

FISCHER & DORITY
PROFESSIONAL CORPORATION

James M. Fischer
Larry W. DORITY

Attorneys at Law
Regulatory & Governmental Consultants

101 West McCarty, Suite 215
Jefferson City, MO 65101
Telephone: (573) 636-6758
Fax: (573) 636-0383

March 3, 2000

FILED²

MAR 03 2000

Missouri Public
Service Commission

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 3660
Jefferson City, Missouri 65102

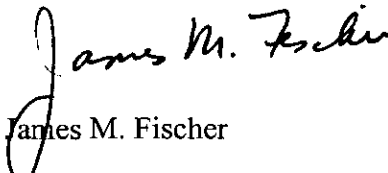
RE: *GS Technology Operating Company, d/b/a GST Steel Company v. Kansas City
Power & Light Company, Case No. EC-99-553*

Dear Mr. Roberts:

Enclosed for filing in the above-referenced matter are the original and fourteen (14) copies of Kansas City Power & Light Company's Response to GST Steel Company's Motion to Compel Production of Documents, for Directed Findings Concerning Information Controlled by KCPL, and for Interim Relief. A copy of the foregoing Response has been hand-delivered or mailed this date to parties of record.

Thank you for your attention to this matter.

Sincerely,


James M. Fischer

/jr
Enclosures

cc: Paul S. DeFord
James W. Brew
Christopher C. O'Hara
Dana K. Joyce
Steve Dottheim
Lera L. Shemwell
John B. Coffman

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED²

MAR 03 2000

Missouri Public
Service Commission

GS Technology Operating Company,
d/b/a GST Steel Company,

Complainant,

v.

Kansas City Power & Light Company,

Respondent.

Case No. EC-99-553

**KANSAS CITY POWER & LIGHT COMPANY'S RESPONSE
TO GST STEEL COMPANY'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS, FOR DIRECTED FINDINGS CONCERNING
INFORMATION CONTROLLED BY KCPL, AND FOR INTERIM RELIEF**

COMES NOW Respondent, Kansas City Power & Light Company ("KCPL"), by and through its attorneys, and makes the following response to the Motion to Compel Production of Documents, for Directed Findings Concerning Information Controlled by KCPL, and for Interim Relief ("Motion to Compel") filed by GS Technology Operating Company d/b/a GST Steel Company ("GST"):

I. THE DISCOVERY DISPUTE

A. Introduction

As will be discussed below, with one exception, GST did not bring the discovery issues contained in its Motion to Compel to KCPL's attention prior to filing the motion. Some of these discovery disputes could have been settled had GST attempted to resolve them informally. GST has alleged that KCPL has not provided it with any information relating to the Hawthorn Incident. This statement is untrue. In fact, GST used information provided by KCPL relating to the Hawthorn Incident in the Direct Testimony of Jerry Ward in an attempt to support one of its claims. Finally, GST's

103

assertion that KCPL's conduct has resulted in delays regarding the procedural schedule is also false. Thus far, the procedural schedule has been modified on three occasions. On two of those occasions, GST asked KCPL to delay the procedural schedule. The third delay resulted from inaccuracies contained in GST's pleadings. KCPL has never requested nor has its conduct resulted in a delay to the procedural schedule.

Unless the Commission is aware of the substantial number of documents that KCPL has provided GST during this complaint proceeding, after reading GST's latest filing, the Commission might conclude that KCPL has denied GST access to any documents relating to the instant proceeding, including the Hawthorn Incident. This is not the case.

Thus far, including subparts, GST has served upon KCPL in excess of 400 data requests. KCPL has made a good faith effort to locate and provide GST with copies of all responsive documents or provide GST with access to such documents. The suggestion that KCPL has not provided GST with information that the Commission has deemed relevant is misleading at best. KCPL has provided GST with a massive amount of information in the form of hundreds of thousands of pages of documents in both hard copy and electronic form. KCPL has provided or made available to GST information on the following topics:

- a) insurance policies concerning the Hawthorn Incident;
- b) historic and projected availability data relating to KCPL's generating units;
- c) planned and unplanned outages;
- d) a description of why Hawthorn 5 was off line at the time of the incident;
- e) maintenance history and all work orders relating to Hawthorn 5 since January 1, 1994;
- f) minutes of KCPL board meetings relating to the Hawthorn Incident;
- g) organizational charts relating to management level employees at the Hawthorn facility;

- h) monthly net generation data, amount of energy sold, and O&M and fuel costs for each power plant;
- i) energy purchases;
- j) off-system sales;
- k) interchange transactions during monthly peaks;
- l) capacity factors;
- m) information of curtailments;
- n) billing information; and
- o) a copy of the software used to calculate production costs.

This is merely a sample of the information that KCPL has provided or made available to GST.

B. KCPL Has Provided GST With A Reasonable Opportunity To Inspect And Copy Documents Relating To The Hawthorn Incident

GST alleges that KCPL has adamantly refused "to disclose information and documentation concerning the boiler explosion" and that KCPL has "avoid[ed] disclosing explosion related documents ... by declaring all of them to be privileged" These statements are surprising given the Commission's concern about the inaccuracy of statements contained in GST's pleadings. See Motion to Compel, pp. 2, 12.

The overwhelming majority of the documents relating to the Hawthorn Incident are stored in a single room at the Hawthorn facility ("Hawthorn Room"). Most of the documents relating to the Hawthorn Incident that were created by KCPL or provided to KCPL by third parties, including the investigators hired by KCPL's insurance companies, are stored in the Hawthorn Room. Documents relating to the rebuild of Hawthorn 5, potential subrogation actions, and the investigation of the Hawthorn Incident are all stored in the Hawthorn Room. While the Hawthorn Room contains documents that are responsive to some of GST's data requests, many of the documents stored there are not relevant to this proceeding.

Nevertheless, in November of 1999, KCPL set aside several days for GST to examine all of the documents stored in the Hawthorn Room. On November 2, 1999, KCPL sent GST's counsel, via overnight mail, an index of the documents stored in the Hawthorn Room. On November 4, 1999, KCPL provided Mr. Jerry Ward, one of GST's consultants, access to the Hawthorn Room. No restrictions were placed on Mr. Ward's inspection of the documents stored in the Hawthorn Room. Mr. Ward had access not only to information relating to the Hawthorn Incident, but also to information that is not relevant to this proceeding, such as information concerning the rebuild of Hawthorn 5. At the end of his inspection, Mr. Ward requested and received copies of hundreds of documents relating to the Hawthorn Incident, including the following:

- a) operator logs,
- b) hold tickets,
- c) furnace probe log,
- d) boiler and turbine start-up checklist (dated February 16, 1999),
- e) notes and diagrams on Hawthorn 5's Burner Management System,
- f) computer printout relating to Hawthorn 5 data acquisition system,
- g) statements from KCPL employees who were on duty the morning of the incident,
- h) diagrams of the gas system at Hawthorn 5,
- i) burner management system O&M manual,
- j) written procedure for gas shutdown, and
- k) index of procedure manuals.

GST's statement that KCPL has refused to disclose information and documentation regarding the Hawthorn Incident is simply not true.

C. On Several Occasions KCPL Has Offered To Supplement Mr. Ward's Inspection By Providing GST With Copies Of Documents Stored In The Hawthorn Room

On February 8, 2000, three months after its initial inspection, GST gave its first indication, via voice mail message, that it needed to supplement or complete its initial review of the documents stored in the Hawthorn Room. On the same day, counsel for

KCPL returned the telephone call and left a voice mail message in which he stated that KCPL would retrieve and provide copies of the requested documents as soon as GST provided KCPL with a data request. The same message was conveyed in a letter that was sent via facsimile the following day. A copy of said letter is attached as Exhibit A.

In subsequent teleconferences with GST's Missouri and Washington, D.C. counsel, KCPL explained to GST that KCPL permitted GST to inspect the documents in the Hawthorn Room because KCPL could not review, segregate, and provide copies of responsive documents from the Hawthorn Room in a timely fashion¹. KCPL now has sufficient resources available to do so. In fact, on February 18, 2000, KCPL offered to copy all of the documents stored in the Hawthorn Room responsive to GST's requests. GST summarily rejected the offer after it was informed that KCPL could not review, copy and deliver the documents by February 21, the following Monday.

D. KCPL Has Agreed To Provide GST Access To The Documents Stored In The Hawthorn Room

At GST's suggestion, KCPL agreed to resolve the issue informally by seeking guidance from Judge Thompson. On February 18th, the parties agreed that counsel for GST would attempt to arrange a teleconference with Judge Thompson for February 22nd, the following Tuesday. On February 18th, GST sent a letter via facsimile to Judge Thompson in which it asked him to participate in a teleconference to resolve the discovery dispute. A copy of that letter is attached as Exhibit B. Instead of following through with the teleconference with Judge Thompson on February 22nd, GST filed the instant Motion to Compel that same day without informing KCPL that it had decided not

¹ It should be noted that the Missouri Rules of Civil Procedure provides a litigant the option of providing a party a reasonable opportunity to inspect and copy responsive documents or providing copies of responsive documents. Missouri Rules of Civil Procedure, Rule 57.01(d).

to resolve the discovery dispute informally. To avoid another discovery battle, and to dispel any impression that KCPL is "stonewalling" GST, in a letter dated February 24, 2000, KCPL invited GST to again inspect the documents stored in the Hawthorn Room. See Exhibit C.

E. KCPL Has Made Good Faith Efforts To Address GST's Concerns Regarding the Discovery Process

While many of GST's specific allegations regarding discovery issues are untrue or inaccurate, there have been some delays given the enormous scope of GST's requests. However, whenever a problem has arisen, KCPL has made a good faith effort to rectify the matter. For example, KCPL failed to provide one week's worth of pricing data that was responsive to a GST data request. KCPL not only reconstructed the lost data, but it informed GST in a letter dated November 2, 1999 ("November 2 Letter") that the reconstructed data "differed slightly from the original run." A Copy of the November 2 Letter is attached as Exhibit D.

The "missing" document referenced in GST's Motion to Compel is another example of how KCPL has engaged in the discovery process in good faith. See Motion to Compel, P. 11. After KCPL realized that it had misplaced a responsive document, KCPL informed GST of the document's existence, and in a letter dated December 27, 1999, stated that it would "continue to search its files for [the] document." A copy of this letter is attached as Exhibit E.

The "missing" document turned out to be a blank form that KCPL received from Crawford Investigative Service, Inc. ("Crawford"). A crucial component of the investigation into the cause of the Hawthorn Incident involves collecting data on the

valves used in Hawthorn 5's gas system. KCPL used the form to record information relating to the valves used in Hawthorn 5's gas system ("Valve Log Form"). On February 22, 2000, and prior to learning that GST had filed the instant Motion to Compel, KCPL provided GST with a copy of a completed Valve Log Form.

Many of the delays in responding to GST's data requests are a direct result of the broad and all-encompassing nature of GST's discovery requests. In a letter dated September 30, 1999, KCPL explained to GST that GST DR 2.5(d) required KCPL to gather approximately 80,000 documents. See Exhibit F. In the same letter, GST was informed that KCPL had hired new employees to assist in responding to GST's discovery requests. In an attempt to make the discovery process more efficient, KCPL told GST that "[n]arrowing the scope of GST's discovery requests will greatly reduce the probability of delays," and offered to explore the feasibility of narrowing the scope of its requests. Id. GST did not respond to the offer.

F. Notwithstanding Its Complaints Concerning KCPL's "Delays," GST Has Also Failed To Provide Information In A Timely Fashion

Despite the fact that, including subparts, KCPL only served approximately 127 data requests on GST, GST has had difficulty providing the requested information. One example involves the Commission's November 2 Order and Order to Show Cause (the "Orders"). The Orders required GST to provide KCPL with information responsive to KCPL Data Request 49—which was served in August of 1999—and KCPL's second set of data requests on or before December 1, 1999 and January 13, 2000, respectively. By February 2, 2000, GST still had not complied with the Orders or offered KCPL an explanation. Rather than file a motion to compel, in a letter dated

February 2, 2000, KCPL reminded GST of its obligations to provide the information. See Exhibit G.

While GST has provided KCPL access to highly confidential documents that are responsive to some of KCPL's data requests, GST refused to provide KCPL with copies of these documents, citing paragraph C of the Protective Order. KCPL is in the process of copying the relevant sections of these documents by hand. Had KCPL exercised the same right under the Protective Order, GST would have had to hire an army of scribes to copy the reams of confidential documents that KCPL has provided it. For every discovery irregularity that GST can point to, KCPL can do the same. The primary difference between the two parties, however, is that in most instances KCPL has provided GST with an opportunity to remedy any shortcomings.

G. Privilege Logs

Prior to filing its Motion to Compel, GST did not bother to discuss with KCPL its concerns over the items listed on KCPL's privilege logs. As discussed below, many of the challenges to the items listed on the privilege logs are without merit. However, after reviewing the Motion to Compel, KCPL has determined that some of the challenges are sound. KCPL did not list the authors of six documents listed on its November 9, 1999, privilege log, and the case law suggests that KCPL may have waived its legal protections when it provided OSHA a copy of the document referenced in GST's Motion to Compel. Accordingly, KCPL has provided GST with copies of these documents. As stated earlier, these issues could have been resolved informally had GST attempted to do so.

H. Documents Created By KCPL and Crawford Are Protected Against Disclosure By The Work Product Doctrine

On February 2, 2000, KCPL sent a privilege log to GST that identified 70 privileged documents responsive to GST data requests. See Attachment C to Motion to Compel. KCPL has asserted, *inter alia*, the work product doctrine as the basis for withholding 42 of the 70 documents listed on the privilege log. The 42 documents consist of question and answer sessions involving those KCPL employees who were on duty the morning the Hawthorn Incident occurred. A KCPL attorney and a representative of Crawford posed the questions. Missouri law is clear on this issue. Documents prepared in anticipation or contemplation of litigation are protected from disclosure by the work product doctrine. State ex rel. Santa Fe Railway Co. v. O'Malley, 898 S.W.2d 550, 552 (Mo. banc 1995) (work product doctrine protects oral and written witness statements from disclosure); State ex rel. Hackler v. Dierker, 987 S.W.2d 337 (Mo.App. E.D. 1998); Missouri Rules of Civil Procedure, Rule 56.01 (b) (3). In O'Malley, the Missouri Supreme Court stated that:

we have no difficulty in understanding how [interrogatories seeking written witness statements] would, to some degree, reveal [the defendant's] attorney's mental impressions, conclusions, opinions, or legal theories. The [discovery requests] seek a schematic of the attorney's investigative process. In general, this schematic aides [sic] the other attorney not because it reveals facts relevant to the case, but because it reveals the investigative process and relative weight attributed to certain witnesses' statements by the opposing side.

Id. 898 S.W.2d 553.

The O'Malley Court held that, in this context, witnesses' oral and written statements were absolutely protected because they constituted intangible work product.

The seeking party was not entitled to the data regardless of possible substantial need and inability to procure the information through other means. Id. In its request, GST seeks intangible work product.

Under Missouri law, tangible work product, such as documents, receives qualified protection from disclosure. Id. The Missouri Supreme Court has held that:

a party may obtain discovery of documents ... that are prepared in "anticipation of litigation ... only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the adverse party is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

O'Malley, 898 S.W.2d at 552, *quoting*, Hickman v. Taylor, 329 U.S. 495 (1947).

GST has failed to demonstrate that it cannot obtain the information contained in the 42 documents by "other means." GST's claim that the "information is not available from any other sources" is false. See Motion to Compel, p. 16. It should be noted that GST has already exercised its right to depose several KCPL employees, including one of KCPL's vice presidents. There is no reason why GST could not have deposed the same KCPL employees that KCPL and Crawford interviewed. GST has failed to offer any reasons why it is no longer capable of deposing KCPL employees. In reality, GST already has copies of statements from these same employees. In fact, GST has used information from these statements in its testimony. See, e.g. Direct Testimony of Jerry N. Ward, p. 13.

The Commission should reject GST's request to override the protection afforded by the work product doctrine. In the alternative, as described below, the 42 documents are protected against disclosure by the Insured/Insurer privilege.

I. The Documents Created By KCPL And Crawford Are Protected Against Disclosure By The Insured/Insurer Privilege

Contrary to GST's assertion, Missouri law has long held that communications between an insured and insurer are privileged when the two parties possess an "identity of interest." Brantley v. Sears Roebuck & Co., 959 S.W.2d 927, 928 (Mo. App. E.D. 1998); State ex rel. Cain v. Barker, 540 S.W.2d 50, 53 (Mo. 1976). In this context, the insured/insurer privilege is an extension of the attorney-client privilege. Id. Therefore, communications between the insured and the insurer enjoy an absolute privilege and are not discoverable by the adversary in the underlying action. Cain, 540 S.W.2d at 57. Moreover, when the insured's and insurer's interests are aligned, the insurer's opinion work product is likewise absolutely protected from discovery. State ex rel. Spear v. Davis, 596 S.W.2d 499, 500-01 (Mo. App. E.D. 1980). Protected work product includes mental impressions, conclusions, and opinions. Id.

Typically, an insured and its insurer possess an "identity of interest" in a liability insurance context because the liability insurer is obligated to defend the insured and pay the resulting judgment. Brantley, 959 S.W.2d at 928. A casualty insurer may be in an adversarial posture with its insured, at least until coverage is acknowledged. State ex rel. J. E. Dunn Constr. Co., Inc. v. Sprinkle, 650 S.W.2d 707, 710 (Mo. App. W.D. 1983).

Here, KCPL and its insurers face a significant dollar loss as a result of the explosion of the Hawthorn 5 boiler, and have a mutual interest in determining the cause of the explosion. This determination could serve as the basis of a claim that defective work or products caused the explosion, and could provide an avenue for KCPL and its insurers to seek damages from those responsible for the defective work or products.

KCPL would have its own cause of action for its deductible and uninsured loss. KCPL's insurers would have KCPL's legal claims by way of subrogation. In effect, the Hawthorn Incident resulted in a single potential cause of action, with KCPL and its insurers having different portions of the identical claim that arose out of a single set of facts. If KCPL and its insurers cannot freely exchange information, they will work at cross-purposes, thereby reducing the possibility of any recovery at all. They clearly have an identity of interest.

Immediately following the explosion, KCPL's insurers acknowledged coverage of the incident, and worked with KCPL in a joint effort that demonstrates the high level of trust between KCPL and its insurers. These circumstances underscore the identity of interest between the KCPL and its insurers.² KCPL and its insurers are coordinating their investigations to accurately identify potential defendants and assess the cause of the explosion so there will be no recurrence of such an event at Hawthorn or at any other generating plant. This is a significant degree of cooperation and information sharing between KCPL and its insurers, and in fact, that KCPL requested Crawford's assistance in the investigation. Since there is ample evidence that demonstrates that KCPL and its insurers share an identity of interest, the 42 witness statements created with Crawford's assistance are absolutely privileged from discovery.

J. KCPL did not Waive the Attorney-client Privilege by Sharing Documents with Crawford

As discussed above, 42 documents are also protected by the attorney-client privilege and the work product doctrine. GST avers that KCPL waived these legal

² The Dunn opinion pointed out another typical difference between liability and casualty insurance situations. The former denotes an obligation of trust, a fiduciary obligation. The latter does not "in the absence of special circumstances" Dunn, 650 S.W.2d at 712, n. 1.

protections when it supplied the documents to Crawford, the investigative agency hired by KCPL's insurers. See Motion to Compel, p. 16.

This is clearly incorrect.³ The primary purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and their clients. Golden Trade v. Lee Apparel, 143 F.R.D. 514, 517 (S.D.N.Y. 1992). Appropriate use of the privilege assures that a person seeking legal advice may do so safely and that an attorney can effectively represent the client based on complete disclosure. Id.

In order to fulfill those goals, the attorney-client privilege is not limited to communications between the client and the attorney. It is the function of the third party—its relationship to the client—that determines whether the attorney-client privilege extends to communications shared with third parties. McCaffrey v. Brennan's Estate, 533 S.W.2d 264, 268 (Mo. App. 1976). Attorney-client communications shared with third parties are privileged when: (1) the third party's presence is consistent with an intention to keep the communication confidential, and (2) the third party is present to assist the rendering of legal services or advice. Consolidated Litig. Concerning Int'l. Harvester's Disposition of Wisconsin Steel, 666 F. Supp. 1148, 1156-57 (N.D. Ill. 1987). These same principles apply regardless of whether the attorney-client communications are made in the presence of a third party or are later disclosed to third parties. Id. at 1156.

The attorney-client privilege has been extended under certain circumstances to cover communications shared with a variety of third parties. See, e.g., Golden Trade,

³ Because the insured/insurer privilege is essentially an extension of the attorney-client privilege, the following analysis under the latter privilege is pertinent.

143 F.R.D. 514 (S.D.N.Y. 1992) (communications with patent agents privileged when assisting attorney in providing legal services); U.S. v. Kovel, 296 F.2d 918 (2nd Cir. 1961) (communications with accountant privileged when the communications are made confidentially and for the purpose of obtaining legal advice); CSC Recovery Corp. v. Daido Steel Co., Ltd., 1995 WL 338294 (S.D.N.Y. 1995) (communications disclosed to financial advisor privileged when linked with legal advice).

In Kansas-Nebraska Natural Gas Co., Inc. v. Marathon Oil Co., 109 F.R.D. 12, 19 (D. Neb. 1984), the defendant moved for an order compelling answers to certain deposition questions. The questions involved a meeting between plaintiff's personnel, plaintiff's counsel, and outside consultants hired by the plaintiff to discuss matters relating to contemplated litigation. The consultants and experts are not specified by vocation, but they were hired to analyze the factual basis of the plaintiff's claim. Id. Plaintiff maintained that the conversations at the meeting were protected by attorney-client privilege and that the presence of the third-party consultants did not destroy the privilege. Id. The court concluded that there was no indication that the consultants' presence at the meeting in question was intended to destroy the confidential nature of the discussion, and that their presence was to facilitate the rendering of legal services. Id. Therefore, the attorney-client privilege still applied. Moreover, notes taken of the meeting also were deemed privileged, "being memoranda of the communications themselves." Id.

The documents supplied to Crawford were created with the intention to keep the communications confidential. In addition, the documents were shared with Crawford, in part, to facilitate the rendering of legal advice regarding potential litigation against

negligent or otherwise responsible suppliers or subcontractors. Thus, these documents maintain their privileged status, and the Commission should not compel KCPL to turn them over to GST.

II. THE COMMISSION SHOULD AGAIN DENY GST'S REQUEST FOR INTERIM RELIEF

For the fourth time in this proceeding,⁴ GST is requesting that the Commission grant it "interim relief." For the reasons stated herein, the Commission should summarily deny this request.

In approximately six weeks, the evidentiary hearings on GST's Complaint are scheduled to commence. At that time, the Commission will consider all the competent and substantial evidence and arguments in this matter.⁵ It would make no sense to grant GST's request for interim relief on the pleadings,⁶ or otherwise schedule additional "interim relief" hearings when the Commission will soon hear the entire case on its merits.

⁴ GST has already requested "interim relief" on three occasions in this proceeding, and in each case the Commission has denied GST's request: (1) On May 11, 1999, GST filed its Complaint with the Commission and requested that it "take immediate steps to protect GST from unjust and unreasonable charges for electric service." On June 1, 1999, the Commission properly denied this request. See Order Denying Motion For Immediate Relief, Directing Expedited Response To Complaint, Setting Prehearing Conference And Requiring Filing Of Procedural Schedule (June 1, 1999); (2) On June 18, 1999, GST filed its Motion For Interim Relief And Expedited Hearings and again requested that the Commission grant it "interim relief." On July 9, 1999, the Commission denied GST's second request for interim relief. See Order Denying Interim Relief And Expedited Hearing (July 9, 1999); (3) On July 21, 1999, GST filed its motion seeking reconsideration of the July 9, 1999, Order Denying Interim Relief, and requested that the Commission grant GST "all or a portion of the interim relief GST requested in its Motion filed June 18, 1999." On August 19, 1999, the Commission denied for the third time GST's request for interim relief. See Order Denying Reconsideration (August 19, 1999).

⁵ It should also be noted that the Commission has requested that the parties file legal memoranda on March 17, 2000, discussing whether the Commission has jurisdiction to hear the GST Complaint. See Order Concerning Show Cause Hearing, (February 17, 2000). KCPL intends to present its legal analysis of those issues at that time. Following consideration of those arguments, it is possible that the Commission may dismiss the Complaint, thereby rendering a hearing on this matter unnecessary.

In its July 9, 1999, Order Denying Interim Relief, the Commission rejected GST's second request for interim relief, stating:

The Commission will deny GST's motion. This case presents complex issues of both fact and law, on which turn large sums of money. The Commission believes the parties will need the full period to which they have agreed, as reflected in the joint proposed procedural schedule, adopted by the Commission on June 22, 1999, in which to prepare and try this case. The Commission believes that it, too, will benefit from the thorough preparation of the parties. Additionally, GST's plea for relief must be balanced against KCPL's right to due process. The Commission is moving this case to hearing as quickly as reasonably possible; the procedural schedule was jointly proposed by the parties. Finally, as KCPL points out, some relief is available to GST under the terms of the special contract.

Nothing has changed that would suggest that the Commission should reverse its position on this matter. On the contrary, with the impending hearings on GST's Complaint ready to commence, it would be an injudicious use of resources to now require hearings to consider "interim relief." If GST truly believes it needs immediate relief, GST still retains the contractual option of switching to KCPL's duly authorized tariffs which are "just and reasonable" as a matter of law. Section 386.270, RSMo 1994; Missouri Gas Energy v. Public Serv. Comm'n, 978 S.W.2d 434, 436 (Mo.App. W.D. 1998).

GST cites numerous "interim rate cases" for the proposition that "the Commission possesses broad authority to grant the interim relief requested by GST." Motion to Compel, p. 20. However, these interim rate cases are inapposite to the present proceeding since the Commission possesses statutory authority to grant public utilities interim rate relief. See Sections 393.140(11) and 393.150, RSMo. 1994; State ex rel.

⁶ It would be unlawful to grant GST "interim relief" on the pleadings since all Orders of the Commission must be based upon competent and substantial evidence. See State ex rel. Rice v. Public Serv. Comm'n,

Laclede Gas Co. v. Public Serv. Comm'n, 535 S.W.2d 561, 567 (Mo. App. 1976)
(interim rate relief is authorized under the file and suspend method).⁷

A. The Commission Lacks Statutory Authority To Grant GST's Relief On An Interim Or Permanent Basis

In the present proceeding, the Commission lacks the requisite statutory authority to grant GST's request. In its August 19, 1999, Order Denying Reconsideration, the Commission clearly addressed this issue with regard to GST's primary interim relief request (i.e., calculating incremental costs as if Hawthorn 5 continued to operate for the months of July through September):

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

In its Motion, GST now attempts to convince the Commission that it is wrong on this point by attempting to distinguish the landmark UCCM case. Motion to Compel, pp. 21-22. However, GST misses the Commission's reason for relying upon UCCM. The UCCM case stands for the fundamental proposition that the Commission must have statutory authority for its orders and actions. Contrary to the positions argued by GST,

220 S.W.2d 61 (Mo. 1949).

⁷ GST also cites Re Kansas City Power & Light Co., Case No. EO-95-181, 3 Mo. P.S.C.3d 396 (April 18, 1995) to support its position that the Commission has authority to grant interim relief. In that case, the Commission merely permitted a special contract to go into effect on an interim basis while the Commission reviewed the specific provisions of KCPL's generic special contract tariff. This case is not authority for the interim relief requested by GST in this proceeding.

the Commission does not have the statutory authority to grant the relief requested by GST in this proceeding on an interim or permanent basis.

In its November 2, 1999, Order Regarding Kansas City Power And Light Company's First Motion To Compel Discovery, the Commission clearly enunciated its role in this proceeding and the nature of its authority:

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 their special contract. May Department Stores Co. v. Union Electric Light & Power Co., 341 Mo. 299, 107 S.W.2d 41, (Mo. 1937). The Commission is authorized, after 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 (Mo.banc1914).

Based upon Missouri law and the Commission's analysis, it is clear that the Commission lacks statutory authority to grant GST the relief it has requested. As the Commission noted in its above-discussed orders, the Commission lacks the statutory authority to: (1) grant GST equitable relief by calculating incremental costs as if Hawthorn continued to operate for the months of July through September; (2) grant GST money damages by requiring KCPL to pay GST any insurance proceeds; or (3) otherwise altering the contract between KCPL and GST. The Commission simply lacks the statutory authority to grant GST this relief.

With regard to GST's request for an investigation into the adequacy of KCPL's service, the Commission has the authority to investigate to ensure that KCPL's service is safe and adequate. See Section 393.130. On February 28, 2000, KCPL filed extensive testimony that demonstrates that its service meets or exceeds industry standards, is safe and adequate, and otherwise reliable. KCPL witnesses Monika Eldridge and Michael E. Bier address these topics extensively. KCPL looks forward to presenting these matters to the Commission in this proceeding to clear the cloud that GST has created by its unfounded allegations regarding the adequacy and reliability of KCPL's service.

With regard to GST's allegations regarding the Hawthorn Incident, the Commission also has the power to investigate the nature of this accident. See Section 393.140(2). In fact, the Commission is conducting an extensive investigation into the Hawthorn Incident in Case No. ES-99-581. The Commission has ordered Staff to file its Report no later than June 8, 2000. The Commission should not use its scarce

administrative and staff resources to duplicate this investigation as a part of this proceeding.

For all of the foregoing reasons, the Commission should again summarily deny GST's request for interim relief, and proceed to review the legal arguments to be filed on March 17, 2000, regarding its jurisdiction over GST's Complaint.

III. THE COMMISSION LACKS THE AUTHORITY TO APPLY THE RES IPSA LOQUITUR DOCTRINE

The Missouri Public Service Commission is an administrative body, not a court, and does not possess the power to perform judicial functions. Straube v. Bowling Green Gas Co., 227 S.W. 2d 666, 668, (Mo. 1950). It has no power to declare or enforce any principle of law or equity. American Petroleum Exchange v. Public Serv. Comm'n, 172 S.W. 2d 952, 955 (Mo. 1943); Lightfoot v. Springfield, 236 S.W. 2d 248, 352 (Mo. 1951). Determination of whether the *res ipsa loquitur* doctrine applies is a matter of law left to the exclusive province of the courts. Weeks v. Rupp, 966 S.W. 2d 387, 394 (Mo. App. W.D. 1998). Therefore, the Commission does not possess the authority to apply *res ipsa loquitur*, even if it were otherwise applicable. In the alternative, the use of the *res ipsa loquitur* doctrine is inappropriate.

A. Res Ipsa Loquitur is Inapplicable in this Case

GST argues that the circumstances surrounding the Hawthorn explosion "require" that the Commission find that KCPL is presumed to have acted imprudently. See Motion to Compel, pp. 16 – 18. According to GST, under the doctrine of *res ipsa loquitur*, a party's negligence is inferred when: (1) an incident resulting in injury is of the kind which ordinarily does not occur without someone's negligence; (2) the incident is

caused by an instrumentality under the control of the defendant; (3) the defendant has superior knowledge about the cause of the incident. Id. at 17.

GST claims that *res ipsa loquitur* should apply in this case because "all of the elements for application of the ... doctrine are present and the Commission needs to apply the established rule in this docket." Id. at 18. GST's argument is plainly incorrect.

First, the cases cited by GST in its Motion to Compel are easily distinguishable in a significant way from the instant case. Each case cited involved a plaintiff in a civil lawsuit who suffered either personal injury or property damage, as a plaintiff must in order to apply the *res ipsa loquitur* doctrine. *Res ipsa loquitur* is a principle of tort law. J.D. Lee and Barry A. Lindahl, Modern Tort Law § 15.19 (Rev. Ed.). A tort is "an injury or wrong committed, with or without force, to the person or property of another." Id. at § 2.01. See also John W. Wade, Victor E. Schwartz, Kathryn Kelly and David F. Partlett, Prosser, Wade and Schwartz's Torts, p. 1 (9th ed. 1994). In the present situation, there is no civil lawsuit with a plaintiff alleging personal or property damage. In its May 11, 1999, Petition, GST merely requested the Commission to investigate the reasonableness of KCPL's charges under the Special Contract approved by the Commission, as well as the adequacy and reliability of KCPL's services. See GST's Petition, p. 1; see also Motion to Compel, p.7. Thus, according to well-established law, the *res ipsa loquitur* doctrine is inapplicable to the current dispute.

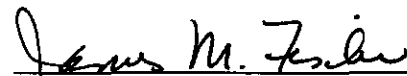
Moreover, GST's statement that the doctrine "is equally applicable to regulatory proceedings to determine management imprudence and the reasonableness of charges to ratepayers" is also unfounded. GST relies on Rochester Gas and Elec. Corp. v. New York Pub. Serv. Comm'n, 117 A.D. 2d 156, 501 N.Y. S. 2d 951 (App. Div. 1986), as

support for this assertion. However, the case never mentions *the res ipsa loquitur* doctrine, and neither the New York Commission nor the Court of Appeals applied it. The Court upheld a Commission order holding that a utility could not recover, through increased rates, the cost of repairing a tube rupture in one of its generators. The Court ruled that the New York Commission's determination that the utility was responsible for the rupture was "supported by substantial evidence." Id. at 160.⁸

IV. CONCLUSION

KCPL respectfully requests that the Commission deny all of GST's requests for relief, including GST's request for interim relief, directed findings, and disclosure of the remaining documents listed on KCPL's privilege logs.

Respectfully submitted,



James M. Fischer MO Bar #27543
Fischer & Dority, P.C.
101 West McCarty, Suite 215
Jefferson City, Missouri 65101
Telephone: (573) 636-6758
Facsimile: (573) 636-0383

Karl Zobrist MO Bar #28325
Timothy G. Swensen MO Bar # 48594
Blackwell Sanders Peper Martin, LLC
Two Pershing Square
2300 Main Street, Suite 1000
Kansas City, Missouri 64108

⁸ Additionally, while the Commission did not permit the utility to recover the cost of repairing the ruptured tube via increased rates, it also did not require the utility to refund to its customers the amount it had charged them through an automatic rate adjustment method reflecting the higher cost of replacement energy. Rochester Gas, 117 A.2d at 158-59.

Gerald A. Reynolds Ct. Bar #407871
Law Department
Kansas City Power & Light Company
P.O. Box 418679
Kansas City, Missouri 64141-9679
Telephone: (816) 556-2785
Facsimile: (816) 556-2787

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand-delivered or mailed, First Class mail, postage prepaid, this 3rd day of March, 2000, to:

Paul S. DeFord
Lathrop & Gage, L.C.
2345 Grand Avenue, Suite 2500
Kansas City, Missouri 64108

James W. Brew
Christopher C. O'Hara
Brickfield Burchette & Ritts, P.C.
8th Floor, West Tower
1025 Thomas Jefferson Street, N.W.
Washington, DC 20007

Dana K. Joyce
Steven Dottheim
Lera L. Shemwell
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102

John B. Coffman
Office of the Public Counsel
P.O. Box 7800
Jefferson City, Missouri 65102


James M. Fischer



Gerald A. Reynolds

(816) 556-2138

(816) 556-2787 (Facsimile)

February 9, 2000

VIA U.S. MAIL AND FACSIMILE (816) 292-2001

Mr. Paul DeFord
Lathrop & Gage, L.C.
2345 Grand Boulevard
Kansas City, MO 64108

RE: Case No. EC-99-553

Dear Mr. DeFord:

As indicated in my recent voice mail message, Kansas City Power & Light Company will provide GS Technology Operating Company d/b/a GST Steel Company with any information that is not covered by a legal protection. As soon as KCPL receives GST's data requests, I will commence gathering those documents that are responsive. To expedite the process, please send the data requests via facsimile.

Contact me if you have any questions or concerns.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Gerald A. Reynolds".

Gerald A. Reynolds

cc: Karl Zobrist
James M. Fischer

EXHIBIT A

KANSAS CITY POWER & LIGHT COMPANY

1000 MAIN STREET, P.O. BOX 10000, KANSAS CITY, MO 64101-0000 • 816.556.2200 • WWW.KCPL.COM

02/18/00 16:52 202 343 0807

B.B. & R., P.C.

002/002

B R I C K F I E L D

B U R C H E T T E

R I T T S . P C

WASHINGTON D.C.
AUSTIN TEXAS

February 18, 2000

VIA FACSIMILE

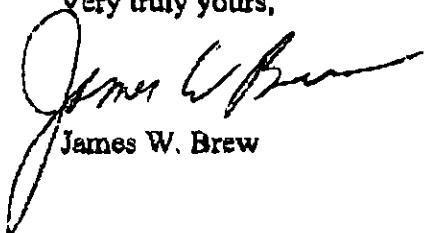
Kevin A. Thompson
Deputy Chief Regulatory Law Judge
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

Re: Case No. EC-99-553

Dear Judge Thompson:

GST and KCPL are experiencing a discovery dispute with respect to voluminous documents GST has asked KCPL to make available for review, and the parties have agreed to seek your assistance in resolving this matter. We would like to arrange a conference call with you at a time that is convenient. KCPL and GST counsel are both available for this purpose on Tuesday morning.

Very truly yours,


James W. Brew

cc: All Parties of Record/by facsimile

EXHIBIT B



Gerald A. Reynolds

(816) 556-2138

(816) 556-2787 (Facsimile)

February 24, 2000

VIA U.S. MAIL & FACSIMILE (202) 342-0807

Mr. James W. Brew
Brickfield, Burchette & Ritts, P.C.
1025 Thomas Jefferson Street, NW
8th Floor, West Tower
Washington, DC 20007

RE: Case No. EC-99-553

Dear Mr. Brew:

On February 18, 2000, after rejecting two reasonable alternatives to a subsequent visit to the Hawthorn facility, including an offer to copy all responsive documents relating to GST's outstanding data requests, you led me to believe that you would set up a teleconference with Judge Thompson for February 22nd to resolve our current discovery dispute informally. Instead of arranging the teleconference, you filed a Motion to Compel on February 22, 2000 and did not bother to inform me that you would not attempt to resolve the dispute informally. As a professional courtesy, you should have informed me of your change in plans.

To avoid another discovery battle, KCPL will permit GST to inspect the files stored at the Hawthorn facility. Contact me at your convenience to arrange the visit. I will need to know the amount of time required to complete your inspection.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Gerald A. Reynolds", is written over the typed name.

Gerald A. Reynolds

cc: Lera L. Shemwell
James M. Fischer
Karl Zobrist
Timothy G. Swensen

EXHIBIT C

KANSAS CITY POWER & LIGHT COMPANY

1201 WALNUT • P.O. BOX 418679 • KANSAS CITY, MO 64141-9679 • 816-556-2200 • WWW.KCPL.COM



Gerald A. Reynolds

(816) 556-2785

(816) 556-2787 (Facsimile)

November 2, 1999

VIA OVERNIGHT MAIL

Mr. James W. Brew
Brickfield, Burchette & Ritts, PC
1025 Thomas Jefferson Street, NW
8th Floor, West Tower
Washington, DC, 20007

Re: Case No. EC-99-553

Dear Mr. Brew:

As I stated this morning, it appears that KCPL has misplaced the actual input data for the week of July 26, 1999. This enclosed unit commitment case was not retrieved from the company's database in its original form. Ms. Lorri Paustian had to recreate the unit commitment case. (You may recall meeting Ms. Paustian during your visit to the Control Center.)

Ms. Paustian has informed me that there are a few hours that differ slightly from the original run. This is due to hourly prices that changed from the time that the original case was run on or about August 2, 1999 to the time the July, 1999 books were closed. The changes appear to be insignificant.

To facilitate your review of the documents stored at the Hawthorn facility, I have enclosed a document log. The log lists all of the documents stored at the Hawthorn facility that may be responsive certain discovery requests propounded by GST.

Contact me if you have any questions or concerns regarding the enclosed data.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Gerald A. Reynolds", is written over a horizontal line.

Gerald A. Reynolds

Enclosures

cc: Lorri Paustian
Paul S. DeFord
Lera Shemwell

EXHIBIT D

KANSAS CITY POWER & LIGHT COMPANY

1201 WALNUT • P.O. BOX 418679 • KANSAS CITY, MO 64141-9679 • 816-556-2200 • WWW.KCPL.COM



Gerald A. Reynolds

(816) 556-2138

(816) 556-2787 (Facsimile)

December 27, 1999

VIA OVERNIGHT MAIL AND FACSIMILE (202) 342-0807

Mr. James W. Brew
Brickfield, Burchette & Ritts, P.C.
1025 Thomas Jefferson Street, NW
8th Floor, West Tower
Washington, DC 20007

RE: Case No. EC-99-553

Dear Mr. Brew:

As previously discussed, KCPL is having difficulty locating one document that may be responsive to GST Request No. 7.2. KCPL will continue to search its files for this document. With the possible exception of the "missing" document, KCPL has provided GST with copies with all other documents responsive to GST Request 7.2, or listed these documents in one of KCPL's privilege logs.

Contact me if you have any questions or concerns.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Gerald A. Reynolds", written over a horizontal line.

Gerald A. Reynolds

cc: Karl Zobrist
James M. Fischer

EXHIBIT E

KANSAS CITY POWER & LIGHT COMPANY

1201 WALNUT • P.O. BOX 418679 • KANSAS CITY, MO 64141-9679 • 816-556-2200 • WWW.KCPL.COM



Gerald A. Reynolds

(816) 556-2138

(816) 556-2787 (Facsimile)

September 30, 1999

VIA OVERNIGHT MAIL AND FACSIMILE (202) 342-0807

Mr. James W. Brew
Brickfield, Burchette & Ritts, P.C.
1025 Thomas Jefferson Street, NW
8th Floor, West Tower
Washington, DC 20007

RE: Case No. EC-99-553

Dear Mr. Brew:

I am in receipt of your letter dated September 29, 1999. As mentioned yesterday, KCPL has already mailed some of its responses to the discovery requests listed in your September 23rd letter.

As for the privilege log, it was transmitted via facsimile and mailed to you yesterday. Please note that KCPL is in the process of compiling a second privilege log.

KCPL is diligently working on the outstanding discovery requests. However, the broad and encompassing nature of GST's discovery requests has made it difficult to deliver some of KCPL's responses within a twenty-day period.

For example, GST Request No. 2.5(d) required KCPL to review approximately 80,000 documents. It is my understanding that KCPL hired an additional worker to download the information responsive to Request No. 2.5(d) onto a compact disk. Another discovery request asks KCPL to identify each meeting where the operation or outage of Hawthorn was discussed. As you can image, KCPL's employees have held numerous meetings

EXHIBIT F

KANSAS CITY POWER & LIGHT COMPANY

1201 WALNUT • P.O. BOX 418679 • KANSAS CITY, MO 64141-9679 • 816-556-2200 • WWW.KCPL.COM



James W. Brew
Page Two

since the Hawthorn Incident, both formal and informal. There is no single document that lists the hundreds of meetings that have taken place since the Hawthorn Incident. KCPL is doing its best to identify as many of these meetings as possible, and to reconstruct the substance of these meetings.

Narrowing the scope of GST's discovery requests will greatly reduce probability of "delays." Please contact me if you wish to discuss the feasibility of this option.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Gerald A. Reynolds".

Gerald A. Reynolds

cc: Karl Zobrist
James M. Fischer
Lera Shemwell



Gerald A. Reynolds

(816) 556-2138

(816) 556-2767 (Facsimile)

February 2, 2000

VIA OVERNIGHT MAIL AND FACSIMILE (202) 342-0807

Mr. James W. Brew
Brickfield, Burchette & Ritts, P.C.
1025 Thomas Jefferson Street, NW
8th Floor, West Tower
Washington, DC 20007

RE: Case No. EC-99-553

Dear Mr. Brew:

I have enclosed a privilege log that lists documents that may be responsive to one or more of GST's data requests. Recently, I learned of the existence of a document titled "H5 Boiler Turbine Start Up Checklist" that may be responsive to GST Request #3.42. Finally, once copied, I will forward diskettes that may be responsive to GST Request #2.5(g).

In light of the recent development regarding GST's corporate structure, I have reviewed GST's original and supplemental responses to KCPL's first and second set of data requests. Several of GST's responses are either inadequate or unclear. For example:

KCPL - 2.14

From January 1, 1994 to June 23, 1998, did GSTOC consider using financial instruments to hedge the electricity commodity price risk associated with the Special Contract? If so, please provide copies of all the documents that GSTOC reviewed in its consideration of using said financial instruments.

GST Response

GST did not use financial instruments to hedge the electricity commodity price risk from January 1, 1994 to June 23, 1998.

EXHIBIT G



James W. Brew

Page Two

GST has answered a question that was not asked. KCPL did not ask whether GST used financial instruments to hedge the electricity commodity price risk from January 1, 1994 to June 23, 1998. Please state whether GSTOC, not GST in its capacity as an operating division of GSTOC, considered using financial instruments to hedge the electricity commodity price risk associated with the Special Contract during the period of January 1, 1994 and June 23, 1998. If so, provide copies of all the requested documents. GST's responses to KCPL - 2.15, 2.17, 2.18, 2.20, and 2.21 suffer from a similar malady as KCPL - 2.14. Please respond to the questions asked, and provide copies of all responsive documents, if any.

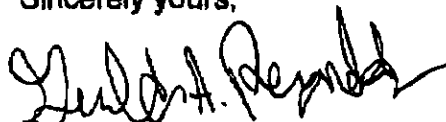
In KCPL Data Requests 2.25, 2.31, 2.34, 2.37, 2.40, 2.45, and 2.51, Mr. Mulhauser responded to data requests seeking information about GSTOC by providing information that relates to GST. It is not clear that GST responded to the question posed. These data requests seek information relating to GSTOC, not GST in its capacity as an operating division of GSTOC. Please provide the requested information at your earliest convenience.

The Commission's Order to Show Cause ordered GST to provide information and documents responsive to KCPL Data Request 49 on or before January 13, 2000. To date, GST has not complied with the Commission's Order to Show Cause. When will GST provide the information and documents requested in KCPL Data Request 49?

As you are aware, in its Show Cause Order, the Commission also denied GST's December 2nd Motion for Clarification and Reconsideration regarding the Commission's November 5th Order. The November 5th Order requires GST to provide information and documents responsive to KCPL's second set of data requests on or before December 1, 1999. When will GST provide the remaining information sought in KCPL's second set of data requests?

Contact me if you have any questions or concerns.

Sincerely yours,



Gerald A. Reynolds

cc: Karl Zobrist
James M. Fischer
Lera Shemwell