

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION  
JEFFERSON CITY  
August 19, 1999**

**CASE NO: EC-99-553**

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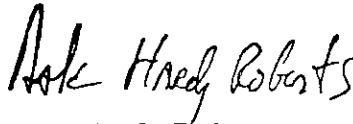
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**Enclosed find certified copy of an ORDER in the above-numbered case(s).**

**Sincerely,**



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

**Uncertified Copy:**

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION**

At a session of the Public Service  
Commission held at its office  
in Jefferson City on the 19th  
day of August, 1999.

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

**ORDER REGARDING KCPL'S MOTION FOR  
CLARIFICATION, RECONSIDERATION AND REHEARING  
OF THE COMMISSION'S ORDER OF JULY 29, 1999,  
AND REGARDING GST STEEL COMPANY'S  
SECOND 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 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. KCPL filed its answer on June 9, 1999. Thereafter, on June 11, 1999, an early 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.

Meanwhile, 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.

On July 2, 1999, GST filed its first Motion to Compel, asserting that KCPL had refused to respond to GST's First Set of Interrogatories and First Request for Production of Documents, served on KCPL on June 18, 1999. On July 14, 1999, KCPL filed its reply to GST's motion to compel. That reply was not timely and KCPL never addressed its untimeliness in any pleading. See Commission Rule 4 CSR 240-2.080(12). However, the Commission considered KCPL's untimely reply in the interest of allowing the parties a full opportunity to present their positions. On July 28, 1999, GST filed its Response to KCPL's Reply to GST's First Motion to Compel.

On July 29, 1999, the Commission by order sustained GST's Motion to Compel and directed KCPL to serve interrogatory answers and requested documents on GST by August 13, 1999. Because the procedural schedule was irretrievably compromised by the delay occasioned by the discovery dispute, the Commission revised the procedural schedule by resetting the due date for GST's direct testimony from August 12, 1999, to September 15, 1999.

## **Discussion:**

On July 23, 1999, GST filed its Motion to Compel KCPL to Respond to GST's Second and Third Sets of Interrogatories and Requests for Production of Documents.<sup>1</sup> On July 26, 1999, the Commission issued its order shortening the time for response to GST's second motion to compel and requiring KCPL to file its response by July 30, 1999. However, KCPL's response to GST's second motion to compel was not filed until August 3, 1999.<sup>2</sup> Also on August 3, 1999, KCPL by letter informed the Commission that it would soon supplement its response to GST's second and third sets of discovery in the light of the Commission's order of July 29, 1999. On August 11, 1999, KCPL filed its supplemental response. Meanwhile, on August 9, 1999, KCPL also filed its Motion for Clarification, Reconsideration and Rehearing with respect to the Commission's order of July 29, 1999. On August 17, 1999, GST filed its reply to KCPL's supplemental response.

Both KCPL's response to GST's second motion to compel discovery, filed on August 3, 1999, and KCPL's supplemental response, filed on August 11, 1999, were untimely. KCPL has not sought leave to respond out-of-time nor in any other fashion addressed the untimeliness of these pleadings. Nonetheless, despite KCPL's failure to comply with the Commission's order of July 26, 1999, the Commission will consider KCPL's response and supplemental response in the interests of permitting each

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<sup>1</sup>Referred to herein as GST's second motion to compel.

<sup>2</sup>KCPL's response is dated July 29, 1999.

party a full exposition of its position. KCPL's supplemental response is expressly made conditional upon the Commission's action on KCPL's motion for clarification. *Supplemental Response*, pages 1-2, paragraph 3.

### **KCPL's Motion for Clarification:**

In its Motion for "Clarification, Reconsideration and Rehearing"<sup>3</sup> of the Commission's order of July 29, 1999, regarding GST's first motion to compel discovery, KCPL states that its responses to GST's first, second, and third sets of discovery were not intended to be obstructive but were, rather, expressive of its view of the appropriate nature and scope of the issues presented herein.

Such objections were not intended to abuse the discovery process or otherwise frustrate the ability of any party to address the real issue in this proceeding: Whether the pricing contained in KCPL's special contract is just and reasonable. However, since discovery is not unlimited and must be designed to lead to admissible evidence, KCPL has objected to discovery which it believed was outside the bounds of the legitimate issues raised by GST's Complaint. KCPL's objections were intended to raise concerns regarding the attempts of GST to broaden the scope of the issues to issues related to Hawthorn and other generating units.

*KCPL's Motion for Clarification*, at page 3, paragraph 5. For this reason, KCPL explains, it refused to answer more than four queries out of the approximately two hundred requests tendered to it by GST in its first, second and third sets of discovery.

However, KCPL does not explain why it has taken no action to narrow the issues before the Commission in this matter. In the first

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<sup>3</sup>Referred to herein as KCPL's motion for clarification.

instance, it is the parties' initial pleadings that frame the issues. Thereafter, the issues may be narrowed or expanded by action of the Commission, on motion of the parties. The Commission has exercised that authority in this case only once. In its *Order Denying Immediate Relief*, issued on June 1, 1999, at page 4, the Commission stated: "[T]he Commission will not conduct its investigation of the boiler explosion at Hawthorn within the context of this case. The Commission will establish a separate docket for that investigation." On June 4, 1999, the Commission established Case Number ES-99-581 for the purpose of investigating the Hawthorn incident. At no time has the Commission ever indicated that the only issue presented by this matter is the one enunciated by KCPL.

KCPL has not moved the Commission to narrow the issues in this case. While it is true that practice before the Commission is in some respects *sui generis*, the parties must still engage in motion practice to narrow the issues, just as in the civil courts. The only such motion filed in this case is a component of GST's second motion to compel, filed on July 23, 1999. That motion prays that the Commission "confirm that the issue of the adequacy of KCPL's service to GST is before it in this proceeding, including specifically:

- (a) the Hawthorn explosion and outage,
- (b) inadequate/imprudent power generation, and
- (c) inadequate/imprudent power delivery."

In determining KCPL's relevance objections to GST's discovery, the Commission has measured GST's discovery requests against the issues raised in GST's complaint, as modified by the Commission's order of

June 1, 1999. A discovery request that is relevant to an issue stated in GST's complaint is necessarily within the authorized scope of discovery as set by Rule 56.01(b)(1), Mo. R. Civ. Pro.:

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[.]

Since KCPL has never invoked the Commission's power to limit the scope of the issues properly before it in this proceeding, KCPL cannot ignore the issues raised by GST's complaint.

A review of GST's complaint in the light of the Commission's order of June 1, 1999, shows that the issues before the Commission in this case are neither so narrow as KCPL contends nor so broad as GST contends. The complaint asserts that GST is a steel producer in Kansas City, Missouri, and one of KCPL's largest single customers. GST's industrial processes depend upon large amounts of electricity. GST purchases electricity from KCPL under a special contract, approved by the Commission; the contract is highly confidential and is covered by a protective order, issued by the Commission herein on May 26, 1999. The contract permits GST to purchase electricity at fluctuating, cost-driven rates rather than at a fixed, tariffed rate.<sup>4</sup>

One complaint of GST against KCPL is that alleged negligent and imprudent management by KCPL has caused significantly higher electricity

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<sup>4</sup>GST, in its *Second Motion to Compel*, at Para. 2, has corrected the Commission's earlier characterization of this as a "market-driven" rate. As GST correctly points out, it is a cost-driven rate.

prices for GST in that repeated outages of KCPL generation facilities, due to poor maintenance by KCPL, has led KCPL to purchase necessary power from other suppliers. The cost of the purchased power is greater than the cost of power generated by KCPL itself; these higher costs are reflected in higher prices to GST.

Another, related complaint by GST against KCPL is that alleged poor maintenance practices have also 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, causing GST to lose large sums of money.

GST has focused on the boiler explosion at KCPL's Hawthorn generating plant on February 17, 1999, as an example of the imprudent conduct it attributes to KCPL. Thus, the Hawthorn incident is relevant to GST's theory of service unreliability due to poor maintenance practices. Additionally, GST contends that as long as the Hawthorn plant remains off-line, KCPL's purchases of replacement power will be greater than ever, resulting in higher costs for KCPL and higher prices for GST. Thus, the Hawthorn incident is also relevant to GST's theory that the prices it pays for service under its special contract are not just and reasonable in view of KCPL's imprudent management practices. Finally, GST contends that KCPL will receive some \$5,000,000 in insurance proceeds from the Hawthorn incident and argues that this sum should be used by KCPL to offset the cost of buying replacement power, thus sheltering GST from higher service prices.

GST's complaint addresses both the adequacy and reliability of the electric service provided by KCPL and whether or not KCPL's charges to GST for that service 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. Pursuant to the Commission's order of June 1, 1999, the Hawthorn explosion and outage is involved herein only to the extent that it is part of these two issues. Likewise, this matter does not involve issues of power generation and distribution except insofar as they directly impact the two issues of the adequacy of KCPL's service to GST and the pricing of KCPL's service to GST.

KCPL specifically objects to a portion of the Commission's order of July 29, 1999, at page 7, where it was stated:

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 denies that it ever admitted GST's allegation as the Commission's order states; rather, KCPL admitted only that "the Hawthorn outage probably would result in an increase in KCPL's incremental costs and that these increased costs would be reflected in GST's rate[.]" *KCPL's Motion for Clarification*, page 4, paragraph 8; *quoting KCPL's Answer*, page 4, paragraph 22). The Commission cited KCPL's Answer not with reference to the amount of any price increase to GST, but as an admission that GST would likely experience higher prices as a direct

result of the Hawthorn outage. In the light of this admission, the Commission concluded

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.

Upon reconsideration, the Commission does not find that any clarification is necessary. KCPL's motion is denied.

### **GST's Second Motion to Compel and KCPL's Responses:**

Attached as exhibits to GST's second motion to compel are copies of two single-page letters, dated July 8, 1999, and July 15, 1999. These letters, GST alleges, are the initial responses provided by KCPL to GST's second and third discovery requests.

KCPL's letter of July 8 stated:

We are in receipt of the Second Set of Interrogatories and Requests for Production of Documents submitted by GST Steel Company on or about June 28, 1999.

Kansas City Power & Light Company objects to each and every one of the Requests numbered 2.1 through 2.38 inclusive, on the basis that they are irrelevant, beyond the scope of these proceedings, and not reasonably calculated to lead to admissible evidence. None of these requests deal with the sole matter involved in the case, which is whether the pricing mechanism contained in the special contract between KCPL and GST is just and reasonable.

Further, KCPL objects to Request 2.40<sup>5</sup> on the basis that providing the production costing model would violate KCPL's licensing agreement with the Owner of the software.

Finally, KCPL objects to Requests 2.5(e) & (g), 2.8, 2.11, 2.18, 2.20(c), 2.27 and 2.28 to the extent that GST seeks information or documents protected by the attorney-client privilege and/or work product doctrine.

KCPL's letter of July 15 stated:

We are in receipt of the Third Set of Interrogatories and Requests for Production of Documents submitted by GST Steel Company ("GST") on or about July 6, 1999 ("Requests"). With the exception of Request 3.36, Kansas City Power & Light Company ("KCPL") objects to each of the Requests on the grounds that the Requests are irrelevant, overly broad, burdensome, beyond the scope of these proceedings, and not reasonably calculated to lead to admissible evidence.

KCPL objects to the Requests to the extent that GST seeks information or documents protected by the attorney client privilege and/or 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.

GST, in its motion filed July 23, 1999, argues that KCPL's responses to its discovery requests were inadequate as a matter of law under Rules 57.01(a) and 58.01(b), Mo. R. Civ. Pro. Each of these rules contemplates specific objections, narrowly tailored to the interrogatory or production request in question. GST further contends that KCPL has failed to effectively raise the attorney-client privilege and the work product doctrine because KCPL has failed to show that the requested documents and information are within either defense. GST complains,

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<sup>5</sup>KCPL's response of August 3, 1999, clarifies that Request No. 2.41 was actually intended.

"Since KCPL has not identified any documents or set forth the specific reasons why a certain document may be privileged, GST is unable to address the specific grounds that KCPL uses to support its claim of privilege." GST also asserts that its discovery requests were indeed relevant and within the scope of these proceedings.

In its supplemental response, KCPL has narrowed its objections significantly; therefore, the Commission need not address the objections originally raised by KCPL in its letters of July 8, 1999, and July 15, 1999, and in its response of August 3, 1999. In its supplemental response, KCPL states:

Despite its decision to voluntarily comply with most of GST's Discovery Requests, KCPL maintains its objections to four categories of discovery requests:

- a) information that predates 1994,
- b) information protected by the attorney-client privilege and/or work product doctrine,
- c) information relating to the Hawthorn Incident, and
- d) those instances where KCPL has a legal obligation not to disclose information to third parties.

Taking up the third of these objections first, KCPL objects to requests 2.5, 2.7-2.11, 2.27, 2.28, and 3.41-3.50 as "relating to the explosion, shutdown and investigation of Hawthorn 5 Generating Station[.]" *KCPL's Supplemental Response*, page 3, paragraph 8. The Commission has explained above that the Hawthorn incident is indeed relevant herein to the extent--and only to the extent--that it is bound up with the issues of the adequacy of KCPL's service to GST and the pricing of KCPL's service to GST. Thus, the Commission concludes that KCPL must

provide the requested information insofar as it relates to these two issues. KCPL need not respond to requests 2.5(f), 2.5(g), 2.7(d), and 3.50, as these appear on their face to be outside the permissible scope of discovery. As discussed below, KCPL also need not provide any information prior to January 1, 1994.

In its supplemental response, KCPL maintains its objections of attorney-client privilege and attorney work product. KCPL originally raised these objections to four of the requests contained in GST's second set of discovery (2.5, 2.8, 2.18, 2.20) and all but one of the requests contained in GST's third set of discovery. In its supplemental response, KCPL states:

As suggested above, KCPL's attorneys have not reviewed the documents that are encompassed by GST's Discovery Requests. Until this legal review is completed, KCPL reserves the right to object to the production of any information that is protected by the attorney client privilege and/or the work product doctrine. KCPL will provide GST with a privilege log if KCPL asserts any privilege or legal protection.

*KCPL's Supplemental Response, page 3, paragraph 6.*

Ordinarily, the time to review documents to determine whether or not a privilege may be asserted to shield them from discovery is prior to asserting that privilege in discovery objections. However, in view of the number of documents encompassed by GST's discovery requests, the Commission considers KCPL's position to be reasonable. For each document that KCPL concludes is in fact privileged, KCPL will provide to GST the document's date, title, author, recipients, a general description of its contents, and a specific citation of the particular privilege claimed.

KCPL objects to providing any information prior to 1994. KCPL originally objected that each of requests 3.1 through 3.61, with the single exception of 3.36, are "overly broad" and "burdensome." Similarly, in its untimely response of August 3, 1999, KCPL asserted that requests 2.1-2.4, 2.7, 2.9-2.12, 2.36 and 3.35 are overly broad and unduly burdensome, particularly to the extent that several of these requests seek detailed information from January 1, 1989, to date.

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.

Under the rule of St. ex rel. Anheuser v. Nolan, *supra*, cited above, the Commission must consider whether otherwise proper discovery can be provided in some less burdensome manner. In this regard, the Commission points out that GST admits in its motion that it entered into its special contract in 1994. *GST's Second Motion to Compel*, page 3, paragraph 5. In view of this admission, the Commission finds that KCPL's

objection to discovery requests seeking information from 1989 to date is well-taken and will be sustained. KCPL need not produce any document or provide any information relating to any period prior to January 1, 1994.

KCPL objects to making discovery in "those instances where KCPL has a legal obligation not to disclose information to third parties." *KCPL's Supplemental Response*, page 2, paragraph 4.d. This objection relates only to request 2.41, which concerns software containing the production costing model used by KCPL to set service prices to GST under their special contract. KCPL states that its software licensing agreement with the owner of the software prohibits compliance. *KCPL's Supplemental Response*, page 3, paragraph 9. However, KCPL cites no authority showing that this objection is a valid bar to discovery and the Commission has found none. The party resisting discovery has the burden of showing the validity of its objection. J. Devine, *Missouri Civil Pleading and Practice* 285 (1986). Therefore, KCPL must produce the requested software. Nonetheless, GST and its attorneys, employees, consultants, and agents shall treat the software produced in response to request 2.41 as highly confidential information subject to the protective order previously entered herein. The software shall not be further disclosed and it shall be returned to KCPL at the conclusion of this litigation.

#### **Adjustment of the Procedural Schedule:**

In its motion for clarification, KCPL moves this Commission to further adjust the procedural schedule by setting each date back by 30

days. The Commission will not rule on this aspect of KCPL's motion until after it has heard from the other parties.

**IT IS THEREFORE ORDERED:**

1. That the procedural schedule previously adopted herein is amended in that GST Steel Company need not file its direct testimony on or before August 12, 1999, but may file it on or before September 15, 1999.

2. That Kansas City Power & Light Company's motion for clarification, reconsideration and rehearing of the Commission's order regarding GST Steel Company's first motion to compel is denied.

3. That the objections of Kansas City Power & Light Company to the data requests and interrogatories contained in GST Steel Company's second and third sets of discovery are overruled, except that Kansas City Power & Light Company need not produce any documents or provide any information relating to any period prior to January 1, 1994, and as otherwise stated in this order.

4. That the software produced in response to data request 2.41 shall be regarded as highly confidential and subject to the protective order previously entered herein. Upon the conclusion of this litigation, the software shall be returned to Kansas City Power & Light Company and GST Steel Company, and its employees, agents, attorneys, and consultants, shall ensure that no electronic, paper or other copies are retained.

5. That Kansas City Power & Light Company shall serve answers and copies of requested documents on counsel for GST Steel Company, as requested in GST Steel Company's second and third sets of discovery,

except as otherwise ordered herein, on or before the tenth day following the effective date of this order.

6. That, in connection with ordered paragraph number 5, above, Kansas City Power & Light Company shall serve a privilege log as described herein on counsel for GST Steel Company with respect to any matters deemed privileged, on or before the tenth day following the effective date of this order.

7. That this order shall become effective on August 31, 1999.

**BY THE COMMISSION**



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

( S E A L )

Lumpe, Ch., Crumpton, Drainer,  
Murray, and Schemenauer, CC., concur.

Thompson, Deputy Chief Regulatory Law Judge

ALJ/Sec'y:

Thompson/Pope

8-16  
Date Circulated

EC-99-553  
CASE NO.

SL  
Lumpe, Chair

AC  
Crumpton, Commissioner

CM  
Murray, Commissioner

AS  
Schemenauer, Commissioner

mae p 59, 11, 14 (?)  
Drainer, Vice-Chair

8-19  
Agenda Date

p.15

STATE OF MISSOURI  
OFFICE OF THE PUBLIC SERVICE.C

Action taken:

5-OAA

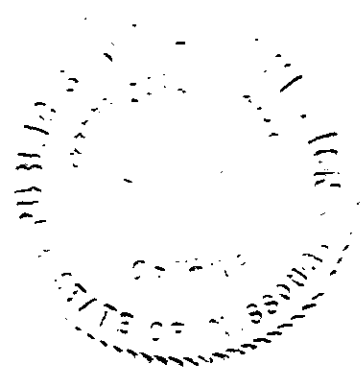
Must Vote Not Later Than

I have compared the preceding copy

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 19TH day of AUGUST, 1999.



Dale Hardy Roberts

Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge