

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
JEFFERSON CITY
July 29, 1999

CASE NO: EC-99-553

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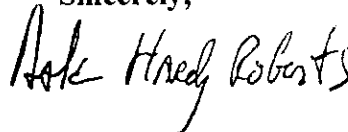
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Enclosed find certified copy of an ORDER in the above-numbered case(s).

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 GST STEEL COMPANY'S
FIRST MOTION TO COMPEL DISCOVERY AND
AMENDING THE PROCEDURAL SCHEDULE

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 sought immediate relief, a request denied by the Commission in its order of June 1, 1999. The Commission did, however, direct that KCPL file its Answer on a shortened schedule and set an early prehearing conference. Thereafter, on June 11, 1999, the prehearing conference was held. The parties filed their joint proposed procedural schedule and preliminary statement of issues on June 18, 1999. The Commission adopted the procedural schedule proposed by the parties by its order issued on June 22, 1999.

On June 18, 1999, GST moved for interim relief and an expedited hearing. KCPL responded in opposition on June 28, 1999; the Staff of

the Missouri Public Service Commission (Staff) responded on June 28, 1999, as well. The Commission denied GST's motion on July 9, 1999.

Discussion:

On July 2, 1999, GST filed its Motion to Compel, asserting that KCPL has refused to respond to GST's First Set of Interrogatories and First Request for Production of Documents, served on KCPL on June 18, 1999. Attached as an exhibit to GST's motion is a copy of a one-page letter which, GST alleges, is the only response ever provided by KCPL to GST's discovery requests. In its response to GST's motion, KCPL admits that the letter in question is the only response that it made to GST's discovery requests.¹

KCPL's letter of June 28 stated:

We are in receipt of the First Set of Interrogatories and Requests for Production of Documents submitted by GST Steel Company ("GST") on or about June 18, 1999 ("Requests"). Kansas City Power & Light Company ("KCPL") objects to each of the Requests to the extent GST seeks information or documents protected by the attorney client privilege and/or the work product doctrine. In addition, KCPL objects to each of the Requests to the extent GST attempts to impose obligations that exceed those imposed by Missouri law.

Finally, the sole issue involved in this matter is whether the pricing mechanism contained in the special contract between KCPL and GST is just and reasonable. Accordingly, KCPL objects to each of the Requests because they are irrelevant, beyond the scope of these proceedings, and not reasonably calculated to lead to admissible evidence.

¹The letter in question is dated July 28, 1999. In its response, KCPL refers to the "letter dated June 28, 1999." The letters are the same, as it is not yet July 28, 1999, as these words are written.

GST, in its motion filed July 2, 1999, argues that KCPL's response to its discovery requests was inadequate as a matter of law. GST further contends that KCPL has failed to effectively raise the attorney-client privilege and the work product doctrine. GST asserts that its discovery requests were indeed relevant, within the scope of these proceedings, and were reasonably calculated to lead to admissible evidence. GST prays that the Commission compel KCPL to respond to its discovery requests and "grant such further relief as deemed just and proper."

The Commission is specifically authorized by statute to "adopt and prescribe" rules of procedure. Section 386.410.1, RSMo Supp. 1998. Pursuant to this authority, the Commission has promulgated its Rule 4 CSR 240-2.090.1, relating to discovery and prehearings:

Any party, in any proceeding before the commission, may obtain discovery by one (1) or more of the following methods: depositions upon oral examination or written questions, written interrogatories, requests for production of documents or things and requests for admission upon and under the same conditions as in civil actions in the circuit court. Sanctions for abuse of the discovery process or failure to comply with commission orders regarding discovery will be the same as those provided for in the rules of civil procedure.

KCPL's response was timely.

KCPL objected to GST's discovery "to the extent GST attempts to impose obligations that exceed those imposed by Missouri law." GST's discovery instrument is labeled as a request for production of documents and purports to direct KCPL to provide copies of documents to GST. See GST's First Set of Interrogatories and Requests for Production of

Documents, pp. 3-5, Instruction Paragraphs Nos. 10-12, 15, and 22; see also e.g. Interrogatory 1.1(d), "provide a copy of all identified policies." Rule 58.01(b), Mo. R. Civ. Pro., however, envisions a rather different procedure than that evidently contemplated by GST. Under the rule, the inquiring party specifies a time, place and location for the inspection of documents and things; the opposing party in its response either agrees or objects. The Supreme Court Rule adopted by the Commission does not authorize an inquiring party to demand copies of documents and, were this action in circuit court, KCPL's objection would be sustained. See State ex rel. State Farm Mut. Auto. Ins. Co. v. Rickhoff, 509 S.W.2d 485, 487-88 (Mo. App., E.D. 1974).

However, the Commission's rules include a discovery device unknown to the circuit courts: Commission Rule 4 CSR 240-2.090(2) provides for "data requests." A data request is "an informal written request for documents or information[.]" Data requests need not take any particular form and it is no objection that GST labeled its data requests as requests for production of documents. Thus, this objection is found to be without merit.

GST's first discovery instrument contains five interrogatories which, with subparts, pose some 15 questions. KCPL answered none of them.

GST complains that KCPL's reliance on the attorney-client privilege and attorney work product doctrines is misplaced. GST is correct. The former is a statutory privilege that protects confidential communications between lawyer and client; the latter, set out at

Rule 56.01(b)(3), protects trial preparation materials from discovery except on a showing of "substantial need" and "undue hardship." The party raising these defenses has the burden of establishing them. Hutchinson v. Steinke, 353 S.W.2d 137, 144 (Mo. App. 1962).

