STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
JEFFERSON CITY
March 23, 2000

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

Kurt U. Schaefer
326 East Capitol Ave.
Jefferson City, MO 65101

Timothy G. Swenson/Karl Zobrist
Blackwell Sanders Peper Martin, LLP
2300 Main Street, Suite 1000
Kansas City, MO 64108

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

Gerald A. Reynolds
KCPL
1201 Walnut Street
Kansas City, MO 64106

James W. Brew/Peter J.P. Brickfield
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

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 23rd day of March, 2000.

GS Technology Operating Company, Inc., d/b/a GST Steel Company, Complainant,	)	
v.	)	**Case No. EC-99-553**
Kansas City Power & Light Company, Respondent.	)	

ORDER REGARDING MOTION TO COMPEL, FOR DIRECTED FINDINGS AND FOR INTERIM RELIEF

On February 22, 2000, GS Technology Operating Company, Inc., doing business as GST Steel Company (GST), filed its Motion to Compel Production of Documents, for Directed Findings Concerning Information Controlled by KCPL, and for Interim Relief. Respondent Kansas City Power & Light Company (KCPL) responded on March 3, 2000. GST then replied to KCPL's response on March 13, 2000. Thus, GST's motion is now ripe and ready for determination.

Request for Interim Relief:

GST has renewed its request for interim relief, a request denied more than once in this proceeding already. GST presents nothing in this latest attempt to gain interim relief that sways the Commission to alter

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its previous decision. Citations to cases in which the Commission granted interim rate relief to utility companies are without relevance in this context. Likewise, the Commission is not persuaded by GST's assertion of the inapplicability of Utility Consumers Council of the State of Missouri v. Public Service Commission, 585 S.W.2d 41, 51-58 (Mo. banc 1979). As KCPL accurately observed in its response, Utility Consumers teaches that the Commission cannot do anything it is not authorized to do by statute.

GST suggests that the Commission is authorized to grant the requested interim relief by Section 393.130.1, RSMo 1994. However, even if the Commission is so empowered under that or some other statute, GST has failed to show why the Commission should exercise this power to grant relief to GST prior to its establishment of any fact in this matter. GST has not shown that this is such a case in which the public interest demands that the Commission take immediate and summary measures. Rather, this is a case in which due process requires that the Commission act, if at all, upon the competent and substantial evidence established by normal contested case procedures.

GST's renewed request for interim relief is denied.

Request for Directed Findings:

GST also requests that the Commission make certain "directed findings"; that is, that the Commission by order apply the doctrine of *res ipsa loquitur* to this proceeding in advance of the evidentiary hearing.

> The doctrine of *res ipsa loquitur* is a rule of evidence that permits a jury to infer from circumstantial evidence that the defendant is negligent without requiring that the plaintiff prove defendant's specific negligence. Trefney v. Nat'l Super Markets, Inc.,

> 803 S.W.2d 119, 121 (Mo. App. 1990). Like any other case, the plaintiff begins in a *res ipsa loquitur case* bearing both the burden of proof and the burden of evidence. McCloskey v. Koplar, 329 Mo. 527, 46 S.W.2d 557, 563 (1932). The plaintiff must prove the doctrine's three elements: "(1) the incident resulting in injury is of the kind which ordinarily does not occur without someone's negligence; (2) the incident is caused by an instrumentality under the control of the defendant; and (3) the defendant has superior knowledge about the cause of the incident." Trefney, 803 S.W.2d at 121. By plaintiffs proving the three elements, the defendant must meet a broader assault than that posed by specific allegations of negligence under a specific negligence theory. McCloskey, 46 S.W.2d at 563. The plaintiff, however, still bears the risk of nonpersuasion and must show by the greater weight of the evidence that injury resulted from the defendant's negligence. *Id.*

Weaks v. Rupp, 966 S.W.2d 387, 393-94 (Mo. App., W.D. 1998).

KCPL asserts in its response that the Commission lacks authority to apply the doctrine of *res ipsa loquitur.* However, the Commission need not reach that question. GST's request to apply the doctrine in this case at this time is without merit. GST has never yet established the three elements of the doctrine.[1] The doctrine is applied in circumstances in which it is clear that the defendant is most likely the negligent party, even if it is not clear precisely how the defendant was negligent. GST has not adduced any facts thus far, and certainly has not shown that KCPL was most likely the negligent party with respect to the Hawthorn incident. For example, KCPL refers several times in its pleadings to other possibilities.

[1]Thus, in a civil trial, plaintiff would request a *res ipsa loquitur* instruction at the close of evidence, and the judge would grant or deny the request based upon the showing made by plaintiff in the trial.

Furthermore, GST invokes the application of *res ipsa loquitur* primarily as a sanction for alleged discovery abuse by KCPL. The Commission is not persuaded that there has been any discovery abuse by KCPL. According to KCPL, many thousands of documents have been produced in response to GST's numerous discovery requests. Additional staff has been employed to help process the requests and the answers to them. Counsel for KCPL appeared perfectly reasonable at the recent prehearing conference and were evidently prepared to negotiate in good faith with GST to resolve the discovery dispute.

GST may argue *res ipsa loquitur* in its posthearing brief if it wishes. However, GST's request for directed findings is denied.

Motion to Compel Discovery:

Finally, GST seeks to compel certain discovery. On March 6, 2000, after KCPL had filed its response and before GST filed its reply, a prehearing conference was convened in this matter. The pending discovery dispute was taken up at that time; the parties also had an opportunity to discuss their differences and some were resolved. GST's reply of March 13, 2000, indicates the following items remain: a Cause and Effect Diagram, KCPL's responses to Data Requests (DRs) 10.6 and 10.7, and certain documents received by KCPL from Crawford Investigative Services.

At the prehearing conference, counsel for KCPL explained that the Cause and Effect Diagram no longer existed and had never consisted of more than some Post-it™ Notes stuck on a wall during a brainstorming session. KCPL need not produce the diagram, for it cannot produce what does not exist.

DRs 10.6 and 10.7 were not discussed in GST's motion of February 22, 2000. Consequently, they are not properly before the Commission at this time as KCPL has not had an opportunity to respond to GST's allegations concerning them.

The only remaining items are forty-some employee statements obtained by Crawford Investigative Services (Crawford) from employees of KCPL. KCPL asserts that these statements are privileged from discovery and GST contends that they are not. KCPL asserts the work product privilege and the attorney client privilege, contending that Crawford took the statements while working jointly for KCPL and its insurer in investigating the Hawthorn incident. KCPL characterizes this work as done in anticipation of litigation, for it shares a common interest with its insurer in finding someone to sue over the boiler explosion. GST, on the other hand, asserts that any possible privilege was lost by sharing the statements with third parties, that is, Crawford and the insurer. GST denies that KCPL and its insurer share a community of interest in this matter and characterizes their interests as potentially adverse. Both cite numerous cases in support of their positions.

The Commission concludes that KCPL is correct. Witness statements are within the attorney work product privilege. Mo. R. Civ Pro. 56.01(b)(3); State ex rel. Atchison, Topeka and Santa Fe Railway Company v. O'Malley, 898 S.W.2d 550 (Mo. banc 1995). The statements themselves, being tangible work product, may be obtained on a showing of substantial need and inability to obtain the equivalent. O'Malley, *supra*, at 554. In the present case, GST has not shown an inability to obtain the equivalent

because, as KCPL has noted, GST is free to depose the witnesses in question. Witness statements also implicate the intangible aspect of the work product privilege because they may embody the impressions, plans, and strategic decisions of counsel. Opinion work product is absolutely privileged. O'Malley, *supra*, 552-53.

Crawford, an investigative agency assisting KCPL in the preparation of this case, is within the ambit of the attorney-client privilege and the work product immunity. The "rule as to the absence of privilege where a third person is present does not apply when the third person is the confidential agent of either the client or the attorney." McCaffrey v. Brennan's Estate, 533 S.W.2d 264, 267 (Mo. App. 1976) (*quoting* 58 Am. Jur. "Witnesses"). The fact that Crawford is also passing information to KCPL's insurer does not defeat KCPL's assertions of privilege. Having acknowledged coverage and paid KCPL's claim, the insurance company's interest is sufficiently identical to KCPL's to support the claim of privilege. *See* Brantley v. Sears Roebuck & Co., 959 S.W.2d 927, 928 (Mo. App., E.D. 1998). As KCPL asserts, its insurer and KCPL own different parts of the same cause of action.

Finally, and as a wholly independent ground for the Commission's decision to deny GST's motion to compel, we have had occasion before in this case to refer to the admonition of State ex rel. Anheuser v. Nolan, 692 S.W.2d 325, 328 (Mo. App., E.D. 1985), concerning the duty of the tribunal to prevent the "[s]ubversion of pre-trial discovery into a 'war of paper.'" That point has been reached here.

GST's motion to compel discovery is denied.

IT IS THEREFORE ORDERED:

1. That the Motion to Compel Production of Documents, For Directed Findings Concerning Information Controlled by KCPL, and for Interim Relief filed by GS Technology Operating Company Inc., doing business as GST Steel Company, on February 22, 2000, and corrected on February 24, 2000, is denied.

2. That this order shall become effective on April 4, 2000.

BY THE COMMISSION

Dale Hardy Roberts

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

Sec'y: Thompson / Pope

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Date Circulated

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SL p7
Lumpe, Chair

Crumpton, Commissioner

Murray, Commissioner

Schemenauer, Commissioner

Drainer, Vice-Chair

footnote 1 p. 3 p. 6

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Agenda Date

Action taken: 5-0 AA

Must Vote Not Later Than _____

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 23rd day of March 2000.

Dale Hardy Roberts

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge