

LATHROP GAGE

PAUL S. DEFORD
(816) 460-5827
EMAIL: PDEFORD@LATHROPGAGE.COM
WWW.LATHROPGAGE.COM

2345 GRAND BOULEVARD, SUITE 2800
KANSAS CITY, MO 64108
(816) 292-2000, FAX (816) 292-2001

July 24, 2000

FILED³

JUL 24 2000

Missouri Public
Service Commission

HAND DELIVERY

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
301 West High Street, 5th Floor
Jefferson City, MO 65101

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

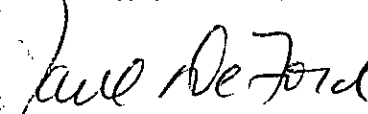
Dear Secretary Roberts:

Enclosed for filing is an original and eight copies of the **Application for Rehearing of GST Steel Company.**

Very truly yours,

LATHROP & GAGE L.C.

By:



Paul S. DeFord

PD/jf
Enclosures
cc: All parties of record

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

FILED³

JUL 24 2000

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

Missouri Public
Service Commission

Case No. EC-99-553

APPLICATION FOR REHEARING
OF
GST STEEL COMPANY

COMES NOW GS Technologies Operating Co., Inc., doing business in Missouri as GST Steel Company ("GST") and requests, pursuant to RSMo § 386.500 and 4 CSR 240-2.160, that the Missouri Public Service Commission ("Commission") grant rehearing on its Report and Order, issued July 13, 2000, and effective July 25, 2000, in this docket. The conclusions and findings set forth in the Report and Order (hereinafter the "Order") are inconsistent with the record evidence in this matter and are based upon serious errors of law. In support of this application for rehearing, GST states as follows:

Summary of Errors

1. The Order failed to apply established legal principles and case law in assessing the evidence in the record and with respect to the burden of proof in cases of this nature.
2. The Order unlawfully discounted the expert testimony of GST's witness regarding the February 1999 Hawthorn Unit No. 5 boiler explosion (the "Hawthorn Incident") by erroneously concluding that:

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- a. GST witness Ward's expert testimony and opinion rests upon hearsay evidence that is not substantial and competent evidence upon which the Commission can rely;
- b. "Most of the information relied on by [GST's expert] Mr. Ward was admitted only for the limited purpose of showing the basis for his expert opinion." (Order at 26-27).
- c. Documents maintained by KCPL in the normal course of business and statements by KCPL's employees that are admissions against the utility's interests were hearsay evidence. The expert opinions of Mr. Ward, which are based on this evidence, are entitled to "little, if any, weight."

3. The Commission has ruled on numerous occasions that the prudence of KCPL's actions were directly relevant to GST's claims that it has been overcharged by KCPL, but the Order fails to address KCPL's actions and failures to act that are addressed at length and documented by substantial and competent evidence.

Overview

4. On May 11, 1999, GST filed a petition asking the Commission to investigate the adequacy of service provided by KCPL and the reasonableness of the prices KCPL has charged GST. GST had experienced numerous service disruptions due to repeated KCPL equipment failures. It also has experienced significant increases in the variable component of electricity prices charged by KCPL due to increased KCPL unit unavailability and forced outage rates, and particularly by the loss of KCPL's 479 MW Hawthorn Unit 5 as a result of a catastrophic explosion that leveled the eleven-story Hawthorn boiler structure.. KCPL has acknowledged that the cause of the explosion was an unnoticed accumulation of natural gas in the Hawthorn boiler during an unscheduled outage in February 1999.

KCPL's business records show that:

- KCPL employees opened the main gas valves to the boiler to restart the unit but did not close the valves after that restart was aborted.

- Water and sewage seeped from the flooded control room into the Hawthorn computer room several floors below, causing electrical shorts and failures which disabled the Burner Management System ("BMS") which controls flame and the flow of fuel to the Hawthorn boiler.
- At about this time, KCPL employees aborted efforts to restart the unit when it was discovered necessary repairs to other equipment had not been completed.
- While attempting repairs to the BMS relays and circuit boards caused by the sewage, KCPL failed to secure properly the main gas valves to the boiler, which had been opened during the aborted startup the previous afternoon.
- The gas valves controlled by the BMS system re-opened while the BMS was under repair, allowing large quantities of natural gas, over 1,100 million cubic feet (MCF), to accumulate in the boiler for nearly a three hour period when the sensors and alarms of the BMS were not functioning.
- The resulting explosion completely destroyed the eleven-story boiler structure. The fact that no fatalities were experienced can only be attributed to the fortuitous combination of a low number of on-site personnel, the time of day of the explosion (12:30 AM), and dumb luck.
- After the explosion, KCPL employees witnessed a fireball that burned until employees closed the main gas valve to the plant.

5. KCPL has acknowledged, and the Commission has found,¹ that the cost of generation and purchased power used to replace Hawthorn's output has been, as was expected, significantly higher than the historic cost of Hawthorn generation. The Commission recognized from the outset as well "the gravity of the harm faced by GST"² and promised an expedited resolution of the issues raised.

6. During the course of this proceeding, the Commission determined on three separate occasions that the reasonableness of KCPL's actions with respect to the Hawthorn Incident was directly relevant to GST's claims that it has been overcharged.³ For its part, the

¹ See Commission Order Denying Interim Relief and Expedited Hearing, dated July 9, 1999.

² See Order Denying Motion for Immediate Relief, Directing Expedited Response to Complaint, dated June 2, 1999, p. 3.

³ Order Regarding GST Steel Company's First Motion to Compel Discovery and Amending the Procedural

Commission Staff unambiguously stated that KCPL has overcharged GST under the Special Contract if the utility has acted imprudently with respect to the Hawthorn Incident⁴.

7. In sum, the Order fails to address the prudence of KCPL's actions with respect to the boiler explosion. GST's testimony described and documented a chain of events, totally and exclusively within the control of KCPL management, over a 24-hour period prior to the explosion. The Order discusses only a single aspect of that chain of events – the source of the February 16 wastewater flood of the Hawthorn control room that led to serious damage to the computerized Burner Management System ("BMS") that controls the flow of gas to Hawthorn's boiler, and that, when functioning normally, protects against any unsafe or potentially explosive conditions. The fact that the flood occurred and that the floodwaters damaged the BMS system are not disputed. Since this flood occurred hours before the explosion, and is a proximate but not direct cause of the explosion, the basic prudence question concerns how KCPL acted, or failed to act, to ensure plant safety under the circumstances created by the flood and the damage to the BMS systems. The Order does not attempt to address this obvious and fundamental question.

8. The Commission arrives at this result through an incorrect legal analysis, which concludes that GST witness Ward's expert testimony, relied upon hearsay evidence upon which the Commission cannot in turn rely as substantial and competent evidence (Order at 25-27). Thus, the Commission erroneously concluded that Mr. Ward's testimony, which addressed and documented the Hawthorn Incident in detail using documents obtained from KCPL, would be "accorded little

Schedule, dated July 29, 1999, p. 7; Order Regarding KCPL's Motion for Clarification, Reconsideration and Rehearing of the Commission's Order of July 29, 1999, and Regarding GST Steel Company's Second Motion to Compel Discovery, dated August 19, 1999, p. 8; Order Regarding KCPL's Motion to Limit the Scope of Discovery and Issues, dated November 16, 1999, (denying KCPL's effort to exclude Hawthorn-related issues from the proceeding) (*mimeo* at 4).

⁴ Tr. 401 (testimony of Dr. Michael Proctor).

weight.” As described below, the Order errs with respect to its underlying legal conclusions and, as a result, improperly disregarded highly probative, substantial and competent evidence.

9. Finally, the Order states that all charges by KCPL to GST have been properly calculated (Order at 12). The Commission, however, failed even to discuss the testimony of GST witness Steven Carver, who explained that, irrespective of prudence questions, KCPL improperly failed to reflect the replacement energy insurance proceeds it received as an offset to the higher replacement energy costs charged to GST (*see* Exhibits 1 and 2).

Argument

I. Kansas City Power & Light Co. Must Produce Evidence That it Exercised Management Prudence

10. The Order’s analysis of the burden of proof and the responsibility to establish imprudence through the introduction of substantial and competent evidence begins and ends with the statement that the burden of proof rests with the complainant. Order at 24. This conclusion is insufficient and inaccurate as a matter of law. First, as noted above, GST filed a petition asking the Commission to investigate the actions of KCPL⁵ and the Hawthorn Incident as it affected the service and prices charged to GST. The Commission determined that such an investigation was warranted, and, under established Commission practice, where questions of management prudence have been raised, the utility carries the burden of proof.

11. In *Re KCPL*, 25 Mo. P.S.C. (N.S.) 228, 280-28, 75 PUR4th 1, 51 (Mo. PSC 1986), the Commission investigated the prudence of the then newly completed Wolf Creek nuclear electric generating plant. With respect to prudence matters, the Commission adopted the conclusions reached in a case from the D.C. Circuit Court of Appeals that addressed this issue.

⁵ See Petition, dated May 11, 1999, as amended by Motion to Amend by Interlineation the First Page of the Petition for an Investigation as to the Adequacy of Service Provided by KCPL and Request for Immediate Relief,

Id. (citing *Anaheim v. Federal Energy Regulatory Commission*, 669 F.2d 799 (DC Cir. 1981)).

The Commission specifically observed that “where some other participant in the proceeding creates a serious doubt as to the prudence . . . , then the [utility] has the burden of dispelling these doubts and proving [its] pruden[ce].” *Id.* (quoting *Anaheim*, 669 F.2d at 809 (quoting *Minnesota Power & Light Co.*, 11 FERC ¶ 61,312, Opinion No. 86 (1980) (footnote omitted))).

12. The explosion and fireball that occurred at Hawthorn on February 17, 1999, suggests imprudence at the outset. Through its expert testimony, and, more importantly, the contemporaneous KCPL witness statements, plant manuals, operator control logs, and other KCPL documents that GST has compiled through the discovery process, each being admissible, reliable, substantial and competent evidence, GST has established a *prima facie* factual case that the boiler explosion is the direct result of KCPL’s unreasonable and imprudent actions. Furthermore, as described in detail in GST’s Initial Brief and Proposed Findings of Fact, during the course of this proceeding, GST produced evidence to demonstrate KCPL imprudence conclusively by substantial and competent evidence. The Order does not discuss or attempt to distinguish the Commission’s established policy that the burden of proof in prudence cases such as this, which the Commission likened to a negligence matter (Order at 27), lies with the utility.

13. Second, in this case, the circumstances require application of the doctrine of *Res Ipsa Loquitur*, a long established principle of law that creates a rebuttable presumption of imprudence. *Weeks v. Rupp*, 966 S.W.2d 387, 393 (Mo. App., W.D. 1998) (citing *Trefney v. Nat’l Super Markets, Inc.*, 803 S.W.2d 119, 121 (Mo. App. 1990)). In short, this rule of law provides that a complainant satisfies its burden of proof and evidentiary burden by demonstrating that:

dated February 29, 2000.

- a. The incident resulting in injury is the kind which ordinarily does not occur if a party exercises reasonable due care;
- b. The incident is caused by an instrumentality under the control of the defendant; and
- c. The defendant has superior knowledge about the cause of the accident.

Trefney, 803 S.W.2d at 121.

14. If the boiler explosion would not have occurred if KCPL had exercised reasonable care, and KCPL had exclusive control over those facilities, the utility is presumed to have acted imprudently in permitting the explosion to occur. GST has established that the three elements of the *Res Ipsa Loquitur* doctrine apply in this proceeding. KCPL exercised exclusive and complete control over Hawthorn before, during and after the explosion. Power plant safe operating practices, including those established by KCPL, are designed to prevent unsafe conditions that could cause such boiler explosions. KCPL controls all of the records and data bases related to Hawthorn's operations and the explosion. Under these circumstances, KCPL is presumptively imprudent and bears the burden of overcoming that presumption of imprudence and proving that it acted reasonably. *Weeks v. Rupp*, 966 S.W.2d 387 (1998 Mo. Appeal); *Zurich Insurance Company v. Missouri Edison Company*, 384 S.W.2d, 623 (1984) (doctrine applied to sewer gas explosion); *Stevens v. Missouri Pacific Railroad Company*, 355 S.W.2d 122, 130 (1962) (explosion occurring on railroad property); *Burr v. Kansas City Public Service Company*, 365 Mo. 115, 276 S.W.2d 120 (1955); *Stephens v. Kansas City Gas Company*, 354 Mo. 385, 191 S.W.2d 601 (1946) (doctrine applied in natural gas explosion case); *Hanson v. City Light and Traction Company*, 238 Mo. App. 182, 178 S.W.2d 804 (1944) (doctrine applied in natural gas leak case); *McCloskey v. Koplars*, 329 Mo. 527, 46 S.W.2d 557 (1932); see 5 Wigmore on Evidence, sec. 2509.

15. Moreover, this applies as much to the wastewater flood as to all other matters in the chain of events leading up to the explosion. Only KCPL employees are authorized to place holds on equipment or systems according to KCPL's Safety Manual (Exh. 9, sched. 12). Thus, whether KCPL employees or an independent contractor were attempting to unclog the sanitary sewer pipes, KCPL's managers were responsible for overseeing the work, and KCPL employees alone were responsible for establishing whatever holds were required to prevent the flood and maintain the safety of the plant. KCPL did not provide evidence to rebut that presumption of imprudence.

16. The Order determined that "the technical rules of evidence are indeed very much applicable to Commission proceedings" (Order at 25), but the Order fails to mention GST's arguments that the above described principle of law regarding presumptive imprudence must be applied in this case. The Commission does not have the option of disregarding this principle of law.

17. Finally, GST has cited a specific instance, involving remarkably similar circumstances, where the New York Public Service Commission applied this doctrine. The New York Commission's Order, Opinion No. 84-23, issued August 29, 1984, states as follows:

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

* * *

Second it is clear that it was RG&E that was exclusively responsible (subject to Federal regulatory supervision) for operating and maintaining Ginna station. . . . It is equally clear that ratepayers had no responsibility for the plant's maintenance and operation.

* * *

Third, the company knew or should have known that damage and potential safety risk would occur if a large piece of metal⁶ was left in the steam generator.⁷

The New York Commission found that the metal piece that caused the outage “was either put down and forgotten by a [RG&E] worker in the steam generator, or dropped by a worker in the steam generator and not reported. No other reasonable conclusion can be drawn from the facts as set forth in the record.”⁸ On this basis, the New York Commission concluded that the utility and its employees failed to exercise reasonable care and that the utility’s actions were imprudent.⁹

18. In sum, in these circumstances, the New York Commission applied the doctrine of *Res Ipsa Loquitur*, and the utility [RG&E] failed to produce evidence to overcome the presumption of imprudence. Except for the type of power plant involved (coal rather than nuclear), the circumstances are remarkably similar in this instance. The doctrine is plainly applicable and should be followed. The Commission in this proceeding erred by failing to apply this principle of law.

II. The Commission Disregarded Substantial and Competent Evidence of KCPL Imprudence

19. As noted above, GST documented undisputed facts that KCPL opened the main gas valve to Hawthorn in preparation of heat-up of the boiler on February 16, 1999, that KCPL halted the heat-up, and that the main gas valve to Hawthorn was not again red tagged and manually closed. The company’s documents, received into evidence without limitation, reveal that KCPL procedure called for the main gas valves to be manually closed and placed on a “red

⁶ A 3.5 pound piece of steel plate inadvertently left in the steam generator continually rubbed against steam generator tubes until one ruptured in January 1982.

⁷ Opinion No. 84-23, Proceeding on Motion of the Commission to Investigate the Outage of Rochester Gas and Electric Corporation’s Ginna Nuclear Plant, *mimeo* at 46-48.

⁸ *Id.* *Mimeo* at 48.

⁹ *Id.*

tag" hold when the boiler was shutdown to ensure plant and worker safety. (See Exhibit 6, schedule 12). The record shows, using contemporaneous KCPL documents and plant records that KCPL caused the wastewater flood in the Hawthorn control room, which resulted in water draining down several floors to the computer room. GST has documented, without challenge from KCPL, that the wastewater flood damaged the Burner Management System ("BMS") that monitors and controls fuel introduction into the Hawthorn boiler. With the BMS malfunctioning, KCPL was operating virtually blind, and was unaware of the gas entering into the boiler through the open main valve, which eventually led to the explosion that occurred on February 17, 1999. Thus, GST established by substantial, competent and compelling evidence that KCPL's reliance on the damaged BMS system was unreasonable and that KCPL's carelessness and failure to follow its own safety procedure created and perpetuated the unsafe and dangerous conditions that precipitated the explosion. By any measure, GST has demonstrated that KCPL's actions were unreasonable and imprudent.

20. The Commission's Order ignored this documentary evidence and the opinion testimony of GST's expert, Mr. Jerry Ward, on the basis that his testimony is "unsupported by substantive evidence." Order at 27. In doing so, the Commission misapplied the technical rules of evidence and failed to consider substantial and competent evidence that conclusively supports GST's claim that the explosion of KCPL's Hawthorn 5 generating unit was the result of KCPL imprudence.

21. Mr. Ward's direct and surrebuttal testimonies were admitted into the record as Exhibits 5 and 6 (Tr. 220, 228). With one limited exception noted below, these exhibits, including appended documents provided by KCPL or prepared by Mr. Ward, were received as a part of the record without objection. Significantly, KCPL did not object to the accuracy,

completeness or authenticity of any copies of KCPL documents that are attached to Mr. Ward's testimony.

22. As explained below, the KCPL employee statements received into the record are admissions against the interests of KCPL. These are admissible, substantial and competent evidence upon which Mr. Ward's expert testimony properly relied. In fact, evidence of this nature is considered highly probative as to the truth of the matters stated therein. KCPL did not challenge the authenticity, completeness or accuracy of these documents and were received into evidence without objection. KCPL documents maintained in the ordinary course of business are admissible evidence in any Commission proceeding. The Commission erred, as a matter of law, in concluding that this evidence is inadmissible hearsay and not substantial and competent evidence.

A. Evidentiary Standard

23. RSMo. § 386.410.1, in pertinent part, provides that "in all investigations, inquiries or hearings the commission or commissioner shall not be bound by the technical rules of evidence." Nonetheless, a Commission decision still must be supported by substantial and competent evidence on the whole record. *Deaconess Manor Association v. Public Service Commission*, 994 S.W.2d 602, 611 (Mo. App., W.D. 1999) (emphasis added). "'Substantial evidence' is competent evidence, which, if true, has probative force on the issues." *Id.* (citing *State ex rel. Utility Consumers Council of Missouri v. Public Service Commission*, 562 S.W.2d 688, 692 (Mo. App., E.D. 1978)). Thus, the Commission has discretion in evidentiary determinations, but it must base its decision on all competent evidence in the record that is probative as to whether the explosion of the Hawthorne 5 generating plant was the result of

imprudence on the part of KCPL personnel. It cannot simply dismiss probative and competent evidence.

B. Use of Expert Testimony

24. The Commission routinely relies upon opinion testimony from industry experts. At the hearing in this proceeding, GST offered, and the Commission received into evidence the expert opinion of Mr. Jerry Ward. Mr. Ward's testimony presents the results of his systematic review and documentation of KCPL's distribution and generation problems in 1998 and 1999, with particular emphasis on the events that led to the explosion of KCPL's Hawthorne 5 generating unit, and the consequential effects on GST. The Commission, however, dismissed Mr. Ward's assessments, the facts he presented, and the KCPL admissions that he relayed, stating: "Most of the information relied on by Mr. Ward was admitted only for the limited purpose of showing the basis of his expert opinion. . . . Because Mr. Ward's opinion testimony is unsupported by substantive evidence, the Commission will accord it little weight." Order at 27. This is a clear error in the Commission's reading of the hearing transcript and the applicable rules of evidence.

25. On April 11, 2000, KCPL filed a motion to strike only the portion of Mr. Ward's direct testimony that directly referenced an affidavit of Mr. Ron Lewonski (Tr. Vol. 5, at 220). Mr. Lewonski was the manager at the GST plant who had direct knowledge of the reliability issues associated with KCPL service and the effects of the repeated service interruptions experienced by GST (Tr. Vol. 5, at 221). KCPL claimed that Mr. Ward could not testify as to Mr. Lewonski's observations as the affidavit constituted hearsay and was not subject to cross-examination (Tr. Vol. 5, at 220, 224). Judge Thompson correctly determined that "[t]he testimony in question [Mr. Ward's discussion of Mr. Lewonski's affidavit that appears at pages

8-11 of Exhibit 5] will not be stricken. However, it will be understood that that testimony is not present[ed] as fact but that it is simply the basis of the opinion offered by Mr. Ward.” (Tr. at 225).

26. KCPL raised no other objections to Mr. Ward’s testimony or any of the documents or materials attached to it. As a result, with the exception of Mr. Ward’s testimony concerning the Lewonski Affidavit, the Commission received into evidence, *without* qualification, Mr. Ward’s Direct Testimony (Exh. 5), Surrebuttal Testimony (Exh. 6), and all other supporting evidence attached thereto (Tr. 220, 228).

27. Once admitted into evidence, the opinion of a qualified expert may amount to substantial and competent evidence. *State ex rel. General Telephone Co. of Midwest v. Public Service Commission*, 537 S.W. 2d 655, 663 (Mo. App. 1976) (citing 2 Am. Jur.2d, Adm. Law § 395, at 201 (1962)). The opinion, however, must be based upon and supported by sufficient facts in evidence. *Brandt*, 937 S.W.2d at 276 (citing *Bilderback v. Skil Corp.*, 856 S.W.2d 73, 75 (Mo. App. 1993)). This Commission cannot turn a blind eye towards the substantial, competent, and probative facts that it has received into evidence.

C. Mr. Ward’s Testimony Rests Firmly Upon Substantial and Competent Evidence

28. The Order states that “[h]earsay evidence is not competent and substantial evidence such as can support a finding, conclusion or decision by this Commission.” Order at 27 (citing *State ex rel. DeWeese v. Morris*, 359 Mo. 194, 200-01, 221 S.W.2d 206, 209 (1949)). Putting aside for the moment whether the evidence on which Mr. Ward’s testimony was based constitutes hearsay, *DeWeese* is inapplicable here. *DeWeese* was a case in which the appellant had objected to the hearsay evidence when it was offered. 221 S.W.2d at 207. As noted by the court in *Arnold v. McLeod*, “[u]nobjected to hearsay evidence may be considered as competent

and substantial evidence in an administrative proceeding.” 720 S.W.2d 385, 387 (Mo. App., E.D. 1986) (quoting *Reed v. Labor & Industrial Relations Commission*, 616 S.W.2d 650, 653 (Mo. App. 1984)).

29. Additionally, pursuant to 4 CSR 240-2.130(1), RSMo. § 536.070 applies to any Commission hearing. Section 536.070.8 provides in relevant part that “[a]ny evidence received without objection which has probative value shall be considered by the agency along with the other evidence in the case.”¹⁰ As discussed above, KCPL objected only to Mr. Ward’s testimony in relation to the Lewonski Affidavit. KCPL did not contest any other aspect of Mr. Ward’s direct or surrebuttal testimony or supporting documentation. Therefore, Mr. Ward’s testimony cannot be disregarded.

30. With respect to “hearsay” evidence, GST presented more than merely the “testimony” of Mr. Ward to show that the explosion of KCPL’s Hawthorn 5 generating unit was the result of KCPL imprudence. Mr. Ward presented KCPL business records, which included portions of KCPL policy manuals, schematic drawings, and contemporaneous signed statements of KCPL personnel that witnessed the events leading up to and including the explosion. All of the documents are readily admissible as substantial and competent evidence upon which the Commission can base its findings, conclusions and decisions because they fall under one or more well-established exceptions to the hearsay rule.

31. Of the materials referenced and relied upon by Mr. Ward, the following are documents prepared or maintained by KCPL in the normal course of its business:

¹⁰ See also *Lemay Bank & Trust Co. v. Oakville Bank & Trust Co.*, 518 S.W.2d 128 (Mo. App. 1974) (indicating that *DeWeese* was inapplicable for several reasons, including (1) the material at issue was not objected to, and (2) *DeWeese* arose before the enactment of RSMo. 536.070.11, which expressly permits the results of statistical examinations, interviews, surveys, and ascertainment of many related facts to be admitted into evidence at an administrative hearing).

Ward Direct (Exhibit 5) Schedules:

- No. 4. KCPL Five-Year Construction Forecasts
- No. 11. Hawthorn 5 Gas Flow – Hourly Readings

Ward Surrebuttal (Exhibit 6) Schedules:

- No. 1. BMS Theory of Operations (Page III-1)
- No. 2. Forney Burner Management System Technical Manual
- No. 3. BMS Theory of Operations (Page III-7, 8 and 9)
- No. 4. Operational Guide 5-4-5A for Hawthorn Station
- No. 10. Excerpt of Renal Retrieved Diskette (control room records)
- No. 12. KCPL Safety Manual
- No. 13. Hawthorn 5 Hold Tags on specifically identified equipment
- No. 16. William Gas Charts (provided by Williams, maintained and provided by KCPL)
- No. 17. Hawthorn Piping and Instrument Drawing (Fuel Gas System)
- No. 22. Excerpt of "1 Finished Draft Valve Log" Diskette

RSMO Section 536.070 (10) provides:

Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of an act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect the weight of such evidence, but such showing shall not affect its admissibility. The term "business" shall include business, profession, occupation and calling of every kind.

32. These materials are admissible evidence as to the substance and accuracy of the matters stated therein in Missouri courts, and Commission proceedings. It not only is proper for an expert such as Mr. Ward to rely on such materials, but they are highly probative evidence, and the best evidence available of KCPL's operating rules and practices. KCPL did not challenge the authenticity or accuracy of these materials.

33. Mr. Ward also relied upon the following statements of KCPL employees surrounding the Hawthorn boiler explosion, which were prepared at the direction of KCPL and not solicited by GST.

Ward Direct (Exhibit 5, Schedule):

No. 7. December 15, 1999, letter from G.W. Burrows (KCPL) to Frank Branca (KCPL)

Ward Surrebuttal (Exhibit 6, Schedule):

No.5. Statement of Melford McLin – KCPL Control Generator, dated February 18, 1999
No.6. Statement of Steve Cox, dated February 21, 1999
No.7. Statement of Mike Irwin, dated February 23, 1999
No.8. Statement of Mike Lunsford, dated February 22, 1999
No.9. Statement of Ronald Fischbach, dated February 16, 1999
No.11. Statement of Johnny Pender, dated February 18, 1999
No.14. Statement of Daniel Hensley, dated February 19, 1999
No.15. Statement of Ray Boylan, dated February 18, 1999
No.18. Statement of Don Stack, dated February 22, 1999
No.19. Statement of Alan Kirkwood, dated February 18, 1999
No.20. Statement of Jim Martin, dated February 18, 1999
No.21. Statement of Rick Utterback, dated February 18, 1999

34. In addition to being included within the business records exception to the hearsay rule, the statements by KCPL personnel are also admissions against the interests of the utility, which are not hearsay at all under the rules of evidence. “Regardless of the precise theory of admissibility, it is clear that admissions of a party come in as substantive evidence of the facts admitted.” McKormick on Evidence, 3rd Ed. 1984, p. 776. In fact, “[w]here a party admits to a material fact, relevant to an issue in a case, the [admission] is competent against him as substantive evidence of the fact admitted and is entitled to considerable weight.” *Burrus v. Norfolk & Western Railway Co.*, 977 S.W.2d 39 (Mo. App., E.D. 1998) (quoting *Mitchell Eng. Div. of Ceco v. Summit Realty*, 647 S.W.2d 130, 141 (Mo. App., W.D. 1982)). A statement by an employee may be an admission against interest were the employer is a party to the litigation

and the statement is relative to the issues involved and the employee making the admission was acting within the scope of his authority. *Brawley & Flowers, Inc. v. Gunter*, 934 S.W.2d 557 (Mo. App., S.D. 1996).

35. For example, in *Holtgrave v. Hoffman*, the court was presented with an expert medical witness' opinion that a patient's spinal cord was intact after an automobile accident. 716 S.W.2d at 334. The patient's expert based his opinion solely on defendant hospital nurse's note recorded within two hours after the patient had been admitted to the hospital, which stated that patient was "moving all extremities." *Id.* The Court found that the nurse's note provided a substantial basis for the expert's opinion. *Id.* at 335.

36. Similarly, in *State ex rel. American Telephone & Telegraph Co. v. Public Service Commission*, appellants claimed that certain portions of a witness' rebuttal testimony and attached schedules contained "hearsay and self-serving conclusions." 701 S.W.2d 745, 754 (Mo. App., W.D. 1985). The court determined that the testimony at issue, which included correspondence between the parties, fell within the admissions against party interest exception to the hearsay rule, stating that "it is well established that an admission may bear on the issue incidentally and circumstantially and still be competent evidence." *Id.* at 754-55 (citing *White v. Burkeybile*, 386 S.W.2d 418, 422 (Mo. 1965)).

37. Lastly, in *Lumpkin v. Sheidley Realty Co.*, the court was presented with an accident report that an assistant manager dictated two days after an employee suffered a fatal accident. 53 S.W.2d 386, 388 (Mo. App. 1932). The full report had been offered and received in evidence without objection. *Id.* The court found that the accident report was competent evidence, especially in the absence of any objection. *Id.* Here, Mr. Ward relied upon several statements by KCPL personnel that are directly related to their work assignments on the day


leading up to and including the explosion of the Hawthorne generating plant and are contrary to KCPL's theory of the case. Those statements are indistinguishable from the standpoint of probative evidence, from the accident report in Lumpkin.

38. In sum, that Mr. Ward's expert testimony is based on substantial and competent evidence is beyond serious question. The Commission erred by failing to address the unchallenged facts recited and documented by Mr. Ward and by disregarding his expert opinion concerning KCPL imprudence. KCPL neither presented evidence on prudence nor attempted to rebut the presumption of imprudence. Costs imprudently incurred by KCPL cannot be passed through to GST. GST, therefore, is entitled to relief as a matter of law.

Conclusion

For the reasons stated herein, GST requests that the Commission grant rehearing and give full weight to all of the record evidence in this matter.

Respectfully submitted,



Paul S. DeFord Mo. #29509

Kurt U. Schaefer Mo. #45829

LATHROP & GAGE, L.C.

2345 Grand Boulevard

Suite 2800

Kansas City, Missouri 64108

Telephone: 816-292-2000

Facsimile: 816-292-2001

James W. Brew

Shawn C. Mohler

BRICKFIELD, BURCHETTE & RITTS, P.C.

1025 Thomas Jefferson Street, NW

8th Floor, West Tower

Washington, D.C. 20007

Phone: (202) 342-0800

Facsimile: (202) 342-0807

Attorneys for GST Steel Company

Dated: July 24, 2000

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, postage prepaid, to all counsel of record as shown on the following service list this 24th day of July, 2000.

Gerald A. Reynolds
KCP&L
1201 Walnut Street
Kansas City, MO 64106

Steven Dottheim
Chief Deputy General Counsel
MO Public Service Commission Staff
P.O. Box 360
Jefferson City, MO 65102

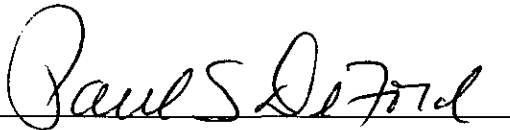
James M. Fischer
James M. Fischer, P.C.
101 West McCarty, Suite 215
Jefferson City, MO 65101

Lera Shemwell
Assistant General Counsel
MO Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

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

Office of Public Counsel
P.O. Box 7800
Jefferson City, MO 65102

Karl Zobrist
Blackwell Sanders Peper & Martin LLP
P.O. Box 419777
Kansas City, MO 64141-6777



Attorney