As GST correctly observes, none of the materials covered by its first set of discovery appears at first glance to be covered by either defense. For example, an insurance policy is hardly a confidential communication between lawyer and client and was not prepared in anticipation of litigation or for trial. The same observation applies to KCPL's accounting records; to the notes and work papers upon which a press release was based; and to insurance claims made by KCPL. KCPL's assertion of these defenses in this circumstance appears to be without merit. In any event, KCPL has failed to show that either of these defenses applies. "Courts generally will not consider abstract objections such as burdensome, overbroad, irrelevant, privileged, or work product with no further specificity as to why a particular interrogatory is objectionable." S. Katz, 16 Missouri Practice--Civil Rules Practice 43 (2d ed. 1998).

KCPL also objects to each request contained in GST's first set of discovery on the grounds that it is "irrelevant, beyond the scope of these proceedings, and not reasonably calculated to lead to admissible evidence." The scope of discovery is set by Rule 56.01(b)(1), which provides:

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 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.

"Relevant" evidence, in turn, is that which tends to prove or disprove a fact of consequence to the pending matter. W. Schroeder, 22 Missouri Practice—Missouri Evidence, § 401.1(a) (1992). Relevance must be determined by reference to the pleadings. See St. ex rel. Anheuser v. Nolan, 692 S.W.2d 325, 327-28 (Mo. App., E.D. 1985).

The pleadings herein concern the adequacy of the service provided to GST by KCPL and whether or not KCPL's charges to GST are just and reasonable. The Commission is authorized, at Section 393.130.1, RSMo 1994, to consider such matters and GST is authorized to make complaint. Section 386.390.1, RSMo 1994. As GST points out, KCPL has burden of establishing that the discovery sought is irrelevant and KCPL has not met that burden.

On July 14, 1999, KCPL filed its reply to GST's motion to compel. That reply was not timely and KCPL has not addressed its untimeliness in any pleading. See Commission Rule 4 CSR 240-2.080(12). However, the Commission will consider KCPL's untimely reply in the interest of allowing the parties a full opportunity to present their positions.

In its reply, KCPL again argues that GST's first set of discovery is irrelevant and thus outside of the scope of permissible discovery:

Requests 1.1, 1.2, 1.4, and 1.5 relate to insurance policies, claims and benefits in connection with the boiler explosion on February 17, 1999 at the Hawthorn Generating Station's Unit No. 5. Request 1.3 [relates to] . . . the preparation of KCPL's March 2, 1999 press release entitled 'KCPL estimates financial impact of plant explosion; plans for the future.' None of these requests are relevant to the core issue in this dispute: Whether GST has been exposed to unjust and unreasonable charges for electric service.

Contrary to KCPL's position, the Commission reads the pleadings to include an issue of service adequacy. The Hawthorn incident is relevant to that issue. Moreover, GST has specifically pleaded that "KCPL has informed GST that as a result of the Hawthorn outage, GST should expect a multi-million dollar price increase for 1999. *GST's Complaint* at 11, paragraph 22. KCPL admitted as much. *KCPL's Answer* at 4, paragraph 22. KCPL can hardly argue that the Hawthorn incident is not also directly relevant to the issue of KCPL's charges to GST. GST has prayed that the Commission require KCPL to use the proceeds of any insurance received with respect to the Hawthorn incident to protect it and other ratepayers "from harm as a result of the outage[.]" *GST's Complaint* at 13-14, paragraph 27(ii). Thus, the nature and extent of KCPL's insurance coverage is also necessarily relevant to this matter. KCPL must answer GST's interrogatories and provide the requested documents.

KCPL will serve full and complete answers to GST's interrogatories, as well as copies of all requested documents, on counsel for GST on or before the fifteenth day after the date of this order. The

Commission notes that KCPL has waived any other objections that could have been raised to GST's first set of discovery.

The Procedural Schedule:

The discovery dispute resolved herein has seriously compromised the procedural schedule adopted by the Commission. Therefore, that schedule must now be revised. The Commission will revise the procedural schedule by resetting the due date for GST's direct testimony from August 12, 1999, to September 15, 1999.

The Commission cautions the parties that further abuse of the discovery process will lead to consideration of the imposition of appropriate sanctions on the offending party.

IT IS THEREFORE ORDERED:

1. That the objection of Kansas City Power & Light Company to the requests for production of documents contained in GST Steel Company's first set of discovery is overruled in that the requests are permissible data requests under Commission Rule 4 CSR 240-2.090(2).

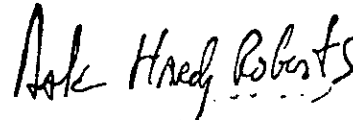
2. That the objection of Kansas City Power & Light Company to the data requests and interrogatories contained in GST Steel Company's first set of discovery is overruled in that the requests are within the permissible scope of discovery, are not irrelevant, and are not barred by the attorney-client privilege or the attorney work product doctrine.

3. That Kansas City Power & Light Company shall serve answers to the interrogatories contained in GST Steel Company's first set of

discovery, and copies of documents therein requested, on counsel for GST Steel Company on or before August 13, 1999.

4. That this order shall become effective on August 10, 1999.

BY THE COMMISSION



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 29th day of July, 1999.

ALJ/Sec'y: Thompson / Pope

7-27
Date Circulated

7-30
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

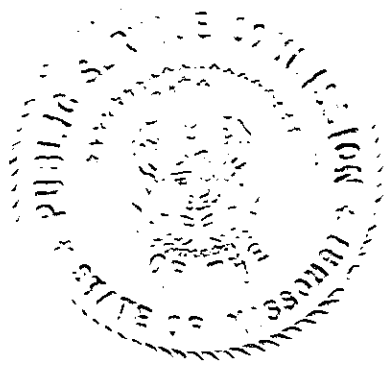
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P. 7

**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 29TH day of JULY, 1999.



Dale Hardy Roberts

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