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April 27, 2000

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**FILED<sup>2</sup>**  
MAY 24 2000  
Missouri Public  
Service Commission

**RE: Case No. EC-99-553 - Kansas City Power & Light Company**

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and eight (8) conformed copies of the **REPLY BRIEF OF THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION**.

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,

Lera L. Shemwell  
Assistant General Counsel  
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LLS:sw  
Enclosure  
cc: Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

GS Technology Operating Company, )  
Inc., d/b/a GST Steel Company, )  
Complainant, )  
v. )  
Kansas City Power & Light Company, )  
Respondent. )

Case No. EC-99-553

FILED<sup>2</sup>  
MAY 24 2000  
Missouri Public  
Service Commission

REPLY BRIEF OF THE STAFF

OF THE MISSOURI PUBLIC SERVICE COMMISSION

COMES NOW the Staff of the Missouri Public Service Commission (Staff) and submits its Reply Brief in the above captioned case.

INTRODUCTION

Initial briefs in this case were filed on May 12, 2000. Staff has presented its position on the issues for Commission decision in its Initial Brief and will not repeat those positions here.

**Commission Jurisdiction**

In its Initial Brief, KCPL suggests that GST has chosen the wrong forum for resolution of this case. The Missouri Public Service Commission (Commission) has exclusive jurisdiction initially to determine whether KCPL was prudent or imprudent in the operation of its facilities and whether imprudent operation has contributed to numerous power disruptions to GST facilities so that GST is not receiving safe and adequate service.

The Commission also has jurisdiction to determine whether KCPL was imprudent in the management and operation of its facilities, and whether that imprudence caused the Hawthorn 5

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boiler explosion so that the cost of replacement power should not be borne by customers. Since there is a general rate moratorium,<sup>1</sup> most customers have not been affected by the costs of replacement power. Currently only certain customers, such as GST, who operate under special contracts have been affected.

The Commission does have jurisdiction to determine whether KCPL operated its facilities prudently. Staff agrees with KCPL's assessment that the relief that GST has requested is largely beyond the Commission's authority to grant.<sup>2</sup> The Commission has already determined that it lacks jurisdiction to grant equitable relief.<sup>3</sup> However, if the Commission were to find that KCPL had operated imprudently either with respect to Hawthorn or generally in the operation of its facilities, and that imprudent operation had harmed GST, GST could then take that decision and go to circuit court for the relief that it seeks.

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<sup>1</sup> Case No. ER-99-313.

<sup>2</sup> Kansas City Power & Light Initial Brief (KCPL Br.) at 1.

<sup>3</sup> Order Denying Reconsideration, Aug. 19, 1999.

**a. Have the charges imposed under the GST/KCPL Special Contract been “just and reasonable” over the period of the contract?**

KCPL suggests that the rates paid by GST may be too low and thus might be considered by the Commission to be unjust and unreasonable for that reason. Staff does not view the issue raised concerning the justness and reasonableness of GST rates to be whether the contract rates are too high or too low, but whether the cost of replacement power should be included in KCPL's billing to GST for electric service.

There is always a risk under a special contract such as this that the incremental cost of production will change.<sup>4</sup> The question is whether that change is due to imprudence on the part of KCPL in its overall management or in relation to the Hawthorn explosion so that it is improper for KCPL to include the increased incremental cost due to KCPL's purchase of replacement power in the billing to GST.

If the Commission decides that KCPL was imprudent in operating its facilities and that imprudence was the cause of the Hawthorn explosion, the costs of replacement power should not be included in the billing to GST, because imprudently incurred costs would be being passed through to customers, or in this case one customer. As Staff witness Michael Proctor testified, in his experience, the Commission has never allowed imprudently incurred costs into rates.<sup>5</sup> While this is not a rate case, but instead is a complaint case, it seems that the same standard should apply, i.e. imprudently incurred costs should not go into even one customer's rates.

The fact that GST has paid less than it would have under a tariffed rate is really not relevant to this issue. The whole idea behind the special contract was that GST would pay less than a tariffed rate. The fact that GST may have paid less than the tariff rate even with the cost of replacement power is not the issue either.

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<sup>4</sup> Tr. at 372.

Staff has not made any recommendation or filed any testimony concerning KCPL's prudence respecting the Hawthorn incident as the Staff is conducting its own investigation into the Hawthorn explosion and has not made any final determination as to the cause or who might be responsible. Staff has suggested that the Commission might choose to wait until the Staff has completed its investigation before making any final determination in this case

**Requirements for a Commission decision.**

One of the considerations in deciding whether or not the Commission should wait to make a decision in this case rests, in part, on the determination of whether the Commission has sufficient competent and substantial evidence on which to base a decision. By law, the Commission must make its decision based on competent and substantial evidence. If the Commission were to determine that it has sufficient competent and substantial evidence to find that KCPL acted imprudently, then the Commission has the basis for a reasonable decision.

For example, if the Commission generally believes GST witness Jerry Ward's testimony and the facts on which he based his theory, and does not believe that KCPL impeached Mr. Ward's testimony, the Commission could find for GST in this case. Such a decision would not preclude a different decision in a subsequent case, such as a rate case. In a subsequent case, there could be different competent and substantial evidence that would be sufficient for the Commission to reach a different conclusion. If the Commission does not have sufficient evidence to make a decision, there are at least two possibilities, wait for more evidence, as Staff has suggested, or dismiss the complaint.

A discussion of what constitutes sufficient competent and substantial evidence may be helpful. The courts have said that: "[s]ubstantial evidence has been defined to mean competent

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<sup>5</sup> Tr. at 376 lines 21-25.

evidence which, if believed, would have probative force on the issues.”<sup>6</sup> The courts define competent evidence as relevant and admissible evidence that can establish the fact at issue.<sup>7</sup>

According to the Supreme Court:

[t]he test is not whether there is some evidence to support the decision . . . , but rather whether there is substantial evidence. The latter terms have been defined to "mean competent evidence which, if believed, would have probative force on the issues." It has also been said that substantial evidence "is more than a scintilla, must do more than create a suspicion of the existence of the fact to be established, and means such evidence as a reasonable mind might accept as adequate to support a conclusion." 2 Am.Jur.2d Administrative Law § 688 (1962).<sup>8</sup>

Substantial evidence has been defined as:

[E]vidence which, if true, has probative force upon the issues, i.e., evidence favoring facts which are such that reasonable men may differ as to whether it establishes them. It is evidence from which the trier or triers of fact reasonably could find the issues in harmony therewith; it is evidence of a character sufficiently substantial to warrant the trier of facts in finding from it the facts to establish which the evidence was introduced.<sup>9</sup>

The Supreme Court recognized substantial evidence "is something less than the weight of the evidence . . . ."<sup>10</sup> More than a scintilla or more than a suspicion, but less than the weight of the evidence is not a particularly high standard.

Staff views the primary issue for Commission decision to be whether KCPL's actions contributed to or caused the Hawthorn explosion to a level that amounts to imprudence. In this case, GST has provided the testimony of Mr. Jerry Ward<sup>11</sup> to address the cause of the Hawthorn explosion. If the Commission believes his testimony and conclusions, and accepts the facts on

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<sup>6</sup> Farnsworth v. Missouri Dept. of Corrections & Human Resources, 747 S.W.2d 180 (Mo.App. 1988)(citations omitted).

<sup>7</sup> Consolidated School Dist. No. 2 v. King by Dresselhaus, 786 S.W.2d 217 (Mo.App. 1990).

<sup>8</sup> Midstate Oil Co., Inc. v. Missouri Comm'n on Human Rights, 679 S.W.2d 842, 846 (Mo. 1984).

<sup>9</sup> Reproductive Health Services, Inc. v. Lee, 660 S.W.2d 330, 335 (Mo.App.1983).

<sup>10</sup> *Id.* citing Consolo v. Federal Maritime Commission, 383 U.S. 607, 620 (1966).

<sup>11</sup> Exh 6, Direct Testimony of Jerry N. Ward; Exh. 7, Surrebuttal testimony of Jerry N. Ward.

which his conclusion is based, the Commission may have sufficient competent and substantial evidence on which to base its decision.

As Staff explained in its Initial Brief<sup>12</sup> the Commission may rely on expert testimony and the facts relied on by that expert as the basis for its decision. While the Commission should not rely exclusively on the expert's opinion, the Commission may rely on the facts relied on by the expert.<sup>13</sup> If the Commission determines that the expert's facts have probative force on the issue, and accepts those facts, those facts could form the basis for the Commission's decision.

GST raised the issue of whether the overall operations of KCPL's system has declined and KCPL responded with the testimony of Ms. Monica Eldridge. GST responded to Ms. Eldridge with Mr. Don Norwood's testimony. Staff reviewed the testimony and concluded that KCPL is currently achieving an acceptable equivalent availability factor.

Evaluation of expert testimony is a matter for the Commission.<sup>14</sup> The Commission, as the trier of fact may choose between conflicting testimony,<sup>15</sup> and determine which testimony it finds most convincing. The Commission may adopt or reject any or all of a witness's testimony,<sup>16</sup> and according to the *Rice* decision, the Commission may choose to disregard evidence which is not credible.<sup>17</sup> This is true even if the evidence is unimpeached. Whether Mr. Ward was impeached by KCPL is for the Commission, as trier of fact, to decide.

The issue of the quantity and quality of the evidence leads to the next issue, that of the burden of proof. Both parties have addressed the issue of whether GST has met its burden of proof.

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<sup>12</sup> Staff Initial Brief (Staff Br.) at 11.

<sup>13</sup> State ex rel. A.P. Green, Inc., v. Public Service Comm'n., 752 S.W. 2d 835, 839 (Mo.App. 1988).

<sup>14</sup> Associated Nat. Gas v. Public Service Comm'n., 706 S.W.2d 870, 880 (Mo.App. 1995).

<sup>15</sup> State ex rel. Associated Natural Gas v. Public Service Commission 706 S.W.2d 870, 882 (Mo.App. 1985).

<sup>16</sup> *Id.*

<sup>17</sup> State ex rel. Rice v. Public Service Comm'n., 220 S.W. 2d 359, 365 (Mo. 1949).

## 1. Burden of proof.

In a complaint case, the burden of proof rests with the Complainant.<sup>18</sup> GST has alleged that KCPL acted imprudently, generally in causing outages, and specifically, in causing the Hawthorn 5 explosion. GST is required to show by competent and substantial evidence that what it alleges is true.

The burden of proof<sup>19</sup> generally has two elements, the burden of persuasion and the burden of going forward.<sup>20</sup> In a complaint case, the burden of proof/persuasion rests with the Complainant, and GST must produce evidence sufficient to make its complaint (prima facie) case. This means that GST must produce sufficient evidence as would prevail until contradicted and overcome by other evidence.<sup>21</sup> That is, GST must produce sufficient proof to support a Commission finding if evidence to the contrary is disregarded.

The burden of proof itself does not ever shift from the party with that burden, in this case, GST. However, the burden of going forward, also called the burden of persuasion,<sup>22</sup> may shift to the opponent, or in this case to KCPL. If GST has met its burden of proof to present sufficient competent and substantial evidence to convince the Commission of its cause, the burden of persuasion then shifts to KCPL to rebut GST's allegations. In other words, once the Complainant makes its case, the burden of going forward with the evidence may shift to the adverse party. The burden may also shift when the facts related to a particular case are

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<sup>18</sup> State ex rel. Tel-Central v. Public Service Comm'n, 806 S.W.2d 432 (Mo.App. 1991).

<sup>19</sup> The necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a cause. The obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact. Black's Law Dictionary, 196-197 (6<sup>th</sup> ed. 1990).

<sup>20</sup> Black's Law Dictionary, 196-197 (6<sup>th</sup> ed. 1990).

<sup>21</sup> *Id.* at 1189-1190 (6<sup>th</sup> ed. 1990).

<sup>22</sup> Frank v. Wabash Railroad Company, 295 S.W.2d 16, 22 (Mo.1956). (Our courts have consistently equated the term "risk of nonpersuasion" with "burden of proof", see, e. g., and, with equal consistency, have distinguished those terms from the "burden of going forward with the evidence" by noting, among other things, that "(w)hile the burden of going forward with the evidence may shift during the progress of the case, the burden of



particularly within the control or knowledge of one party, then the burden of production falls on that party.<sup>23</sup>

KCPL has made documents related to the investigation available to GST, but it seems to Staff that the facts and documents related to the explosion are particularly within the control of KCPL, so that the burden of going forward would shift to KCPL after GST met its initial burden of proof.

Whether or not GST made its case is a matter for the Commission, as trier of fact, to decide. The fact that Staff is not "convinced"<sup>24</sup> does not, in and of itself, mean that the Commission lacks sufficient competent and substantial evidence to make a decision. Staff is conducting its own investigation and did not and will not rely on GST's witnesses for its determination of the cause of the explosion or for its determination of whether KCPL acted prudently or imprudently concerning the explosion.

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proof, absent a statutory provision to the contrary . . . , remains with the party having the affirmative of the issue . . . until the termination of the case).

<sup>23</sup> In re Monnig, 638 S.W.2d 782, 786 (Mo.App. 1982). (Where the party who has not the general burden of proof possesses positive and complete knowledge concerning the existence of facts which the party having that burden is called upon to negative, or where for any reason the evidence to prove a fact is chiefly, if not entirely, within the control of the adverse party ... the burden of evidence is on the party who knows, or has special opportunity for knowing, the fact ... although he is obligated to go no farther than necessity requires. The default of the adversary to go forward with that evidence gives rise to an inference that the proof, if adduced, would not be favorable. Pasternak v. Mashak, 428 S.W.2d 565, 568[2, 3] (Mo.1967); 29 Am.Jur.2d, Evidence § 131 (1967). The effect of the rule is to lessen the initial quantum of evidence the party without access to the information is required to adduce. 1 Jones on Evidence § 5:9 (6th ed. 1972).

<sup>24</sup> Tr. at 328-329.

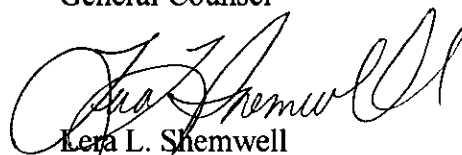
If the Commission were to decide that GST did provide sufficient competent and substantial evidence to support a decision, the Commission would then look at the evidence to determine whether the burden of persuasion shifted to KCPL and whether KCPL carried its burden of going forward. If the Commission does not accept GST's evidence as sufficient to support a Commission decision, the burden of going forward does not shift to KCPL and the complaint could be dismissed.

### CONCLUSION

Staff has not taken any position in this case concerning the cause of the Hawthorn explosion and has reached no conclusions concerning the incident. Staff continues to believe that the allegations raised by GST are very serious and warrant continued review to determine if the equivalent availability factor of KCPL's facilities declines further. However, Staff is not recommending a formal investigation into KCPL overall maintenance and operations at this time.

Respectfully submitted,

DANA K. JOYCE  
General Counsel

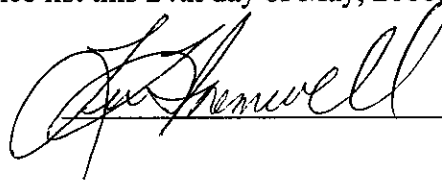


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## Certificate of Service

I hereby certify that copies of the foregoing have been mailed, faxed, or hand-delivered to all counsel of record as shown on the attached service list this 24th day of May, 2000.



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