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October 28, 1999

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
Truman State Office Building, Room 530
PO Box 360
Jefferson City Missouri 65102

FILED²

OCT 28 1999

Missouri Public
Service Commission

Re: Case No. EC-99-553

Dear Judge Roberts:

Enclosed for filing is an original and fourteen (14) copies of **GST Steel Company's Reply to Kansas City Power and Light Company's Motion to Limit the Scope of Discovery and Issues.**

Should you have any questions, please feel free to contact me.

Sincerely,

LATHROP & GAGE L.C.

By:


Kurt U. Schaefer

cc: To all parties of record

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

FILED²

OCT 28 1999

Missouri Public
Service Commission

GST Steel Company,

Complainant,

v.

Kansas City Power & Light Company,

Respondent.

Case No. EC-99-553

**GST STEEL COMPANY'S REPLY TO
KANSAS CITY POWER AND LIGHT COMPANY'S MOTION
TO LIMIT THE SCOPE OF DISCOVERY AND ISSUES**

By motion dated October 18, 1999, Kansas City Power & Light Company ("KCPL") seeks to limit the scope of issues in this docket and to avoid responding to discovery questions propounded by GST Steel Company ("GST") concerning the Hawthorn 5 boiler explosion experienced in February 1999. KCPL's motion should be denied in all respects. For the reasons explained below, KCPL's motion is untimely as an objection to GST's discovery, and its attempt to narrow the issues in this docket is irrational, contrary to the public interest, and based upon inaccurate application of Missouri law. In support of its Reply, GST states as follows:

I. BACKGROUND

1. GST information requests 7.2 and 7.3, which were served September 17, 1999 and are reprinted below, seek existing information regarding the Hawthorn 5 boiler explosion.

7.2 Please identify and provide copies of all documents, reports, memoranda, analyses, evaluations, conclusions, and/or

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presentation slides or overheads prepared by Crawford Investigation Service in connection with the Hawthorn incident.

- 7.3 Please identify and provide copies of all documents, reports, memoranda, analyses, evaluations, recommendations, conclusions, and/or presentation slides or overheads prepared by the seven-member "KCPL Internal Cause & Loss Team," identified by KCPL in Exhibit #'s 28 & 29 in its Response to GST Request 2-5(f).

In its motion, KCPL seeks to avoid answering these requests. It claims that the scope of the issues in this docket should be narrowed because matters relating to the boiler explosion are "not directly relevant" to this proceeding. It asserts that there also are privilege and other reasons for withholding the requested information.

2. In its *Order Regarding GST Steel Company's First Motion to Compel Discovery and Amending the Procedural Schedule*, dated July 29, 1999, the Commission rejected KCPL's "misplaced" reliance on attorney-client and attorney work product claims of privilege. The Commission observed in that Order:

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.

In that same Order, the Commission further stated:

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. (emphasis supplied).

The Commission directed KCPL to provide GST complete and timely answers to GST's information requests and cautioned KCPL against further abuses of the discovery process. (Order at p. 8).

3. In its Order granting GST's second motion to compel discovery, the Commission addressed KCPL's untimely responses and failure to comply with its July Order. *Order Regarding KCPL's Motion for Clarification, Reconsideration and Rehearing of the Commission, Order of July 29, 1999, and Regarding GST Steel Company's Second Motion to Compel Discovery*, dated August 19, 1999, see pp. 1, 3. In that Order, the Commission noted that KCPL had taken no action to narrow the issues before the Commission in this docket, and that GST's complaint specifically raised questions concerning the following matters as they pertained to the adequacy of service and cost of service to GST:

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

The Commission further held that:

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.

The Commission restated in this Order that KCPL had admitted "GST would likely experience higher prices as a direct result of the Hawthorn outage." (*Order* at pp. 8-9). The Commission thereupon reiterated its prior conclusion that the Hawthorn explosion, and the company actions or inactions leading up to the explosion, were pertinent issues to be addressed in this docket.

4. In both the July 29, 1999, and August 19, 1999 Orders, the Commission stated that it possesses continuing jurisdiction over the matters raised in GST's complaint pursuant to RSMo §393.130.1, which prohibits all unjust or unreasonable charges. Excessive energy charges to GST due to unreasonable or imprudent practices at Hawthorn which permitted the explosion to occur are thus prohibited as a matter of law.

II. ARGUMENT

A. KCPL Has Failed To Comply with Commission Orders

5. In its August 19, 1999 Order, the Commission again rejected KCPL's attempted use of attorney-client privilege and the work product doctrine as a shield against valid discovery, and directed KCPL to provide a specific listing and description of each document claimed to be privileged. (*Order* at p. 12). KCPL has failed to provide the privileged document log required by this Order.¹ At this point, the Commission should find

¹ On September 29, 1999, GST received a log listing six documents, totaling eleven pages, of materials KCPL claimed were pertinent but privileged documents that were in the possession of one KCPL attorney. A privilege log concerning all documents assembled as a result of GST's requests has not been produced. Following repeated inquiries from GST, KCPL has indicated that many assertedly privileged documents are being withheld, but no list of such documents has been produced.

that KCPL has waived any claim of privilege with respect to any documents not listed as privileged today. GST asks that the Commission direct KCPL to immediately produce all withheld documents that are not so listed.

6. In its latest motion, KCPL again misapplies claims of attorney client privilege and fails to provide the document listing required by the August 19, 1999 Order. Further, the company simultaneously admits that requests 7.2 and 7.3 go directly to the heart of the cause of the Hawthorn explosion while claiming that the cause of the explosion is not "directly relevant" to this proceeding (*compare* KCPL Motion at pp. 2 and 3). The Commission should reject KCPL's incongruous pretzel logic and direct immediate disclosure of the materials requested.

B. KCPL's Objection Is Not Timely

7. As noted above, GST served its seventh set of interrogatories on KCPL on September 17, 1999. Pursuant to the discovery procedures applicable in this docket, KCPL had 10 days to object to any such requests and 20 days to answer those to which it did not object. KCPL failed to object or produce answers in a timely fashion. On this basis alone, given KCPL's persistent disregard for discovery procedure and schedule in this matter, the Commission should reject summarily KCPL's untimely objection to GST's requests 7.2 and 7.3.

C. GST's Requests Are Directly Relevant To Issues In This Docket

8. GST information requests 7.2 and 7.3, as KCPL acknowledges in its current motion, go directly to the heart of facts that KCPL or its agents have unearthed with respect to the cause of the explosion at Hawthorn. The requests seek information in the company's

possession that could not be more directly relevant to GST's complaint, and which may not be obtained from other sources.

D. KCPL's Reasons For Opposing Disclosure Have No Merit

9. KCPL asserts that its Internal Cause and Loss Team is cooperating with Starrs Technical Risks Agency, which has employed Crawford Investigation Services ("Crawford") to determine the cause of the explosion. The company asserts that disclosure of investigatory documents in this docket could impede the "free flow of information" between KCPL and Crawford and possibly jeopardize the insurer's subrogation rights and KCPL's ability to recover damages from possible third parties (*Motion* at p. 3). Also, KCPL claims the insured/insurer privilege might apply as well. Finally, KCPL asserts that production of such documents in this docket might make the Commission's investigation in Case No. ES-99-581 more difficult (*Motion* at p. 4). None of these claims make the remotest sense.

10. Disclosure of investigation documents in *any* Commission docket will have the same impact, if there is any, on the free flow of information between KCPL and Crawford. The Commission thus can expect the same KCPL objection to be interposed in Case No. ES-99-581 as the company raises here. The answer in both cases is that the Commission has the authority and obligation to examine these documents in the discharge of its statutory duty, that the documents are directly pertinent to GST's claims in this docket, and that the Commission has established mechanisms already employed in this proceeding to guard against the public disclosure of highly confidential materials. GST has been, and will continue to abide by the rules set by the Commission regarding highly confidential documents. Also, the possibility that KCPL might have a possible cause of action against a third party does not serve as a shield against discovery in Commission proceedings. The

potential subrogation of the insured to KCPL's rights similarly does not create a bar against disclosure that KCPL cannot assert itself.

11. KCPL suggests, but does not actually assert, that the documents requested by GST may be protected from discovery by the insured/insurer privilege, attorney-client and/or work product privileges. If such privileges were to apply, they would preclude their production to the Commission and its Staff² as well as to GST. There is, however, no showing that any such privilege applies to any of the requested materials, and KCPL makes no effort to identify particular documents. With respect to possible attorney-client or work product doctrine claims, GST expects that the process, ignored to date by KCPL, that the Commission established in its August 19, 1999 Order, should apply. KCPL must identify and describe specifically each document responsive to GST's requests, which the utility maintains is absolutely immune to discovery by anyone, including the Commission. All other documents are overdue and should be produced immediately.

12. The relationship of KCPL to its insurers does not create a new type of immunity from disclosure. In Missouri, a very limited extension of the attorney-client privilege has been applied to communications between an insured and insurance company employees in automobile accident cases where (1) the policy requires the insurance company to defend [the insured] through its attorney, and (2) the communication is intended for the information or assistance of the attorney in so defending him. *State ex rel., Cain v. Barker*, 540 S.W.2d 50 (Mo. banc 1976). In *Cain v. Barker*, the Court took repeated pains to emphasize that the insurance company attorneys were required by standard policy terms

² Any such documents provided to Commission Staff would constitute a waiver of the claim of privilege.

to represent the insured in any legal action against the insured for causing an accident. Apart from such imputed attorney-client situations, there is no separate class of privileged communications for insurers and insured. Those circumstances do not exist here. KCPL and its insurers may have similar interests (subrogated rights) or potentially adverse interests (if the investigation discloses a condition that would disqualify coverage under existing policies). In neither event will the insurers act as attorneys for KCPL pursuant to provisions of those policies. There is no extended attorney-client privilege in this setting, the information requested is otherwise discoverable, and it should be produced.³

13. As noted above, the Commission should find that KCPL has waived any traditional privilege claims as to requests 7.2 and 7.3. Even if the Commission finds such privilege claims have not been waived, the need for disclosure of the requested documents outweighs any KCPL interest in non-disclosure. If KCPL means to assert that some of the requested documents may be prepared in contemplation of litigation, it should have identified specifically the documents prepared for this purpose and for which only a limited immunity from disclosure applies. Rule 56.01(b)(3) provides that documents "prepared in anticipation of litigation or for trial by ... [the] other party's ... insurer ... are discoverable upon a certain showing of needs and hardship."⁴ In this instance, the need for disclosure has been established since all parties agree the investigative documents go to a core question in this docket and such information is not available from any other sources. Hardship has been established as well in the form of the harm to GST caused by higher replacement energy

³ See *Parrett v. Ford Motor Co.*, 47 FRD 22 (W.D. Mo. 1968).

⁴ See dissent of Seiler, C.J. in *State ex rel., Cain v. Barker*, 540 S.W.2d 50 (Mo. banc 1976).

costs due to the Hawthorn outage and the Commission's need for the best information available on the causes of the explosion to resolve GST's complaint. Furthermore, ratepayers have paid for the insurance policies applicable to the Hawthorn explosion in the cost of service used to determine rates. Charges to any ratepayer that are affected by the explosion and outage, a category that certainly includes GST, make those customers a real party in interest in the investigation. GST is thus entitled to access to the investigative information requested.

14. Any information produced in this docket will facilitate the Commission Staff's review in Case No. ES-99-581. Staff has followed discovery in this docket and attended the depositions conducted to date. It is clear that Staff's review has benefitted in numerous ways as a result. The company's bald claim that GST's discovery could impede progress in Case No. ES-99-581 is wrong on its face.

15. GST recognizes that the cause of the explosion is a commercially sensitive issue for KCPL, but Hawthorn explosion-related questions, and the information available to date on that subject, cannot be skirted in this docket unless KCPL is willing to admit it is responsible for the explosion and will not, in the context of the issues in this docket, charge GST for costs related to the explosion and outage. In that regard, GST asks the Commission to condition any restriction it may impose on the discovery of documents or other material related to the Hawthorn explosion on KCPL's agreement to stipulate or admit the following facts:

1. The potential safety and health hazards of allowing natural gas to accumulate in the Hawthorn 5 boilers are known to KCPL and generally acknowledged in the industry.

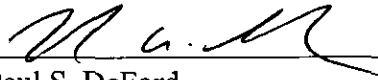
2. That KCPL was exclusively and solely responsible for operating and maintaining Hawthorn 5.
3. That KCPL knew, or should have known, that damage and safety risk would occur if natural gas were allowed to accumulate in the Hawthorn 5 boiler when the plant was shut down.
4. That implementation of proper safe shutdown procedures would ensure that the gas lines feeding the boiler would be fully closed.
5. That the accumulation of natural gas in the Hawthorn 5 boiler that led to the explosion and destruction of the boiler building resulted from the failure of KCPL employees to close all required gas valves and to verify the proper closure of all required gas valves to the Hawthorn 5 boiler.

16. Finally, it is apparent that KCPL and Crawford possess a wealth of information concerning the Hawthorn explosion that the company would prefer not to disclose at this time. If such information is not disclosed now, KCPL must be barred from introducing or relying on any documents, analyses, or data which it now possesses or can develop from such materials, at any point in this proceeding. The company should not have the opportunity to introduce selected segments of such information in its testimony or through cross examination if it refuses to disclose the information now.

WHEREFORE, for the reasons stated herein, GST urges the Commission to deny KCPL's motion in its entirety, to direct KCPL to produce the materials requested by GST

immediately, and to provide such further additional relief that GST requests or that the Commission deems warranted.

Respectfully submitted,


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ATTORNEYS FOR GST STEEL COMPANY

Dated: October 28, 1999

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, postage prepaid, to all counsel of record as shown on the following service list this 28th day of October, 1999.

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