceedings by Commission Rule 4 CSR 240-2.090(1). The Commission, too, will treat KCPL's discovery requests as data requests.

KCPL served 52 data requests upon GST on August 4, 1999. GST responded with a letter setting out a lengthy set of objections on August 16, 1999. GST stated objections to all but five of the 52 data requests. GST objected to 25 data requests as irrelevant² and to 18 others as "overbroad" because their scope extended to irrelevant matter.³ GST also asserted the attorney-client and attorney work product privileges to 30 of KCPL's data requests.⁴

In its motion to compel, KCPL states that GST "has objected to several interrogatories relevant to KCPL's defenses, and otherwise designed to lead to admissible evidence." KCPL points the Commission's Order of August 19, 1999, in which the Commission stated that relevancy, for discovery purposes, is determined in the first instance by the issues raised by the parties in their pleadings. KCPL asserts that, as the Commission "has already permitted broad discovery of the allegations in GST's Complaint, it is also appropriate to permit discovery regarding KCPL's defenses to the Complaint."

²Data Requests (DRs) 5-19, 38-41, 46-49, 51-52.

³DRs 20-33, 42-45.

⁴DRs 20-49.

In its response to KCPL's motion, GST states that the objectionable requests concern GST's relationship to AIR, an affiliated iron producer; labor disputes at GST; the Asian economic crisis; electric rates at other GSTOC domestic steel facilities;⁵ documents passed between GST and its financial adviser; and "Requests 38-41, which inappropriately asked GST to draw a legal conclusion." GST contends that "[n]one of these subject matters are germane to the adequacy of service, contract, and rate issues before the Commission." GST points out that the Commission, in its Orders of July 29, 1999, and August 19, 1999, has "narrowed the issues in this proceeding to 'the adequacy of service provided to GST by KCPL [including the Hawthorn incident] and whether or not KCPL's charges to GST are just and reasonable.'"

KCPL, in its reply to GST's response, reasserts its theory that the Commission has already ruled that any matter raised in the pleadings is properly discoverable: "Indeed, in both Orders the Commission notes that parties may obtain discovery regarding any matter, not privileged, relevant to the subject matter in the dispute, as framed in the pleadings."

The permissible scope of discovery is set out in Rule 56.01(b)(1):

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible

⁵"GSTOC" is, evidently, GST's corporate parent.

things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The present dispute turns on relevance. KCPL argues that GST must provide the information sought in its data requests because the information is relevant to matters included in KCPL's Answer; GST contends, in opposition, that it need not provide the information because it is not relevant to the dispute properly before the Commission.

It is true that the issues, in the first instance, are framed by the parties in their pleadings. This does not mean, however, that the mere inclusion of an assertion in a pleading renders it an appropriate subject for discovery. It is only matter relevant to the "subject matter involved in the pending action" as articulated in the claims and defenses of the parties which is discoverable. Rule 56.01(b)(1).

A "claim" is "[a] cause of action," BLACK'S LAW DICTIONARY 247 (6th ed., 1990), a set of facts that entitles one to redress or relief against another. *Id.*, at 221. A "defense," in turn, is "[t]hat which is offered by the party proceeded against in an action or suit, as a reason in law or fact why the plaintiff should not recover or establish what he seeks." *Id.*, at 419. Both concepts necessarily require consideration of the subject matter jurisdiction of the tribunal. "[A] complaint under the Public Service Commission Law is not to be tested by the technical rules of pleading; if it fairly presents for determination some matter which falls within the jurisdiction of the

Commission, it is sufficient." State ex rel. Kansas City Terminal Ry. Co. v. Public Service Commission, 272 S.W. 957, 308 Mo. 359 (Mo. 1925). Likewise, discovery may be had, in proceedings before the Commission, only with respect to matters falling within the jurisdiction of the Commission.

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 is authorized, after hearing, to set just and reasonable prospective rates. State ex rel. Utility Consumers' Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41, 48-49 (Mo. banc 1979). The Commission also has "plenary power to coerce a public utility corporation into a safe and adequate service." State ex rel. Missouri Southern R. Co. v. Public Service Commission, 259 Mo. 704, ___, 168 S.W. 1156, 1163 (banc 1914).

With these considerations in mind, we turn to KCPL's data requests. DRs 5 through 19 deal exclusively with purchases of "direct reduced iron" by GST and other members of its corporate family from AIR, an affiliate. Against GST's relevancy objection, KCPL asserts that these requests are relevant to KCPL's "defense" that GST's financial health is threatened by factors unrelated to KCPL, such as transactions with AIR. However, this purported defense is irrelevant to the issues of electric supply adequacy and rate reasonableness that are properly before the Commission. Therefore, GST's objection to DRs 5 through 19 must be sustained.

DRs 20 through 29 relate to the Special Contract between GST and KCPL. DRs 30 through 33 seek, from various members of GST's corporate family, "all documents that discuss or relate to KCPL." GST complains

that these requests are overbroad and irrelevant. The Commission has had previous occasion to point out that Missouri courts have recognized an affirmative duty to prevent the "[s]ubversion of pre-trial discovery into a 'war of paper,' whether to force an adversary to capitulate under economic pressure or to inflate billable hours[.]" State ex rel. Anheuser v. Nolan, 692 S.W.2d 325, 328 (Mo. App., E.D. 1985). To that end,

in ruling upon objections to discovery requests, trial judges must consider not only questions of privilege, work product, relevance and tendency to lead to the discovery of admissible evidence, but they should also balance the need of the interrogator to obtain the information against the respondent's burden in furnishing it. * * * Thus, even though the information sought is properly discoverable, upon objection the trial court should consider whether the information can be adequately furnished in a manner less intrusive, less burdensome or less expensive than that designated by the requesting party.

First of all, while GST is a party to this matter, its corporate affiliates are not. KCPL contends that these discovery requests directed to non-parties are appropriate "[b]ecause of the inextricable connection and influence between GST and its affiliated entities[.]" However, KCPL cites no authority for this proposition. KCPL's discovery requests to those entities are, indeed, overbroad, in that they exceed the scope of the pending action. Thus, DRs 21, 22, 23, 27, 28, 29, 31, 32, and 33 are improper. DR 30 is simply too vague and is therefore improper. GST's relevancy and overbreadth objections will be overruled with respect to DRs 20, 24, 25, and 26, which concern GST and the Special Contract.

These DRs are similar to many of those addressed by GST to KCPL and previously sustained by this Commission.

GST also raises the attorney/client privilege and attorney work product privilege with respect to DRs 20, 24, 25, and 26. In addition to asserting these privileges, GST avers that it has provided non-privileged and redacted documents to KCPL as well as a privilege log setting out details with respect to the privileged documents and portions of documents. This procedure was approved by the Commission in its Order of August 19, 1999.

DRs 34 through 37 have to do with GST's electric rate and electricity expense. DRs 38 through 41 seek documents in which the GST-KCPL Special Contract is referred to as being "unjust and unreasonable." DRs 42 through 45 seek information concerning directors' meetings of GST and its affiliates at which KCPL or the Special Contract were discussed. GST raises the attorney-client and work product privileges as to all of these requests; it also contends that DRs 38 through 41 are irrelevant and that DRs 42 through 45 are overbroad and irrelevant. As discussed above, GST avers that it has provided copies of relevant, non-privileged and redacted documents to KCPL as well as a privilege log. The Commission concludes that DRs 35, 36, 37, 39, 40, 41, 43, 44, and 45 are inappropriate to the extent that they seek documents not in the possession of GST but of its corporate relatives. Those entities are not parties to this matter. The Commission concludes that DRs 34, 38, and 42 are relevant and must be answered, to the extent not otherwise privileged.

DRs 46 through 48 concern either GST's labor relations or the Asian economic crisis. DR 49 does not concern GST, but its affiliate, GSTOC. KCPL asserts that this information pertains to GST's "steel producing activities and profitability during 1994-1999." KCPL further asserts that this information is relevant to allegations in GST's complaint "that its production is likely to decrease, that it will need to reduce its workforce, and that its very viability is 'severely threatened' by the allegedly unjust and unreasonable rates in the Special Contract and by KCPL's allegedly unreliable and inadequate electric service." The presence of such allegations in GST's Complaint do not make them fit matters for determination by this Commission. Whether these allegations are true or false is immaterial to the issues before the Commission. The Commission concludes, therefore, that these requests are irrelevant and need not be answered. Further, DR 49 concerns GSTOC, a non-party.

DRs 51 and 52 seek standard financial information from GST. GST shall provide the information sought in DRs 51 and 52.

IT IS THEREFORE ORDERED:

1. That the objections of GST Steel Company to the data requests contained in Kansas City Power & Light Company's first set of discovery are overruled with respect to Data Requests 20, 24, 25, 26, 34, 38, 42, 51, and 52, in that the requests are within the permissible scope of discovery and are not irrelevant.

2. That the objections of GST Steel Company to the data requests contained in Kansas City Power & Light Company's first set of discovery

are sustained with respect to Data Requests 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 39, 40, 41, 43, 44, 45, 46, 47, 48, and 49, in that the requests are not within the permissible scope of discovery and are irrelevant.

3. That the objections of GST Steel Company to the data requests contained in Kansas City Power & Light Company's first set of discovery are sustained to the extent that GST Steel Company asserts the attorney-client privilege or the attorney work product doctrine.

4. That GST Steel Company shall serve answers to Data Requests 20, 24, 25, 26, 34, 38, 42, 51, and 52, contained in Kansas City Power & Light Company's first set of discovery, and copies of documents therein requested, on counsel for Kansas City Power & Light Company on or before November 15, 1999, except for those items as to which GST Steel Company asserts the attorney-client privilege or the attorney work product doctrine. For each document that GST Steel Company believes is in fact privileged, GST Steel Company shall provide to Kansas City Power & Light Company the document's date, title, author, recipients, a general description of its contents, and a specific citation of the particular privilege claimed.

5. That this order shall become effective on November 12, 1999.

BY THE COMMISSION

A handwritten signature in black ink, reading "Dale Hardy Roberts". The signature is written in a cursive, slightly slanted style.

**Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge**

(S E A L)

Kevin A. Thompson, Deputy Chief
Regulatory Law Judge, by delegation
of authority pursuant to 4 CSR
240-2.120(1), (November 30, 1995)
and Section 386.240, RSMo 1994.

Dated at Jefferson City, Missouri,
on this 2nd day of November, 1999.

ALJ/Sec'y:

Thompson Pope

10-27

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Date Circulated

Return by 3 p.m.

10 a.m.

EC-99-553

CASE NO.

[Signature]
Lumpe, Chair

[Signature]
Crumpton, Commissioner

[Signature]
Murray, Commissioner

[Signature]
Schemenauer, Commissioner

[Signature]
Drainer, Vice-Chair

STATE OF MISSOURI
OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and

I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson
City, Missouri, this 02nd day of November 1999.

Dale Hardy Roberts

Dale Hardy Roberts

Secretary/Chief Regulatory Law Judge

