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March 13, 2000

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Missouri Public Service Commission

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
Room 530
Truman State Office Building
Jefferson City Missouri 65101

Re: **GST Steel Company v. Kansas City Power & Light Company**
Case No. EC99-553

Dear Secretary Roberts:

Enclosed for filing in the above-referenced case please find an original and fourteen copies of **GST Steel Company's Reply to KCPL's Response to GST's Motion to Compel Production of Documents, For Directed Findings Concerning Information Controlled by KCPL, and For Interim Relief.**

Thank you in advance for your attention to this matter.

Sincerely,

LATHROP & GAGE L.C.

By: Kurt U. Schaefer

KUS/jf
Enclosures
cc: All Parties of Record

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BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

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

GST STEEL COMPANY'S REPLY TO KCPL's RESPONSE TO GST'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS, FOR DIRECTED FINDINGS CONCERNING INFORMATION CONTROLLED BY KCPL, AND FOR INTERIM RELIEF

GS Technologies Operating Company, Inc., doing business in Missouri as GST Steel Company ("GST"), makes the following Reply to the Response of Kansas City Power & Light Company ("KCPL") to its Motion to Compel Discovery, for Directed Findings Concerning Information Controlled by KCPL, and for Interim Relief:

OVERVIEW

KCPL responded to GST's Motion in the first instance by producing relevant documents that the utility had withheld and by agreeing to permit GST access to on-site documents that it has denied GST prior to filing the Motion. In those respects, KCPL conceded the accuracy of GST's Motion and abandoned objections that had no merit. KCPL's concessions do not, however resolve all matters raised in the Motion. Issues that the Commission should resolve are addressed below.

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I. Discovery Issue Update

In response to GST's motion, KCPL conceded GST's point by agreeing to allow GST access to the "voluminous" materials it kept on site rather than copying and delivering them to GST. On March 7 and 8, GST reviewed materials in the Hawthorn "records" room, and KCPL, so far at least, has provided copies of materials requested in a timely fashion.

Further conceding GST's claims, on March 2, KCPL supplied the April 15, 1999, Cause and Loss Team Summary Report that KCPL had supplied to OSHA but withheld from GST for more than six months (*see* GST Motion, p. 15). On March 2, KCPL also supplied copies of Cause and Loss Team meeting minute notes and Weekly Progress Reports, but only for the months of March and April 1999. The progress in these areas was noted at the March 6 pre-hearing conference.

Following the prehearing conference, GST and KCPL discussed outstanding discovery requests, including production of the "Cause and Effect Diagram" the KCPL Cause and Loss Team worked on throughout March and April 1999. To facilitate matters, GST supplied KCPL with a highlighted copy of the company's own memos to identify documents specifically referenced in those materials, including the Cause and Effect Diagram, which GST has requested be produced.

GST and KCPL also discussed GST data requests numbered 10.6 and 10.7, which concerned control problems experienced on February 16, 1999 (10.7) and identification of the equipment damaged by the water and sewage overflow that occurred that day (10.6). On March 7, GST received an incomplete response to request 10.7 (and advised KCPL of the manner in which it was deficient). GST has requested a response to request 10.6 that reflects KCPL's current knowledge of damaged equipment and systems, but has not received a reply.

GST has endeavored to make its discovery requests as specific as possible to avoid confusion and unnecessary delays in production, and continues to discuss the status of requests with KCPL informally. At this point, KCPL needs to produce the Cause and Loss Team Cause and Effect diagram. The company also needs to produce all Cause and Loss Team documents except those listed on its existing Privilege Logs (and for which the claim of privilege has not been challenged). Finally, KCPL needs to produce documents it has received from Crawford Investigative Services (GST request 7.2). To this point, KCPL has not produced, identified or claimed as privileged documents originated by Crawford (see also discussion in Part II, below).

II. Matters Relating to Privilege

KCPL's obligation in the first instance is to describe documents in sufficient detail to establish that a privilege from disclosure exists. The utility conceded in its Response that it had waived privilege claims by failing to provide such detail for several of the documents on its privilege log.

KCPL argues in its Response that statements taken of KCPL employees who were on duty at the time of the Hawthorn boiler explosion are privileged attorney-work product (Response, p. 9), while simultaneously claiming credit for copying many of those documents for GST witness Ward (Response, p. 4). The net result of KCPL's internally inconsistent claims is that the utility has waived any privilege claims as to the materials actually disclosed. GST has not challenged privilege claims as to documents prepared by or for persons known to be attorneys of KCPL (*e.g.*, Mr. Reynolds and Ms. Shannon).

The employees of Crawford Investigative Services, however, are not employees of KCPL and are not working on behalf of KCPL. They are investigating the explosion on behalf of KCPL's insurers, whose interests could very well be adverse to KCPL's in the end.

KCPL's Response reasserts its claim of the "Insured/Insurer Privilege" against disclosure. The Commission must reject this asserted privilege. 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*, a case KCPL relies upon,[1] the Court took repeated pains to emphasize that insurance company attorneys were required by standard policy terms 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.

Unlike the accident liability cases in which insurance company attorneys in fact represent the claimant, KCPL and its insurers have no such identity of interest. They are parties in a potential chain whose shared interest only extends to possible claims against other parties down the chain. The fact that KCPL and Crawford (for the insurer) are conducting separate investigations into the explosion is proof positive that they are parties with some shared and some divergent interests.

[1] *See* KCPL Response at 11.

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. Like GST, Crawford has requested data from KCPL. The fact that KCPL and Crawford have, or may continue to be, acting cooperatively in certain areas of inquiry for their own convenience does not create an attorney-client relationship, and KCPL documents supplied to Crawford are open for discovery. Notably, KCPL does not claim in its Response that KCPL and Crawford are a legal team or that they share the same interests.

KCPL's disclosure of information to Crawford waives any claim of privilege that may otherwise have applied. Further, the Commission has held previously that the potential subrogation claims of the utility insurers to KCPL's rights (*e.g.*, against an equipment vendor) are not superior to the customer's.[2] The contractual ties between KCPL and its insurers do not erect a privilege barrier to data KCPL shares with Crawford. There is no identity of these parties, and communications between them are not privileged.

Similarly, communications between KCPL and Crawford are not protected by the attorney-client privilege because Crawford is not part of the KCPL litigation team. Putting this matter in perspective, KCPL's confidential communications with its consultants in this case, such as Mr. Eldridge, would fall within recognized privileges from disclosure, as would communication between GST's attorneys and consultants. The cases cited by KCPL apply to such circumstances (*see* KCPL Response at 13-14). KCPL, or for that matter GST, communications with third parties, or their consultants, however confidential, would not be privileged. This is the circumstance that applies to KCPL communications with and documents

[2] Order Regarding KCPL's Motion to Limit the Scope of Discovery and Issues, dated November 16, 1999, *mimeo* at 4.

supplied to Crawford. There is no extended attorney-client privilege in this setting, the information requested is otherwise discoverable, and it should be produced.[3]

III. The Commission Should Grant GST's Request for Interim Relief

KCPL argues incorrectly that the Commission lacks the statutory authority to grant the relief GST seeks on either an interim or permanent basis (KCPL Response at 17-19). The Commission in fact has jurisdiction over GST's claims and the authority to grant the relief GST requests on either basis is a matter of black-letter Missouri law.

KCPL's Response acknowledges that the Commission has authority to investigate the adequacy of KCPL's electric service,[4] and to investigate the Hawthorn 5 boiler explosion.[5] Although KCPL is loathe to admit it, there similarly is little doubt that the Commission has authority under RS Mo. § 393.130(1) to order KCPL not to include any unjust or unreasonable charge in its rates for electric service. Further, the law does not distinguish between rates charged by KCPL under generally applicable tariffs or under contracts approved by the Commission for specific customers. In either case, the Commission has plenary and continuing jurisdiction to prevent the utility from rendering excessive charges, and ample authority to order appropriate relief. Indeed, no other body has this authority and the Commission may neither waive nor delegate that authority.

GST does not ask the Commission to award money damages, or to grant some form of equitable relief. KCPL's arguments along these paths are both incorrect and misleading. GST has requested that the Commission order KCPL to remove imprudently incurred costs from the

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

[4] See KCPL Response at 19, citing RSMO § 393.130.

prices it charges GST. If the Commission finds that imprudent KCPL practices caused the Hawthorn explosion, it needs to order KCPL to recalculate the affected bills to remove the imprudently incurred replacement energy costs that have been included in the calculation of the prices charged to GST. The question posed in GST's February 22, 2000, Motion to Compel is whether it is now appropriate, given the passage of more than a year from the Hawthorn explosion, to provide protective relief to GST, on a subject to true-up basis. As explained in GST's Motion, the Commission possesses adequate authority to grant such relief, the principle that should guide the Commission's actions is to safeguard consumer interests, and the Commission has exercised that authority on a regular basis at the request of utilities.

Finally, GST explained in detail in its Motion that the Commission's reliance on the UCCM[6] precedent was misplaced. (*See*, GST Motion at pp. 19-22.) KCPL's Response argues that UCCM is applicable, but does not address the substance of the case precedent GST cites. In short, whatever relief the Commission may grant on a permanent basis it may grant on an interim basis in this circumstance, particularly on a subject to true-up basis as Staff previously suggested. This is not a matter of the Commission acting beyond its authority as a court of law or equity. It is simply a case where the Commission is exercising its everyday rate and utility supervisory powers to safeguard both consumer and utility interests while a record is developed on a matter the Commission considers to be complex.[7]

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[5] KCPL Response at 19, citing RS Mo. § 393.140(2).

[6] State ex rel. Utility Consumers Council of the State of Missouri v. Public Service Commission, 585 S.W.2d 41 (Mo. Banc 1979).

[7] *See* Order dated July 9, 1999, at p. 4.

IV. The Doctrine of *Res Ipsa Loquitur* is Directly Applicable in This Proceeding

KCPL thoroughly misapplies legal concepts and precedents in opposing the application of the doctrine of *Res Ipsa Loquitur* in this proceeding. As explained in GST's Motion to Compel,[8] the doctrine appropriately assigns the burden of proof and presumption of responsibility in cases of this nature where:

- An incident ordinarily would not occur if those in charge exercised reasonable care;
- The facilities involved were under a party's management and control; and
- That party possesses superior knowledge or means of information concerning the incident.

The parties have agreed to a List of Issues in this proceeding that includes whether KCPL operated its generation, transmission and distribution facilities "in a reasonable and prudent manner."[9] The term "reasonable and prudent" describes the standard of care demanded of the utility.[10] A core purpose of this proceeding is to determine if KCPL has satisfied that standard of care with respect to its service to GST, and the fundamental premise of *Res Ipsa Loquitur* is applicable in establishing a presumption of imprudence by the utility in allowing the boiler explosion to occur. In this regard, it is instructive to note the following Commission determination in the 1986 prudence review of Wolf Creek's construction costs:

> With respect to the question of the presumption of management prudence, the commission agrees with the following conclusions of the Washington, D.C., circuit court of appeals:

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[8] *See* Motion at 16-17.

[9] *See* "List of Issues and Order of Witness Examination" jointly filed March 10, 2000, by the parties in this docket.

[10] *See, In Re Kansas City Power & Light Co.*, 75 PUR 4th 1, 51 (Wolf Creek investigation) (1986).

> "The Federal Power Act imposes on the company the 'burden of proof to show that the increased rate or charge is just and reasonable.' 16 U.S.C. § 824d(3). Edison relies on Supreme Court precedent for the proposition that a utility's costs are presumed to be prudently incurred. See *Missouri ex rel. Southwestern Bell Teleph. Co. v. Missouri Pub. Serv. Commission*, 262 U.S. 276, 289, Footnote 1, PUR1923C 193, 200, 67 L.Ed. 981, 986, 43 S.Ct. 544 (1923). However, the presumption does not survive 'a showing of inefficiency or improvidence.' *West Ohio Gas Co. v. Ohio Pub. Utilities Commission*, 294 U.S. 63, 6 PUR NS 449, 79 L.Ed. 761, 55 S.Ct. 316 (1935); see 1 A.L.G. Priest, '*Principles of Public Utility Regulation*', 50-51 (1969). As the commission has explained, 'utilities seeking a rate increase are not required to demonstrate in their cases-in-chief that all expenditures were prudent. . . . However, where some other participant in the proceeding creates a serious doubt as to the prudence of an expenditure, then the applicant has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent.'" *Re Minnesota Power & Light Co.*, 11 FERC ¶ 61,312, Opinion No. 86 (1980) (footnotes omitted). *City of Anaheim v. Federal Energy Regulatory Commission*, 216 U.S.App.D.C. 1, 669 F.2d 799 (1981).

In this case, GST has provided *prima facie* evidence of KCPL's imprudence. KCPL should be required to overcome the presumption that it failed to exercise reasonable care.

Finally, GST's Motion cited a specific instance, involving remarkably similar circumstances, where the New York Public Service Commission applied this doctrine.[11] KCPL asserts that the New York Commission and the New York Court of Appeals did not use the term *Res Ipsa Loquitur* or apply the doctrine in the cited Rochester Gas & Electric Corp. case,[12] but a reading of the New York Commission Order shows that the principle clearly was employed. The New York Commission's Order, Opinion No. 84-23, issued August 29, 1984, states as follows:

> First, a review of the consequences of the company's [RG&E] actions and inactions is warranted to highlight the risks incident to nuclear technology, the potential health and safety hazards involved and the cost penalties of delay and error.
>
> * * *

[11] GST Motion at 17-18.

[12] KCPL Response at 22.

> Second it is clear that it was RG&E that was exclusively responsible (subject to Federal regulatory supervision) for operating and maintaining Ginna station. . . . It is equally clear that ratepayers had no responsibility for the plant's maintenance and operation.
>
> * * *
>
> Third, the company knew or should have known that damage and potential safety risk would occur if a large piece of metal[13] was left in the steam generator.[14]

The New York Commission found that the metal piece that caused the outage "was either put down and forgotten by a [RG&E] worker in the steam generator, or dropped by a worker in the steam generator and not reported. No other reasonable conclusion can be drawn from the facts as set forth in the record."[15] On this basis, the New York Commission concluded that the utility and its employees failed to exercise reasonable care and that the utility's actions were imprudent.[16]

In sum, in those circumstances, the New York Commission applied the doctrine of *Res Ipsa Doctrine*, and the utility [RG&E] failed to produce evidence to overcome the presumption of imprudence. Except for the type of power plant involved (coal rather than nuclear), the circumstances are precisely the same in this instance. The doctrine is plainly applicable and should be applied. The Commission should establish a presumption that KCPL failed to exercise reasonable care and acted imprudently in causing the Hawthorn boiler explosion.

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[13] A 3.5 pound piece of steel plate inadvertently left in the steam generator continually rubbed against steam generator tubes until one ruptured in January 1982.

[14] Opinion No. 84-23, Proceeding on Motion of the Commission to Investigate the Outage of Rochester Gas and Electric Corporation's Ginna Nuclear Plant, *mimeo* at 46-48.

[15] *Id. mimeo* at 48.

[16] Id.

CONCLUSION

For the reasons stated herein, GST requests that the Commission grant the relief requested in GST's February 22, 2000 Motion.

Respectfully submitted,

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Dated: March 13, 2000

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 13th day of March, 2000.

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