

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

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.) Case No. EC-99-553
)
 Kansas City Power & Light Company,)
)
 Respondent.)

ORDER DENYING RECONSIDERATION

On July 21, 1999, GST Steel Company (GST) filed its motion seeking reconsideration and clarification of the Commission's order of July 9, 1999, which denied GST's earlier motion for interim relief and an expedited hearing. Kansas City Power and Light Company (KCPL) responded in opposition to GST's motion for reconsideration on August 3, 1999, and GST replied on August 4, 1999.

In its motion, GST prays that the Commission reconsider its order of July 9, 1999, issue a further order to "clarify" the order of July 9, 1999, and grant GST "all or a portion of the interim relief GST requested in its Motion filed June 18, 1999." *GST's Motion for Reconsideration*, page 9. GST supports these requests by suggesting, first, that the Commission was wrong to believe that relief is available to GST under the terms of its special contract with KCPL, because "KCPL's tariffed rates

137

are not an economically viable option for GST." *Id.*, at page 8. GST also asserts that "[I]n attempting to be mindful of KCPL's due process rights, the Commission unfairly has imposed a significant economic burden on GST." *Id.* This burden is "the increase in hourly KCPL production costs being charged to GST while this matter is pending * * * with no assurance that it can recoup any overpayments if it prevails on the merits." *Id.* GST complains that in the July 9, 1999, order, the Commission "failed to discuss either the alternatives or the underlying need for equitable relief." *Id.*, at page 5.

KCPL urges the Commission to deny GST's motion for reconsideration as untimely. KCPL notes that GST's motion was filed one day after the effective date of the order of July 9, 1999; KCPL also notes that GST filed its motion outside the 10-day response period prescribed by Commission Rule 4 CSR 240-2.080(12). Finally, KCPL argues that the relief sought by GST, as well as the three alternatives proposed by the Staff of the Public Service Commission, are unavailable to the Commission as a matter of law.

GST, in its reply to KCPL's response, contends that the Commission should overlook the untimely nature of its motion and consider it anyway. GST points out that the Commission considered KCPL's untimely response in an ongoing discovery dispute in this matter and asks "that the same Commission discretion apply to GST's Application and that GST should be allowed full opportunity to present its position and the important issues at stake in this proceeding." *GST's Reply to KCPL's Response*, at page 3, paragraph 4.

The Commission is fully aware of the importance of the issues presented by this case. Therefore, the Commission will consider GST's motion for reconsideration. Even if the Commission were to reject that motion as untimely, GST is free to file a new request for interim relief at any time. Therefore, the Commission will deem GST's motion for reconsideration to be just such a new request for interim relief. This result is particularly appropriate in view of the new allegations pleaded by GST in its reply, regarding the recent heat wave and its likely effect on the prices GST pays for service under the special contract. *Id.*, at pages 3-4, paragraphs 5 and 6.

GST evidently seeks clarification from the Commission with respect to its jurisdiction to hear and determine GST's complaint and to provide the remedies sought by GST.¹ GST argues that the Commission may act, despite the parties' special contract, to ensure that KCPL's cost-based prices to GST are just and reasonable. Section 393.130(1), RSMo. Likewise, GST argues that the Commission is authorized to exclude costs from the rate base where the costs result from imprudent management. See St. ex rel. Valley Sewage Co. v. Public Service Commission,

¹Nowhere in its motion does GST actually specify just what aspect of the order of July 9, 1999, it desires to have clarified. However, more than half of the argument presented in that motion concerns the Commission's jurisdiction.

515 S.W.2d 845, 850 (Mo. App. 1974);² In re Great River Gas Co.,
30 Mo. P.S.C. (N.S.) 2, 5 (July 19, 1989).³

KCPL, by contrast, argues that the Commission "may not alter contract rates unless the public welfare is jeopardized, nor may the Commission construe or enforce contracts." *KCPL's Response*, at page 3, citing Kansas City Power & Light Co. v. Midland Realty Co., 93 S.W.2d 954, 959 (Mo. 1936). KCPL previously asserted that the special contract prices are presumptively just and reasonable because the Commission approved the special contract.

The Midland Realty case is of no assistance to KCPL. In that decision, the Missouri Supreme Court held that a contract rate for steam heat was contrary to the public welfare where it was lower than the actual costs of the service as established by the Commission after an investigation and hearing. *Supra*, at 958. It follows that a contract rate that is higher than the actual costs of service, plus a reasonable rate of return, is also contrary to the public welfare. This is just the situation that GST contends exists.

In Midland Realty, the court went on to state that

the statute purporting to preserve existing contracts does not operate to exempt such contracts from the scope of the exercise of the police power of the state to protect or promote the general or public welfare by regulating rates of public utilities so as to raise or

²"Ratemaking bodies, within the ambit of their statutory authority, are vested with considerable discretion to make such pragmatic adjustments in the ratemaking process as may be indicated by the particular circumstances in order to arrive at a just and reasonable rate."

³"The Missouri Supreme Court has held that the Commission may exclude costs in establishing the just and reasonable rates to be charged."

lower, as the case may be, previously existing contract rates.

Midland Realty, 93 S.W.2d at 959. Thus, Midland Realty is authority by which the Commission may grant GST the ultimate relief it has requested, following an investigation and hearing, rather than authority to the contrary as KCPL evidently supposes.

However, it is also clear that the Commission cannot grant GST the interim relief it seeks. In this, its third request for immediate or interim relief, GST repeatedly characterizes the relief sought as "equitable." *GST's Reply to KCPL's Response*, at page 1, paragraph 1, and at page 2, paragraph 2. The Commission is an administrative agency, a creature of statute, and cannot do equity. See Soars v. Soars-Lovelace, Inc., 142 S.W.2d 866, 871 (Mo. 1940). The Commission can only do what it is expressly authorized to do by statute. The Missouri Supreme Court has held that the Commission is without statutory authority to provide interim relief of the sort proposed herein by GST and the Staff. See St. ex rel. Utility Consumers Council of the State of Missouri v. Public Service Commission, 585 S.W.2d 41, 51-8 (Mo. banc 1979).

In Utility Consumers, the court held that the Commission was not authorized to permit electric utilities to pass fuel price changes on to consumers through automatic fuel adjustment clauses (FACs). The court described the purpose of a FAC:

[T]raditional ratemaking methods have been subjected to severe criticism in that they are expensive and time consuming to the detriment of both the utility and consumers. The fuel adjustment clause is considered a more efficient and effective substitute because, among other reasons, it reduces "regulatory lag" and thus

permits a utility to recover increased fuel costs in times of inflation without undue delay that could be harmful to its economic structure and thus reduce investors' incentives to invest in the utility.

Utility Consumers, *supra*, 585 S.W.2d at 50. The interim relief sought by GST here is, like a FAC, a means of avoiding "regulatory lag." Like a FAC, the interim relief sought by GST is not authorized by statute and, therefore, is not available.

IT IS THEREFORE ORDERED:

1. That GST Steel Company's application for reconsideration and clarification of the Commission's order of July 9, 1999, is denied.
2. 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

8-17
Date Circulated

EC-99-553
CASE NO.

[Signature]
Lumpe, Chair

[Signature]
Crompton, Commissioner

Am 1,2,3,4,5
Murray, Commissioner

[Signature]
Schemenauer, Commissioner

[Signature]
Drainer, Vice-Chair

8-19
Agenda Date

5-0AA

pp. 1, 3

Action taken: _____

Must Vote Not Later Than _____

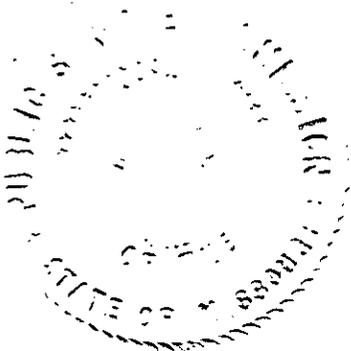
COMMISSION

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 19TH day of AUGUST, 1999.



Dale Hardy Roberts

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge