

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION  
JEFFERSON CITY  
July 13, 2000**

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

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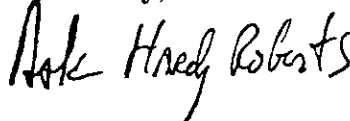
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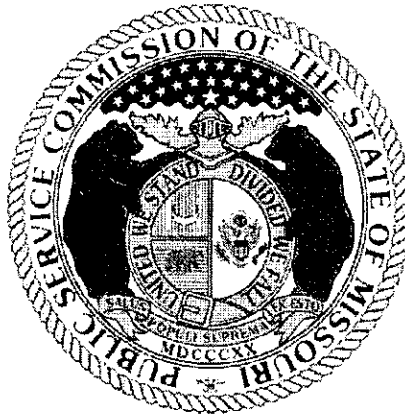
**Enclosed find certified copy of a REPORT and ORDER in the above-numbered case(s).**

Sincerely,



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

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**



GS Technology Operating Company, Inc.,  
doing business as GST Steel Company,

Complainant,

v.

Kansas City Power & Light Company,

Respondent.

Case No. EC-99-553

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**REPORT AND ORDER**

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**Issue Date:**

July 13, 2000

**Effective Date:**

July 25, 2000



# BEFORE THE PUBLIC SERVICE COMMISSION

## OF THE STATE OF MISSOURI

GS Technology Operating Company, Inc.,	)	
doing business as GST Steel Company,	)	
	)	
Complainant,	)	
	)	
v.	)	<u>Case No. EC-99-553</u>
	)	
Kansas City Power & Light Company,	)	
	)	
Respondent.	)	

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REGULATORY LAW JUDGE: Kevin A. Thompson, Deputy Chief.

## REPORT AND ORDER

### Procedural History

On May 11, 1999, GS Technology Operating Company, Inc., doing business as GST Steel Company (GST), filed its Petition for an Investigation as to the Adequacy of Service provided by the Kansas City Power & Light Company (KCPL) and Request for Immediate Relief. GST filed its petition in both Highly Confidential (HC) and Nonproprietary (NP) versions, together with a motion for a protective order. GST sought a protective order to protect the details of its special contract with KCPL

from disclosure. On May 12, GST filed a Supplement to its petition, as well as the supporting affidavit of Ronald F. Lewonski. On May 18, KCPL filed its response, in HC and NP versions, to GST's request for immediate relief; GST replied on May 21, 1999.

The Commission construed GST's petition as a complaint and issued its Notice of Complaint on May 26, 1999. The Commission also adopted a protective order on that date. On June 1, the Staff of the Missouri Public Service Commission (Staff) responded to GST's petition and request for immediate relief. However, on the same day, the Commission issued its order denying GST's request for immediate relief, shortening the time allowed KCPL to answer the complaint, setting a prehearing conference, and requiring the filing of a procedural schedule.

On June 9, 1999, KCPL filed its Answer in HC and NP versions. An amended Answer was filed on September 9, 1999, also in HC and NP versions. A prehearing conference was held on June 11. On June 18, the parties filed a joint proposed procedural schedule. Also on that date, GST filed its request for interim relief and expedited hearings in HC and NP versions. The Commission adopted the joint proposed procedural schedule by order issued on June 22. On June 28, KCPL responded in opposition to GST's request for interim relief. Staff responded on the same day, but supported GST's request. KCPL responded to Staff's response on July 7 and the Commission denied GST's request for interim relief by Order issued on July 9, 1999. GST applied for reconsideration and clarification on July 21. KCPL responded on August 3, in HC and NP versions. The Commission denied GST's motion on August 19, 1999.

Meanwhile, the first of several discovery disputes arose on July 2, 1999, when GST filed its motion to compel KCPL to respond to its first set of interrogatories and requests for production. KCPL responded on July 14. On July 23, GST filed its motion to compel responses to its second and third sets of discovery in HC and NP versions. On July 26, the Commission by Order shortened the time allowed to KCPL to respond to GST's second motion to compel. On July 28, GST filed, in HC and NP versions, its reply to KCPL's response to its first motion to compel. On July 29, the Commission issued its Order Regarding GST's First Motion to Compel and Amending the Procedural Schedule.

KCPL notified the Commission by letter on August 3 that it had re-evaluated its objections to GST's second and third sets of discovery in the light of the Commission's order of July 29; it filed its HC and NP versions of its response to GST's second motion to compel on the same day. On August 9, KCPL moved for clarification, reconsideration and rehearing of the Commission's order of July 29. On August 11, KCPL filed its modified response to GST's second motion to compel; GST replied on August 17. On August 19, the Commission issued its Order regarding GST's second motion to compel and regarding KCPL's motion for clarification of August 9.

On August 31, 1999, KCPL filed its first motion to compel discovery with supporting suggestions, in HC and NP versions. On September 13, GST and KCPL moved jointly to modify the procedural schedule. On September 21 the Commission modified the procedural schedule as requested by the parties and, as GST had never responded, granted KCPL's

first motion to compel. On September 22, the Commission issued a Notice of Correction.

On October 4, 1999, James Brew moved for leave to appear for GST *pro hac vice*. On the same day, GST moved for reconsideration with respect to the Commission's granting of KCPL's first motion to compel, and belatedly filed its response to that motion. GST also filed supporting suggestions on that day. As grounds for reconsideration, GST stated that it had never been served with a copy of KCPL's first motion to compel. Therefore, the Commission on October 6, 1999, issued its Order Directing Filing, requiring the parties to specify the date and manner, if any, in which that motion had been served upon them. Public Counsel filed its response on October 8; Staff filed its response on October 14. Neither of these parties had ever been served with KCPL's motion, although both had received a copy from the Commission in the normal course of affairs. Also on October 14, counsel for GST and KCPL filed a joint response, in which KCPL consented to the vacation of the Commission's order granting its first motion to compel and to GST's late response. Accordingly, on October 19, the Commission vacated the portion of its order of September 21 that concerned KCPL's first motion to compel. At the same time, the Commission granted Mr. Brew's motion to appear *pro hac vice* and gave notice of its acceptance of KCPL's Amended Answer, to which no party had objected.

Meanwhile, on October 13, 1999, KCPL filed its second motion to compel discovery and, on October 19, GST and KCPL again moved jointly for modification of the procedural schedule. On the latter day, KCPL moved to limit the scope of discovery and the issues. On October 19, the Commission



again modified the procedural schedule as requested by the parties. The Commission issued a Notice of Correction on October 20.

On October 21, 1999, KCPL replied to GST's belated response to its first motion to compel. On October 28, both GST and the Staff responded to KCPL's motion to limit the scope of discovery and the issues. On November 2, the Commission issued its new order regarding KCPL's first motion to compel; on November 5, the Commission issued its order regarding KCPL's second motion to compel. Therein, the Commission granted KCPL's second motion to compel, again because GST had never responded to it. On November 8, KCPL replied to GST and the Staff as to KCPL's motion to limit the scope of discovery and the issues. On November 16, the Commission issued its order disposing of KCPL's motion to limit the scope of discovery and the issues.

On November 18, GST responded in opposition to KCPL's request for alternative relief, contained in its November 8 reply. Therein, KCPL had requested that the Commission hold this case in abeyance pending the Commission's final resolution of its investigation of the Hawthorn incident in Case No. ES-99-581. On December 1, the Commission denied KCPL's request for alternative relief. On the same day, GST filed its motion seeking clarification and reconsideration of the Commission's Order of November 5, granting KCPL's second motion to compel. GST filed a corrected version of this motion on December 2. KCPL responded in opposition to GST's motion on December 13 and GST replied on December 22.

On January 6, 2000, the Commission issued its Order to Show Cause. This Order denied GST's motion for clarification and reconsideration as to

the Commission's Order of November 5, 1999, which had granted KCPL's second motion to compel. The Show Cause Order also vacated a portion of the Commission's Order of November 2, 1999, regarding KCPL's first motion to compel, and directed GST to respond to certain data requests (DRs) to which the Commission had originally sustained GST's objection. The Commission took this action because, through the pleadings filed on December 13 and December 22, the Commission learned for the first time that GST Steel Company (GST Steel) was not a distinct legal entity from GS Technology Operating Company, Inc. As this was the basis on which GST's objection to certain DRs had been sustained, that determination necessarily had to be reversed. The Show Cause Order also set a show cause hearing on January 18, 2000, for GST to show why sanctions ought not be imposed upon it or upon its attorneys. Finally, the Show Cause Order suspended the procedural schedule pending the Commission's decision on the Show Cause Order, except for a prehearing conference set for January 18.

On January 7, 2000, the Commission issued a procedural order with respect to the show cause hearing. On January 13, GST filed its response to the Show Cause Order, as well as a motion for leave to file out-of-time. KCPL and Staff also responded to the Show Cause Order on that day. On January 18, the Commission held the show cause hearing, as well as the prehearing conference previously scheduled for that day. KCPL filed a letter brief on January 20; GST filed copies of certain authorities on the same day. KCPL filed a further letter brief on January 27, to which GST responded on February 2.

On February 17, 2000, the Commission issued its Order Concerning the Show Cause Hearing. In that Order, the Commission determined that, while GST had engaged in discovery misconduct, GST's attorneys had not. The Commission imposed no sanction because KCPL represented that any prejudice was cured. The Commission also established a new procedural schedule and directed the parties to file memoranda of law regarding the Commission's subject matter jurisdiction with respect to the issues raised by GST's petition and the remedies therein sought. These memoranda were filed on March 17. In the Order of February 17, the Commission also reformed the style of the case to reflect the relationship of GST Steel Company and GS Technology Operating Company, Inc., and directed GST to amend its petition to correctly state that relationship. GST complied on February 29.

On February 22, 2000, GST filed its third motion to compel and also requested directed findings and interim relief; GST filed a correction of this motion on February 24. KCPL responded on March 3 and GST replied on March 13. On March 2, the presiding officer notified the parties that all pending discovery matters would be taken up at the prehearing conference scheduled for March 10. At that conference, the presiding officer heard the arguments of the parties regarding GST's third motion to compel. The parties were able to resolve several discovery issues at that time. On March 23, the Commission granted GST's third motion to compel and denied its requests for directed findings and for interim relief.

On April 5, 2000, the Commission by order directed KCPL to file a privilege log referred to in a letter copied to the presiding officer by KCPL on April 4. The Commission filed that letter in the case. KCPL filed the privilege log on April 17. On April 11, KCPL moved to strike portions of the direct testimony of GST's witness, Jerry N. Ward. This motion was taken up at the hearing as insufficient time remained to deal with it prior to the hearing.

Pursuant to the procedural schedule and the Commission's rules, the parties filed prepared testimony. GST filed direct testimony on November 17, 1999, as well as evidence on billing by KCPL on November 18 and November 22. KCPL and Staff filed rebuttal testimony on February 28, 2000. The parties filed a list of issues and agreed order of witnesses and cross-examination on March 10. GST filed surrebuttal testimony on April 6 and Staff filed cross-surrebuttal on the same date. The parties filed their position statements on April 12 and certain affidavits and schedules were filed on April 14.

The Commission held an evidentiary hearing on April 17 and 18, 2000. All parties were represented at the evidentiary hearing and were accorded a full and fair opportunity to adduce evidence in support of their positions and to cross-examine adverse witnesses. The hearing transcript was filed on April 25, 2000, and the Commission established a briefing schedule by order on April 27. On May 11, Staff was excused, at its request, from filing proposed findings of fact and conclusions of law.

Staff and KCPL filed initial briefs on May 12, 2000; KCPL also filed proposed findings of fact and conclusions of law on that date, in HC

and NP versions. Also on that date, GST moved for leave to file its initial brief and its proposed findings of fact and conclusions of law out-of-time. The Public Counsel advised the Commission by letter that it would not brief the case.

On May 15, 2000, GST filed its initial brief and its proposed findings of fact and conclusions of law. On May 24, the parties filed their reply briefs. GST also on that date filed its corrected proposed findings of fact and conclusions of law, HC and NP versions.

### **GST's Motion for Leave to File Out-of-Time:**

GST moved for leave on May 12, 2000, to file its initial brief and proposed findings of fact and conclusions of law out-of-time. Thereafter, it filed these items on May 15, with a correction on May 24. No party has objected to GST's motion and the time for doing so has long since passed. Therefore, the Commission will grant GST's motion.

### **Discussion**

Pursuant to the procedural schedule established by the Commission, the parties jointly filed a list of issues to be determined by the Commission. Each party also filed a statement of its position with respect to each issue. The issues formulated by the parties are as follows:

1. Have the charges imposed under the GST/KCPL Special Contract been "just and reasonable" over the period of the contract?
2. Has KCPL properly accounted for the insurance proceeds that it has received as a result of the Hawthorn incident?

3. Does the Commission have the authority to order KCPL to pay GST insurance proceeds received by KCPL as a result of the explosion of the Hawthorn 5 plant? If so, is it reasonable and appropriate to do so?

4. Does the Commission have the authority to order KCPL to recalculate GST's bills under the contract? If so, should those bills be recalculated (i.e., by using KCPL's incremental costs as if Hawthorn continued to operate)? Is it reasonable and appropriate to do so?

5. Has KCPL operated and maintained its generation units in a reasonable and prudent manner?

6. Has KCPL operated and maintained its distribution and transmission facilities in a reasonable and prudent manner?

7. Should the Commission order a formal investigation into the operation and maintenance of KCPL's generation, transmission and distribution facilities?

8. Should the Commission delay any decision in this case pending the outcome of the Staff's independent and final report of the boiler explosion at Hawthorn 5?

### **Findings of Fact**

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider

relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

### **The Special Contract:**

GS Technology Operating Company, Inc., doing business as GST Steel Company, is a corporation engaged in the manufacture of steel in Kansas City, Missouri. Specifically, GST manufactures grinding balls and rods for the mining industry and carbon wire rods. GST uses electric arc furnaces in its manufacturing process which consume extremely large amounts of electricity. GST purchases this electricity from KCPL and GST is KCPL's largest "single point retail customer," that is, its largest customer taking service at one location. GST has no other source of electricity available to it in Kansas City.

The steel industry is extremely competitive. GST has sought to acquire electric service at an advantageous price through a special contract with KCPL, the "Amended and Restated Power Supply Agreement," executed on August 12, 1994. This special contract was approved by the Commission. In the Matter of a Special Contract filed by Kansas City Power & Light Company, Case No. EO-95-67 (*Order Approving Agreement and Tariff*, issued October 26, 1994). The special contract, which is confidential, provides a formula by which to calculate the price which GST pays to KCPL for electric service. At all times herein pertinent, KCPL accurately computed its charges for electric service to GST pursuant to the special contract.

The special contract provides flexibility to GST by permitting it to schedule production when KCPL's incremental costs are low. The special

contract price includes a fixed component and a variable component. The variable component fluctuates as KCPL's incremental production costs fluctuate. Factors affecting the variable component of the special contract price are KCPL's fuel costs, operations and maintenance expenses, and purchased power expenses.

Under the special contract, GST has paid significantly less for electric service than it would have paid under KCPL's applicable general service tariffs. Under the special contract, GST is not subject to the rate increases, nor does it benefit from the rate decreases, that are applicable to KCPL's regular Missouri retail customers. The special contract permits GST to opt for service under any of KCPL's general service tariffs at any time. GST has never exercised this option.

### KCPL's System:

KCPL owned and operated, in whole or in part, seven fossil fuel generating units, one nuclear generating unit, and several gas/oil peaking units. Among the generating assets operated by KCPL was Hawthorn Generating Station Unit No. 5 (Hawthorn 5), a 479 megawatt (MW) coal-fired, baseload generating unit that entered service in 1956.<sup>1</sup> Hawthorn 5 was one of KCPL's more economical baseload units and generated about 2 million MW hours (MWh) annually. KCPL's other baseload generating stations were Montrose 1, 2 and 3 (total rating of 563 MW), Iatan (726 MW), LaCygne 1 and 2 (total rating of 1,619 MW), and Wolf Creek (1,236 MW). While Wolf Creek is a nuclear power plant, the others are all coal-fired, and use

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<sup>1</sup>A "baseload" unit is one that is always operated at maximum capacity.



either fuel oil or natural gas in addition to coal. Generating resources are generally dispatched in ascending variable cost order; that is, the lower-cost generating units are used before the higher-cost generating units. Hawthorn 5 fell between LaCygne and Montrose in KCPL's resource stack.

In August 1998, a ruptured steam line at Hawthorn 5 caused an unplanned outage at that unit that lasted until November 11, 1998, for a total of 83 days. This outage was caused by a contractor's error, in that the pipe in question was a welded pipe rather than a seamless pipe as specified in the plans. GST experienced increases in the variable portion of its rate under the special contract due to this unplanned outage at Hawthorn 5.

KCPL experienced other outages in its system, both planned and unplanned, in September 1998. GST asserts that not a single KCPL generating unit operated for all 30 days of September 1998. However, total system availability that month was 78 percent. In January 1998, total system availability was 97 percent. Forced outages of short duration are not unusual for baseload, coal-fired generation units.

### **The Hawthorn Incident:**

At about 12:30 a.m. on February 17, 1999, an explosion destroyed Hawthorn 5's 11-story boiler, causing the immediate shutdown of that unit. KCPL has not returned Hawthorn 5 to service since the explosion. The Commission has initiated an investigation into the explosion at Hawthorn 5. In the Matter of Kansas City Power & Light Company, Case No. ES-99-581 (*Order Establishing Case*, issued June 4, 1999). That investigation is

still in progress. The cause of the Hawthorn explosion is not presently known; neither is the degree of responsibility properly to be attributed to KCPL for the explosion.<sup>2</sup>

As a result of the Hawthorn 5 explosion, KCPL estimated that it would experience a net increase in costs for calendar year 1999 between \$6.5 million and \$11.5 million. To replace the power that had been generated by Hawthorn 5, KCPL planned to bring on-line in the spring of 1999 Hawthorn 6, a 142 MW gas-fired combustion turbine generating unit.

KCPL also planned to purchase 350,000 MWh on the energy market. KCPL has received \$5 million from an insurance policy covering replacement energy expense in the event of an incident such as the Hawthorn 5 explosion, which it credited to Account 401555, Purchased Power Expense.

KCPL informed GST that the Hawthorn outage would probably result in an increase in KCPL's incremental costs and that these increased costs would be reflected in GST's rate under the special contract. In the nine months following the Hawthorn 5 explosion, GST paid over \$3.0 million more for electric service to KCPL than it would have paid had Hawthorn 5 remained on-line. Since the Hawthorn 5 explosion, KCPL has relied upon more expensive system resources and higher-priced off-system purchases of replacement power to replace the electricity that would have been generated by Hawthorn 5. The variable portion of GST's rate under the special contract has risen accordingly.

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<sup>2</sup>See discussion under Conclusions of Law, *infra*.

### Other Service Disruptions:

GST also experienced repeated service disruptions in 1998 due to recurring KCPL equipment failures at its Blue Valley Substation. KCPL employs seven large 161 kV transformers and nine 13 kV distribution circuits to provide service to GST. Failures of KCPL's Transformer No. 12 cut power to GST's steel mill on January 20, 1998, and repeatedly from July to October of that year. The failure of this transformer was due to manufacturing defects and not to poor maintenance by KCPL. KCPL has replaced that transformer. In November 1998, GST experienced production delays of 545 minutes due to the failure of KCPL's Transformer No. 1A. KCPL's maintenance of this transformer was well within the manufacturer's recommendations.

On November 13, 1998, KCPL's underground Feeder Cable No. 5316-1 failed, causing GST to scrap 15 tons of steel and shut down for 170 minutes. On November 17, 1998, while Feeder No. 5316 was under repair, Feeder No. 5314 was grounded, causing GST to scrap 19 tons of steel. GST's rod mill was shut down for 180 minutes on this occasion and its south plant was shut down for 300 minutes. Cable faults caused eight outages at GST in 1998; however, two of these were cables owned by GST. Many of these equipment failures resulted from upgrades at GST and nearby industrial facilities. Praxair, Inc., a manufacturer of industrial gases and a neighbor of GST, expanded its facilities in 1998, leading to a much larger demand for power. GST itself in the past decade installed computerized production control equipment which is sensitive to voltage fluctuations.

KCPL has invested over \$1 million to improve the electric service it

provides to GST. Most of the reliability problems raised by GST have already been resolved.

### **Alleged Management Imprudence:**

GST contends that it has experienced increasingly unreliable service from KCPL since July 1998, due to imprudent management decisions by KCPL. GST identifies this imprudence as decreased expenditure on, and attention to, the operation and maintenance of its coal-fired generation units by KCPL's management. In 1994, the percentage of time that Hawthorn 5 was off-line was 7.1 percent; in 1998, it was 33.52 percent. However, although Hawthorn 5 was off-line for an increased period in 1998, its capacity factor for that year was higher than in all previous years except 1997. KCPL's overall maintenance expenditures have decreased from over \$81 million in 1992 to just under \$71 million in 1998. KCPL's operations expenditures associated with its coal-fired plants decreased from approximately \$138.3 million in 1993 to approximately \$126.4 million in 1998. KCPL's maintenance expenses associated with its coal-fired plants decreased from about \$39.5 million in 1993 to \$32.6 million in 1998. KCPL reduced its forecasted five-year capital expenditures from \$191.6 million in 1994 to \$81.2 million in 1999.

Analyses of performance data showed that KCPL's system performed within acceptable industry standards throughout the pertinent period. The equivalent availability factor (EAF) for KCPL's units has been close to the peer group average and, thus, at an acceptable level. However, this data did show a declining trend for KCPL's units EAF and increasing forced outage rates at some of its units. The equivalent availability of KCPL's

units has been about 80 percent and, between 1994 and 1998, its baseload units have demonstrated relatively high capacity factors:

<u>Unit:</u>	<u>Average Capacity Factor:</u>
Montrose	60.53%
Hawthorn	63.74%
La Cygne	69.69%
Iatan	82.10%
Wolf Creek	97.03%

### **Purchased Power and Other Expenses:**

From 1995 to 1998, KCPL's dependence on purchased power increased as its peak demand rose from 2,714 MW to 3,175 MW, an increase of 17 percent. KCPL's purchased power expense increased from 1994 through 1998 from about \$33.9 million to \$63.6 million. These increases in KCPL's purchased power expense directly affected the variable component of GST's rate under the special contract.

During the same period, KCPL incurred large expenses in connection with mergers. In 1996, KCPL incurred \$13 million in expenses related to an unconsummated merger with UtiliCorp, a \$5 million termination fee arising from the UtiliCorp merger, and another \$13 million to defend against an unsolicited exchange offer by Western Resources. In 1997, KCPL had merger related expenses of about \$7 million and paid \$53 million to UtiliCorp as a termination fee. In 1998, KCPL incurred about \$15 million in expenses related to an attempt to merge with Western Resources. However, GST produced no evidence showing that any of these merger-related expenses were ever passed on to GST.

## Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law.

### Jurisdiction:

KCPL is an "electrical corporation" and a "public utility" within the intendments of Section 386.020, (15) and (42), RSMo Supp. 1999.<sup>3</sup> Consequently, the Missouri Public Service Commission has jurisdiction over KCPL's services, activities and rates pursuant to Section 386.250 and Chapter 393, RSMo. However, it does not necessarily follow that the Commission has jurisdiction to hear and determine GST's complaint, or, if the Commission can hear the complaint, that it may grant the relief sought herein by GST.<sup>4</sup>

### Jurisdiction to Hear GST's Complaint:

Citing Section 393.130.1, GST complains that KCPL's cost-based rate for electric service is not just and reasonable because of the inclusion therein of certain imprudently incurred expenses. Likewise, citing the same section, GST complains that the electric service provided

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<sup>3</sup>All statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), revision of 1994.

<sup>4</sup>GST's initial pleading was styled a "petition," not a "complaint"; however, the two words are synonyms pursuant to Section 386.390.1, RSMo 1994: "Complaint may be made by . . . any corporation . . . by petition or complaint in writing[.]"

by KCPL is inadequate and unreliable, again because of imprudent management. The alleged imprudence is a cost-saving reduction in operational expenses, resulting in inadequate maintenance of KCPL's generation, transmission and distribution assets and systems. The most spectacular example of KCPL's managerial incompetence, GST charges, is the destruction of its Hawthorn 5 generation unit by an explosion. GST seeks several remedies, including a finding that it has been overcharged and recalculation of its bills for services already rendered.

Section 393.130.1, under which GST brings its complaint, provides:

Every gas corporation, every electrical corporation, every water corporation, and every sewer corporation shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such gas corporation, electrical corporation, water corporation or sewer corporation for gas, electricity, water, sewer or any service rendered or to be rendered shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge made or demanded for gas, electricity, water, sewer or any such service, or in connection therewith, or in excess of that allowed by law or by order or decision of the commission is prohibited.

However, the Commission's power to hear and determine a complaint brought under Section 393.130.1 is defined by Section 386.390.1, which states in pertinent part:

that no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, sewer, or telephone corporation, unless the same be signed by the public counsel or the mayor or the president or chairman of the board of aldermen or a majority of the council, commission or other legislative body of any city, town, village or county, within which the alleged violation occurred, or not less than twenty-five consumers or purchasers, or prospective consumers or

purchasers, of such gas, electricity, water, sewer or telephone service.

The gravamen of GST's complaint under Section 393.130.1 is that KCPL's charges have not been just and reasonable. Consequently, GST's complaint is subject to the perfection requirement stated in Section 386.390.1. However, GST's complaint is not perfected as that section requires.

At the Commission's direction, the parties addressed this jurisdictional defect in memoranda due on March 17, 2000. In those memoranda, GST and the Staff of the Commission took the position that perfection was not required under a line of cases beginning with State ex rel. Laundry, Inc. v. Public Service Commission, 327 Mo. 93, 34 S.W.2d 37 (1931). KCPL, predictably, took the position that perfection under Section 386.390.1 was required and reminded the Commission of various occasions when it had dismissed complaints for lack of perfection.

The Commission agrees with KCPL that GST's complaint must be perfected under Section 386.390.1. Laundry, Inc., *supra*, and its progeny have to do with misclassification, that is, which of several approved rates should a consumer be charged and not, as here, with whether a rate is just and reasonable. However, Section 386.390.1 also provides that the Commission may hear and determine an unperfected complaint "upon its own motion." The statute does not specify when or how the Commission is to exercise this authority. The Commission concludes that it may do so in this order. Therefore, the Commission shall determine the merits of GST's complaint "upon its own motion" as authorized by Section 386.390.1.



## Jurisdiction to Provide a Remedy:

As noted previously, however, authority to hear and determine GST's complaint does not necessarily equal authority to grant the relief therein requested. The Public Service Commission "is purely a creature of statute" and its "powers are limited to those conferred by the [Missouri] statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted." State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41, 47 (Mo. banc 1979); State ex rel. City of West Plains v. Public Service Commission, 310 S.W.2d 925, 928 (Mo. banc 1958). While the Commission properly exercises "quasi judicial powers" that are "incidental and necessary to the proper discharge" of its administrative functions, its adjudicative authority is not plenary. State Tax Commission v. Administrative Hearing Commission, 641 S.W.2d 69, 75 (Mo. 1982), quoting Liechty v. Kansas City Bridge Co., 162 S.W.2d 275, 279 (Mo. 1942). "Agency adjudicative power extends only to the ascertainment of facts and the application of existing law thereto in order to resolve issues within the given area of agency expertise." State Tax Commission, *supra*.

The Public Service Commission Act is a remedial statute and thus subject to liberal construction; however, "'neither convenience, expediency or necessity are proper matters for consideration in the determination of' whether or not an act of the commission is authorized by the statute." *Id.*, quoting State ex rel. Kansas City v. Public Service Commission, 301 Mo. 179, 257 S.W. 462 (banc 1923). The Commission is without authority to award money to either GST or KCPL, American Petroleum Exchange v. Public

Service Commission, 172 S.W.2d 952, 955 (Mo. 1943), or to alter, construe or enforce their special contract. May Department Stores Co. v. Union Electric Light & Power Co., 341 Mo. 299, 107 S.W.2d 41, (Mo. 1937); Kansas City Power & Light Co. v. Midland Realty Co., 93 S.W.2d 954, 959 (Mo. 1936). The Commission is authorized, after a hearing, to set just and reasonable prospective rates. State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission, 585 S.W.2d 41, 48-49 (Mo. banc 1979). The Commission also has "plenary power to coerce a public utility corporation into a safe and adequate service." State ex rel. Missouri Southern R. Co. v. Public Service Commission, 259 Mo. 704, \_\_\_, 168 S.W. 1156, 1163 (banc 1914).

The Commission cannot direct KCPL to recalculate its charges to GST for electrical service already rendered, or to be rendered, as though some portion of that electricity had been generated by Hawthorn 5 at a lower cost. That would constitute a species of equitable relief and this Commission cannot do equity. See Soars v. Soars-Lovelace, Inc., 142 S.W.2d 866, 871 (Mo. 1940). Likewise, the Commission cannot direct KCPL to recalculate its charges to GST for electrical service already rendered, or to be rendered, using insurance proceeds received with respect to the Hawthorn 5 explosion to reduce the cost of replacement power. American Petroleum Exchange, *supra*. With respect to charges already paid for service already rendered, the Commission is authorized to determine that GST has been overcharged; GST may then seek a remedy in the courts. State ex rel. Kansas City Power & Light Company v. Buzard, 350 Mo. 763, 168 S.W.2d 1044 (1943); State ex rel. Inter-City Beverage Co., Inc. v.

Missouri Public Service Commission, 972 S.W.2d 397, 972 (Mo. App., W.D. 1998).

### **Sufficiency of the Evidence:**

The burden of proof at hearing rests with the complainant in cases where, such as here, the complainant alleges that a regulated utility has engaged in unjust or unreasonable actions. Ahlstrom v. Empire District Electric Company, 4 Mo.P.S.C.3d 187, 202 (1995); Margulis v. Union Electric Company, 30 Mo.P.S.C. (N.S.) 517, 523 (1991). Thus, GST must establish all facts necessary to support the relief it seeks by a preponderance of the credible evidence.

The centerpiece of GST's case is the explosion of KCPL's Hawthorn 5 generating unit. GST presented the testimony of an expert witness, Jerry N. Ward, to show that the explosion was the result of imprudence on the part of KCPL's employees. KCPL objected to Mr. Ward's testimony to the extent that it relied on inadmissible evidence, such as the statements of persons who were not themselves called as witnesses. Mr. Ward was permitted to testify, but the information he relied upon was received only to show the basis of his opinion, and not as substantive evidence.

"The reception of evidence in hearings of this character should be governed by the rules of evidence as applied in civil cases, excepting insofar as such rules may be modified and relaxed by permissible legislative enactments." Garrard v. Dep't of Health and Welfare, 375 S.W.2d 582, 586 (Mo. App. 1964). Section 386.410.1, RSMo Supp. 1999,

provides that "in all investigations, inquiries or hearings, the commission or commissioner shall not be bound by the technical rules of evidence."

Nonetheless, Section 386.510 requires that a Commission decision be both reasonable and lawful. A decision "is lawful if the Commission had statutory authority to issue it." State ex rel. Utility Consumers Council v. Public Service Commission, 562 S.W.2d 688, 692 (Mo. App., E.D. 1978).

A decision "is reasonable if it is supported by competent and substantial evidence on the whole record." Utility Consumers, supra; State ex rel. Ozark Electric Cooperative v. Public Service Commission, 527 S.W.2d 390, 392 (Mo. App. 1975). "Substantial evidence is evidence that if true has probative force upon the issues[.] Competent evidence is that which is relevant and admissible evidence which is capable of establishing the fact in issue." Hay v. Schwartz, 982 S.W.2d 295, 303 (Mo. App., W.D. 1998) (citations and internal quotation marks omitted). Thus, because the Courts have held that a Commission decision must be supported by evidence of record that is both competent and substantial, the technical rules of evidence are indeed very much applicable to Commission proceedings.

Mr. Ward offered expert testimony. Expert testimony takes two forms. An expert may testify as a sort of fact witness to the existence of facts that can only be observed or understood by a person with the requisite expertise. W.A. SCHROEDER, 23 MISSOURI PRACTICE SERIES—EVIDENCE, Sec. 702.1.a (1992). More frequently, an expert offers an opinion "as to the inferences and conclusions that should be drawn from other evidence." *Id.* This sort of testimony is proper where it will "assist the trier of

fact to understand the evidence or to determine a fact in issue[.]”  
Section 490.065. Mr. Ward’s testimony was of the latter sort.

Experts are generally permitted in Missouri to offer opinion testimony as to causation, including the causes of such incidents as building collapses, fires and blast damage. SCHROEDER, *supra*, Sec. 702.1.b.3.A. Thus, GST offered, and the Commission received, Mr. Ward’s expert opinion as to the cause of the boiler explosion at Hawthorn 5.

Section 490.065.3 provides that:

The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.

Thus, an expert may rely on hearsay evidence to support an opinion, so long as that evidence is of the type reasonably relied upon by other experts in that field, and such evidence need not be independently admissible. State v. Woodworth, 941 S.W.2d 679, 698 (Mo. App., W.D. 1997). However, it is also true that an expert’s reliance upon inadmissible evidence does not thereby somehow transform that evidence into competent and substantive evidence. Peterson v. National Carriers, Inc., 972 S.W.2d 349, 354 (Mo. App, W.D. 1998); St. ex rel. Missouri Highway & Transportation Commission v. Delmar Gardens of Chesterfield, 872 S.W.2d 178, 182 (Mo. App., E.D. 1994); and see St. ex rel. Missouri Highway & Transportation Commission v. Sturmfels Farm L.P., 795 S.W.2d 581, 589-90 (Mo. App., E.D. 1994). Hearsay evidence is not competent and substantial evidence

such as can support a finding, conclusion or decision by this Commission. St. ex rel. DeWeese v. Morris, 359 Mo. 194, 200-201, 221 S.W.2d 206, 209 (1949).

An expert's opinion testimony is not the proper vehicle by which to introduce into the record as independent, substantive evidence the evidence upon which the expert relied in reaching that opinion. See Covington v. Division of Family Services, 603 S.W.2d 103 (Mo. App., W.D. 1980); Garrard v. Dep't of Public Health and Welfare, 375 S.W.2d 582 (Mo. App. 1964). Most of the information relied on by Mr. Ward was admitted only for the limited purpose of showing the basis of his expert opinion. Thus, for example, in the same way, the out-of-court statements of a criminal defendant were admitted to show the basis of a psychiatrist's expert opinion that the man was malingering and not for the truth of the statements' assertions. State v. Barnes, 740 S.W.2d 340, 343 (Mo. App., E.D. 1987). Because Mr. Ward's opinion testimony is unsupported by substantive evidence, the Commission will accord it little weight. SCHROEDER, *supra*, Sec. 703.1.

### **The Hawthorn 5 Explosion:**

At the hearing, GST offered, and the Commission received, the expert opinion of Jerry N. Ward that the Hawthorn 5 explosion was the result of imprudence by KCPL employees. Imprudence, in this regard, is simple negligence, that is, a failure to meet the appropriate minimum standard of care: "Negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances[.]" BLACK'S LAW DICTIONARY 1032 (6<sup>th</sup> ed. (deluxe), 1990).

Mr. Ward hypothesized that a failure by KCPL employees to follow proper safety procedures by placing a "hold" on a sewage sump pump while the sewage system was under repair permitted wastewater to back up in the restroom adjacent to the Hawthorn 5 control room, then to flood the control room floor, drip down three stories to the computerized Burner Management System (BMS) and disable the BMS, thereby allowing natural gas to enter the shut-down boiler, which consequently exploded. However, as discussed at length above, GST did not place any of these facts into the record, thereby precluding the Commission from finding that the chain of events hypothesized by Mr. Ward had actually occurred. Additionally, Mr. Ward was not able to exclude other possible causes of the wastewater backup, which causes were not due to any negligence attributable to KCPL. For example, confronted with a drawing showing the presence of a check valve<sup>5</sup> between the Hawthorn 5 restroom and the sump pump that he considered to be the likely cause of the wastewater backup, Mr. Ward stated,

The fact that there was a check valve installed is not particularly significant since either it was not working or the piping system that's installed there is installed differently from the description of the drawing. I have no way of knowing.

While not significant to Mr. Ward in terms of his theory of the cause of the explosion, the check valve is necessarily legally significant in assigning blame for the explosion.<sup>6</sup> For example, if the contractor who built Hawthorn 5 failed to actually install the check valve, the results

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<sup>5</sup>A check valve is a device in a piping system that prevents liquid contents from flowing in an undesired direction. The purpose of the check valve in question was to prevent wastewater from flowing up into the Hawthorn 5 restroom.

<sup>6</sup>Assuming that the wastewater backup led to the boiler explosion.

of that failure would likely be attributable to the negligence of the contractor and not to KCPL. If the check valve was installed, but failed to operate properly, the results of that failure would likely be attributable to the negligence of the manufacturer of the check valve and not to KCPL.

Likewise, Mr. Ward's opinion that KCPL employees caused the backup, and thus the explosion, by failing to place a "hold" on the wastewater sump pump is not persuasive. Mr. Ward admitted that outside maintenance contractors were present at Hawthorn 5 on February 16, 1999, engaged in attempting to clear the clogged sewer line. Mr. Ward was unable to conclusively exclude their activities as a link in the chain of causation leading to the wastewater back-up. Cross-examination of Mr. Ward with respect to KCPL's safety procedures suggested that a "hold" on the sump pump was not required where it was not itself under repair and a check valve separated it from the portion of line that was actually under repair.

For the purposes of this case, the Commission concludes that GST has failed to show that imprudence on the part of KCPL employees caused the explosion at Hawthorn 5 on February 17, 1999. This is not a conclusion that KCPL is not responsible for the Hawthorn 5 explosion. The Commission is unable on this record to determine that issue. The Commission considers the Hawthorn 5 explosion to be an open question, pending the conclusion of Staff's ongoing investigation in Case No. ES-99-581.

### **Adequacy and Reliability of Electric Service:**

The Commission concludes that the performance of KCPL's system throughout the pertinent period, with the exception of the Hawthorn 5



explosion, was within acceptable limits. The Commission reiterates that, on this record, it makes no findings as to the Hawthorn explosion. The Commission finds the testimony of Staff expert Dr. Eve Lissik to be both credible and persuasive.

Dr. Lissik analyzed data from KCPL's annual FERC Form 1.<sup>7</sup> Dr. Lissik concluded that, over the period 1993 to 1998, KCPL's coal-fired production expenses decreased although its overall production expenses increased. Over the same period, Dr. Lissik concluded that coal-fired operation and maintenance expenses declined from two-thirds of KCPL's total production expenses to less than half of the total. Dr. Lissik stated that these patterns may indicate significant changes in management focus at KCPL.

Dr. Lissik performed an independent analysis of three factors for each of KCPL's baseload generating units, including net peak demand, capacity factor and percent of time off-line. Dr. Lissik stated that a decrease in the first two of these factors, and an increase in the third, would indicate declining unit availability. Dr. Lissik stated that "Staff found none of these indications." Although Hawthorn 5 was off-line for an increased period in 1998, its capacity factor for that year was higher than in all previous years except 1997. Dr. Lissik offered her opinion that the case presented by GST was "inconclusive."

Dr. Lissik also reviewed the report produced by KCPL's expert, Monica Eldridge. Dr. Lissik found Ms. Eldridge's report to be useful and

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<sup>7</sup>"FERC" is the Federal Energy Regulatory Commission.

reliable, despite the criticism of GST's expert, Don Norwood. Dr. Lissik testified that, based on her review of Ms. Eldridge's report and of other evidence produced by the parties, "KCPL's generating units are operating within acceptable limits." However, Dr. Lissik also stated that the increasing forced outage rates at some of KCPL's units, together with a slight but steady decrease in equivalent availability, was a "cause for some concern." Likewise, in the opinion of Dr. Lissik, KCPL's reductions in operating expenses and capital investment, together with the Hawthorn 5 explosion, "merit further analysis." The Commission also agrees with Dr. Lissik that, while GST has failed to prove its case, it has nonetheless identified a declining trend in KCPL's performance that is a matter for concern.

The Commission will direct the Staff to address these concerns in the course of its investigation of the Hawthorn 5 explosion in Case No. ES-99-581.

### **Just and Reasonable Charges:**

The Commission concludes that, throughout the pertinent period, KCPL's charges to GST for electric service have been just and reasonable. The charges were properly and correctly calculated under the special contract, which was freely negotiated by the parties and approved by the Commission. That contract was designed by the parties to afford GST the lowest possible rates for electric service. By virtue of its variable component, which rose and fell as KCPL's incremental costs of production rose and fell, the special contract necessarily carried with it a certain degree of risk. As Staff expert Dr. Michael S. Proctor testified, the

parties apportioned these risks when they negotiated their special contract. While GST has not enjoyed rates as low as it evidently hoped for, it has enjoyed rates lower than any of KCPL's tariffed rates. Thus, the Commission concludes that GST has not shown that it has been overcharged by KCPL for electric service.

**IT IS THEREFORE ORDERED:**

1. That the Motion for Leave to File its Brief Out-of-Time, filed by GS Technology Operating Company, doing business as GST Steel Company, on May 12, 2000, is granted.

2. That any pending motions not otherwise granted are denied.

3. That the Commission shall, on its own motion, pursuant to Section 386.390.1, RSMo 1994, hear and determine the petition filed by GS Technology Operating Company, doing business as GST Steel Company, on May 11, 1999, as to whether or not the charges to it by Kansas City Power & Light Company for electric service have been just and reasonable.

4. That it is the decision of this Commission that the charges of Kansas City Power & Light Company to GS Technology Operating Company, doing business as GST Steel Company, on account of electrical service provided have at all pertinent times been just and reasonable and that GS Technology Operating Company, doing business as GST Steel Company, has not been overcharged therefor.

5. That it is the decision of this Commission that, at all times herein pertinent, Kansas City Power & Light Company has operated and maintained its generating, distributing and transmitting system at an adequate level, except as stated in Ordered Paragraph 6, below.

6. That the Commission makes no findings, and reaches no conclusions, as to the explosion that occurred at Hawthorn Station Unit No. 5 on February 17, 1999, except that the Commission finds that GS Technology Operating Company, doing business as GST Steel Company, has failed to show that the explosion resulted from imprudence on the part of Kansas City Power & Light Company.

7. That the Staff of the Missouri Public Service Commission, in its investigation of the explosion that occurred at Hawthorn Station Unit No. 5 on February 17, 1999, in Case No. ES-99-581, shall investigate and report to the Commission as to whether or not the safety procedures prescribed by the management of Kansas City Power & Light Company were adequate and appropriate, whether or not Kansas City Power & Light Company's employees followed those safety procedures, and whether Kansas City Power & Light Company has provided adequate and appropriate training to its employees. Likewise, the Staff of the Commission shall investigate and report to the Commission in Case No. ES-99-581 as to whether or not the performance of Kansas City Power & Light Company's system has declined over the past decade and, if so, why.

8. That this Report and Order shall become effective on July 25, 2000.

9. That this case may be closed on July 26, 2000.

**BY THE COMMISSION**

A handwritten signature in black ink, reading "Dale Hardy Roberts". The signature is written in a cursive, slightly slanted style.

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

( S E A L )

Lumpe, Ch., Drainer, Murray, and  
Simmons, concur;  
Schemenauer, C., dissents, with  
separate dissenting opinion attached;  
all certify compliance with the  
provisions of Section 536.080,  
RSMo 1994.

Dated at Jefferson City, Missouri,  
on this 13th day of July, 2000.

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**


GS Technology Operating Company, Inc., )  
doing business as GST Steel Company, )  
Complainant, )  
v. )  
Kansas City Power & Light Company, )  
Respondent. )

**Case No. EC-99-553**

**Dissenting Opinion of Commissioner Robert G. Schemenauer**

I respectfully dissent with the majority of my fellow Commissioners regarding their decision in ORDERED paragraphs 4, 5, and 6. In my opinion there was sufficient evidence presented to show that Kansas City Power & Light Company bears some degree of responsibility for the Hawthorn explosion. Management's decisions to reduce staff and employee training along with their failure to update and follow their own operating and maintenance procedures contributed to the events that led up to the explosion. The seriousness of this incident is only slightly mitigated by the fact that no loss of life occurred. I believe that a decision in this case should have been delayed until after the Staff's investigation of the Hawthorn Plant explosion was completed.

Respectfully submitted,

  
Robert G. Schemenauer  
Commissioner

Dated at Jefferson City, Missouri,  
on this 13<sup>th</sup> day of July, 2000.

AT/Sec'y: Thompson/Papo  
7-10 EC-99-553  
Date Circulated CASE NO.

SL 34, 7, 13, 16, 17, 21, 28  
Lumpe, Chair

ml p 29-30, 28  
Drainer, Vice Chair

CM 3, 10, 14, 16, 25, 32, 33  
Murray, Commissioner

AS 10  
Schemenauer, Commissioner

KS  
Simmons, Commissioner

7-13  
Agenda Date

OK

Action taken: \_\_\_\_\_

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 13<sup>th</sup> day of July 2000.

Dale Hardy Roberts

Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge

