
**IN THE
SUPREME COURT OF MISSOURI**

No. SC84117

DIRECTOR OF REVENUE,

Appellant,

v.

KANSAS CITY POWER AND LIGHT COMPANY,

Respondent.

**Petition For Review
From The Administrative Hearing Commission,
The Honorable Karen A. Winn, Commissioner**

Appellant's Brief

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Jurisdictional Statement

Kansas City Power and Light Company (“KCP&L”) claimed a refund of sales taxes on electricity sold to the Hyatt Regency Crown Center in Kansas City. On October 22, 1998, KCP&L filed a claim for a refund of \$66,806.27, which KCP&L calculated based upon a ratio of the square feet of customer space to total space in the hotel, with a vacancy rate of 30%. KCP&L’s basis for its refund claim was that the Hyatt was reselling the electricity used in the hotel rooms to its customers.

The Director denied KCP&L a refund and it appealed. The Administrative Hearing Commission overturned the Director’s denial and awarded a refund of \$41,589.14.

There are essentially two issues in this case -- whether the electricity sold by KCP&L to the Hyatt qualifies as a resale, and, if so, if the evidence supports the amount of the refund. This case falls within the exclusive jurisdiction of this Court because it requires the construction of the revenue laws of this State. Mo. Const. Art. V, § III. This case is one of first impression; the basis specifically asserted for a refund has never been considered by a Missouri court.

Statement of Facts

Kansas City Power and Light Company (“KCP&L”) sold electricity to the Hyatt Regency Crown Center in Kansas City. [LF 1] From September 1, 1995 to August 31, 1998, KCP&L collected and remitted \$89,075.03 in sales tax to the Director of Revenue for its sales of electricity to Hyatt. [LF 12]

On October 22, 1998, KCP&L filed a claim for a refund of \$66,806.27 in sales tax paid for the electricity sold to Hyatt. [LF 7] KCP&L calculated the refund amount based upon a ratio of the square feet of customer space to total space in the hotel, less a vacancy rate of 30%. [T. 44, 54-55] KCP&L’s basis for its refund claim was that the Hyatt was reselling the electricity used in the guest and meeting rooms to its customers.[LF 1]

The Director denied KCP&L a refund and it appealed. [LF 1, 6] The Administrative Hearing Commission overturned the Director’s denial and awarded a refund of \$41,589.14. [LF 24; Appendix, p. 14]

The Commission Hearing

At the hearing, three witnesses testified on behalf of KCP&L: Mike Anwar, controller for the Hyatt Hotel; Howard Breeding, the Hyatt’s director of engineering;

and Carol Welch,¹ who works for Grant Thornton.

Mr. Anwar testified that the Hyatt is over 20 years old and has 731 rooms on 40 floors. He did not know the exact number of ballrooms or meeting rooms. [T. 8] But from the Hyatt website, it lists 42,860 square feet of meeting space. [T. 9] Mr. Anwar confirmed that the 42,580 square feet of meeting rooms could also be used for banquets. [T. 13-14]

Mr. Anwar admitted that in responding to interrogatories, the Hyatt had stated that there was 181,500 square feet for the banquet and meeting rooms, and he thought that this figure was used to calculate the refund claim. [T. 15-16, 18] Although the Hyatt has a laundry room with washers and dryers, Mr. Anwar did not know where the laundry was included in the square footage listed in interrogatory responses. [T. 25]

Similarly, Mr. Breeding did not know the exact square footage of the kitchens and dining room, nor the square footage of the laundry. [T. 35-36, 38] He also did not know what percentage of the common area there is in the hotel in relation to the banquet and guest rooms. [T. 41]

¹ The attachments to the Complaint list her as Carol “Welsh” [LF 4], but the transcript lists her as Carol “Welch.” As the transcript is cited extensively, she will be identified as Carol Welch.

In calculating the refund request, Ms. Welch used a figure of 181,500 square feet for the banquet and meeting rooms. She calculated about 550,000 square feet for the guest, meeting and banquet rooms, based upon figures that she said came from the Hyatt. [T. 47-48]

Mr. Anwar testified that each guest room has an individual thermostat so the guests can control the temperature in the room. He also stated that most of the meeting rooms have individual thermostats, but that some are controlled from a computer panel, so a guest can call and have the hotel adjust the temperature. The hotel maintains the rooms and common areas at about 70 degrees. [T. 10-11]

Mr. Breeding confirmed this information, stating that the hotel is part of the Crown Center complex, and that the complex gives the hotel heating water and chill water, which is used to heat and cool the hotel. [T. 29] Each guest room has its own thermostat, but for the big meeting rooms, one unit may do two or three rooms, run by a computer. [T. 29-30]

The Hyatt has seven kitchens with a lot of kitchen equipment, but Mr. Breeding did not know how many electrical ranges or ovens are in the kitchens, nor their energy usage. [T. 36] The kitchens are not all the same size, and some of the kitchens run all day long, while others run for just part of the day. [T. 36-37] The hotel also has electrically operated vending machines on each floor, and Mr. Anwar thought that the

refund claim does not involve the electricity used in the hallways, but wasn't sure if it included the vending machines. [T. 21-22]

Mr. Breeding admitted that in response to preparing for a refund claim, no one ever asked him how much electricity the washers or dryers used. Nor did anyone ask him how much energy the thermostats might use. He also did not know how much electricity the hotel's compressors used. [T. 39] Although the laundry is powered by electricity, he did not know how much energy is used by the washers or the dryers. [T. 38-39]

Carol Welch testified that the refund request was calculated based upon the gross receipts charged by KCP&L times a percentage of usage for the guest rooms and the meeting and banquet rooms. The percentage was based on square feet. [T. 42- 44] Ms. Welch admitted that her firm helps clients obtain refunds, and that the total amount of their fee is based upon the refund. [T. 50-51]

In calculating the refund, Ms. Welch didn't look at the actual energy usage of the appliances, she just took the total square footage and deducted the areas that were no guest, meeting, or banquet space. She did not know how much electricity was used in the restaurants, any particular guest room, the meeting rooms, or the laundry. [T. 54-55]

In calculating a percentage, Ms. Welch assumed that the heat it takes to cool a 12' by 12' guest room is comparable to the amount used to cool a 12' by 12' meeting room or office. [T. 55] In calculating the amount of the refund, Ms. Welch did not take into consideration whether or not KCP&L received a 2% discount for timely filing. [T. 58-60]

As to the electrical rate classification of the Hyatt by the Public Service Commission, Mr. Anwar did not know if the Hyatt was a domestic or commercial user. [T. 16] He did state that he had not filed a claim for the Hyatt saying that they were a residential user of electricity. [T. 20] Mr. Breeding assumed the Hyatt's electrical usage would be classified as commercial by the Public Service Commission, since it was a commercial building and it would be commercial use. [T. 33-34] Ms. Welch did not know whether the Hyatt was classified as a domestic utility user or a commercial one, and she acknowledged that prior to this claim, she had never filed a refund claim on behalf of Hyatt based upon their electrical usage. [T. 53]

With respect to the electricity bill received by the Hyatt, Mr. Anwar testified that the bill does not break down the electricity used by any particular area of the hotel. There is no breakdown for the electricity used by the meeting rooms or the guest rooms. [T. 16-17]

For the base price of the room, the Hyatt factors in all of the expenses for the room, like guest supplies, towels, cleaning, amenities, cost of utilities and everything for the base price. Mr. Anwar further stated that in pricing, the Hyatt also looks to see the local prices, but that everything is factored in for determination of the price. [T. 11] The vacancy rate is also taken into consideration when pricing the room, because the labor expense and utilities have to be covered even if the room is vacant. [T.12] Real estate and personal property taxes are also included. [T. 22] The average vacancy rate for the hotel is 30%. [Resp. Ex. A, p. 6, q. 24]

On cross-examination, Mr. Anwar admitted that he does not personally determine the cost of the price for the guest rooms. That is done by the corporate office in Chicago, based upon what he tells them as to local conditions, such as cost of labor and cost of living, and their local expenses. The corporate office also looks at the market. Competitive pricing is also a factor. [T.24]

The Commission Decision

After the hearing, the Commission received proposed findings of fact and conclusions of law from the parties. On November 7, 2001, the Commission issued its decision. [LF 11; Appendix p. 1]

The Commission found that Hyatt was reselling electricity to its customers. [LF 22] Due to this fact, the Commission further found that KCP&L was entitled to a

refund for sales taxes paid on electrical sales to they Hyatt. But the Commission found that the refund was limited to the guest, meeting and banquet room. [LF 21, 24]

Based upon the conflicting evidence as to the amount of the hotel that was subject to the refund, the Commission used the lowest amount of square footage. [LF 23-24] In addition, the Commission lowered the amount of the refund by the vacancy rate of the hotel, 30%. [LF 24] Based upon these calculations and assumptions, the Commission found that KCP&L was entitled to a refund of \$41,589.14. [LF 24]

The Director of Revenue timely filed an appeal from the Commission's decision awarding a tax refund to KCP&L.

Points Relied On

I.

The Administrative Hearing Commission erred in holding that Kansas City Power and Light is due a tax refund on certain sales of electricity , because the power company did not make a sale for resale of electricity to the Hyatt hotel within the meaning of §144.010.1(10), RSMo, in that the Hyatt’s guests rented hotel rooms from the Hyatt – they did not purchase electricity from the Hyatt.

Scotchman’s Coin Shop, Inc. v. Administrative Hearing Comm’n,

654 S.W.2d 873, 875 (Mo. banc 1983)

Sneary v. Director of Revenue,

865 S.W.2d 342, 345 (Mo. banc 1993)

Kansas City Royals Baseball Corp. v. Director of Revenue,

32 S.W.3d 560 (Mo. banc 2000)

§144.010.1(10), RSMo

II.

The Administrative Hearing Commission erred in calculating the amount of the refund of sales taxes due to Kansas City Power and Light based upon the square footage of the guest rooms because the refund amount is not supported by competent and substantial evidence, in that KCP&L failed to produce evidence that one square foot of guest room used the same amount of electricity as one square foot of the rest of the hotel, and there was no evidence as to the amount of electrical usage of any identifiable portion of the hotel.

Dick Proctor Imports v. Director of Revenue,

746 S.W.2d 571 (Mo. banc. 1988)

J.B. Vending Co., Inc. v. Director of Revenue,

54 S.W.3d 183, 185 (Mo. banc 2001)

Standard of Review

Review of the Commission's decision is limited to the determination of whether that decision was supported by competent and substantial evidence on the whole record, or whether it was arbitrary, capricious, unreasonable, unlawful, or in excess of its jurisdiction. *J.B. Vending Co., Inc. v. Director of Revenue*, 54 S.W.3d 183, 185 (Mo. banc 2001), quoting *Psychiatric Health Care Corp. of Missouri v. Dep't of Social Services, Division of Medical Services*, 996 S.W.2d 733, 735 (Mo. App. W.D. 1999) (quotations omitted).

Argument

I. The Administrative Hearing Commission erred in holding that Kansas City Power and Light is due a tax refund on certain sales of electricity , because the power company did not make a sale for resale of electricity to the Hyatt Hotel within the meaning of §144.010.1(10), RSMo, in that the Hyatt's guests rented hotel rooms from the Hyatt – they did not purchase electricity from the Hyatt.

Kansas City Power and Light (KCP&L) sold electricity to the Hyatt Regency Crown Center, collected the sales tax and remitted it to the Director of Revenue. KCP&L then sought a refund of some of these sales taxes, claiming that the Hyatt was

reselling the electricity to its guests when it rented guest rooms and banquet facilities. The Administrative Hearing Commission held that by providing electricity in its rooms, the Hyatt was reselling the electricity, thereby entitling KCP&L to a refund.

But the Hyatt is in the hotel business, not the electricity business, and did not resell electricity to its guests. The Commission's decision to award a refund is erroneous, as the decision is not supported by competent and substantial evidence on the whole record, and it is arbitrary, capricious, unreasonable, and unlawful. *J.B. Vending Co.*, supra.

This Court has not previously examined the resale exclusion in the context of the bundle of conveniences that is the rental of hotel rooms and facilities. This Court has consistently recognized the importance of looking beyond the "legal fictions and academic jurisprudence in order to discover the economic realities of the case." *Scotchman's Coin Shop, Inc. v. Administrative Hearing Comm'n*, 654 S.W.2d 873, 875 (Mo. banc 1983), citing *In re Union Electric Co.*, 161 S.W.2d 968, 971 (Mo. banc 1942). Here, as in so many prior cases, the appropriate analysis is an examination of the underlying transaction between the hotel and its guests to ascertain the true purpose or true object of the transaction.

The economic reality of this case is that the Hyatt is not in the business of selling electricity. Guests do not go to the Hyatt to purchase electricity. There is no

evidence in the record that a guest could purchase just electricity from the Hyatt. Instead, the Hyatt rents the use of its guest rooms, and banquet and meeting rooms, for consideration. The guests get a bundle of conveniences of which they may take advantage for a specified period of time. The Hyatt itself consumes the electricity for the purpose of providing that bundle of conveniences to its guests.

In determining the true object or true purpose of a transaction, this Court looks to the expectations of the parties. See, *Sneary v. Director of Revenue*, 865 S.W.2d 342, 345 (Mo. banc 1993). Here, a guest's intention is to rent a room for a certain length of time, not to purchase electricity. The guest expects that the hotel provide a comfortable temperature, a bed, a working telephone, a working television, clean towels, running water, maid service, and all of the other conveniences that normally attend the rental of a hotel room.

There was no evidence at the hearing that a guest rents a hotel room to get electricity. What the guest expects in renting the hotel room is not the electricity, but the benefits of electricity: heating and air conditioning, hot and cold water, lighting, radio and television. In short, the guest's object is to rent a comfortable furnished hotel room, not to purchase electricity.

Hyatt's rental of guest rooms is, of course, subject to sales tax under section 144.010.1(10)(e), RSMo.² The statute differentiates between room rental and "items of a non-reusable nature," including but not limited to, soap, shampoo, tissue, toiletries, food, and confectionary items. Such items, when offered to guests without charge, are not items "sold at retail" to guests. Section 144.011(11), RSMo. Thus, a hotel does not pay sales tax on its purchase of these items. Electricity is also offered to guests without charge, but it is not one of the items for which the hotel is excluded from paying sales tax on the purchase.

Rental by the Hyatt of a banquet or meeting room is also subject to sales tax. §144.010.1(10)(e), RSMo. And the electricity used in such facilities is no more resold than the electricity used in the guest rooms. Guests who rent such facilities do so for the purpose of securing a space, for a specific period of time, in which to gather a number of people in a convenient fashion. It is reasonable for guests to assume that the temperature will be comfortable; the expectation for comfort is likely to be one of the reasons that the guests chose that type of facility, rather than holding their meeting or banquet outdoors or in a private home.

The economic reality of the matter is that the hotel's guests, whether renting guest rooms or meeting rooms, are purchasing convenience, not electricity. The

² Unless noted, all references are to the Revised Statutes of Missouri, 2000.

outcome of this claim for refund might be different if there were evidence that a guest asked to "rent" a meeting room, with the intent he would only set foot therein to plug in a long extension cord, that would power a sound system for an outdoor concert in a park next door. But that is not the evidence, and it is unlikely that the hotel would even permit the person to do so. Because, again, the hotel is in the business of renting rooms and facilities – not selling electricity. And that is the reason that guests patronize the hotel.

Control of the thermostat does not convert the reality of the transaction to one of resale of electricity to guests, as KCP&L argued below. The meter belongs to the Hyatt; the decision whether to supply electricity and the restrictions on use are solely that of the Hyatt. The Hyatt consumes the electricity to provide the bundle of conveniences that make up what the guest is purchasing— a hotel room.

The Commission did not focus on the economic realities of the transaction, i.e., the nature of what the guest was purchasing. Instead, the Commission likened the hotel guests' use of electricity to the cases involving factored-in costs (costs included in a sales price). But these cases are distinguishable from electricity used in a hotel room.

The factored-in cost cases typically involve a situation where the tangible personal property sent to the customer includes packaging, or a situation where the

customer is given an item or prize by the business. The Commission cited a number of cases. Among them was *King v. National Super Markets, Inc.*, 653 S.W.2d 220 (Mo banc 1983), where this Court held that the store resold grocery bags by transferring them to its customers, and that consideration was paid since the cost of the bags was included in the price of the groceries. In *Kansas City Royals Baseball Corp. v. Director of Revenue*, 32 S.W.3d 560 (Mo. banc 2000), this Court held that the cost of purchasing promotional items given to customers is factored into price charged for each ticket of admission to baseball game is not subject to use tax. Similar cases include *House of Lloyd, Inc. v. Director of Revenue*, 884 S.W.2d 271 (Mo. banc 1994) (cost of packing material was factored into price charged to the end purchaser); and *Sipco, Inc. v. Director of Revenue*, 875 S.W.2d 539 (Mo. banc 1994) (value of dry ice used to preserve pork products during shipping was factored into amount paid for the products).

But the paper bags in *King*, the t-shirts and hats in *KC Royals*, the packing materials in *House of Lloyd*, or the dry ice in *Sipco*, the electricity here does not leave with the guest. The guest's enjoyment of a hotel room, including any electrical power, is restricted to the premises of the hotel.

The factoring-in cases also do not address the situation where tangible personal property is used to provide a non-taxable service. In that situation, the purchaser of

the service pays no tax on the benefit he receives from the item. The service provider is considered the end user of the property, and must pay tax on his purchase of these items. For example, a shoeshine is not a taxable service, even though the customer gets the benefit of the some tangible personal property (a dab of shoe polish) in the transaction. The shoe shiner pays tax on his purchase of the polish; but the customer, who gets the benefit of the polish, pays no tax on the transaction. This transaction is not considered a sale of shoe polish. See, 12 CSR 10-103.600. The same analysis should apply here, notwithstanding the fact that the service of providing a hotel room is taxable.

The Commission's decision is erroneous because the rental of a hotel room does not meet the requirements of a sale for resale in another way. Such a sale requires a transfer of title or ownership. §144.010.1(10), RSMo. In renting a hotel room, the guest is not purchasing the title or ownership of the electricity bought by the Hyatt. The Hyatt necessarily maintains control of the electricity flowing through the building, and the guests rent rooms subject to the hotel's restrictions.

Before the Commission, KCP&L focused on the fact that a guest can adjust the room temperature, but this ignores the evidence that for some of the meeting rooms, a guest had to request that the hotel raise or lower the temperature. [Testimony of Mike Anwar, T. 10-11] The mere fact that a guest can have the temperature of a

room adjusted to his liking does not pass title to the electricity that creates the heat or air conditioning. Nor does the Hyatt, in adjusting the temperature, transfer title to the compressors, furnace, heating and cooling coils, or air conditioning units to the guest.

The Hyatt cannot operate its business without purchasing electricity. Unlike the factoring-in cases cited above, the hotel does not rent out rooms without electricity. The Royals can play a baseball game and charge admission without providing the giveaways, but the Hyatt could not render the taxable service of renting a hotel room without purchasing electricity. The Hyatt is the purchaser of electricity and consumes it in providing its service; Hyatt is not reselling it.

The Commission erred in finding that the rental of a hotel room is a resale of the electricity by the hotel for sales tax purposes. It is not a resale, nor is it a sale at retail by the Hyatt to its guest. The decision of the Commission should be reversed.

II. The Administrative Hearing Commission erred in calculating the amount of the refund of sales taxes due to Kansas City Power and Light based upon the square footage of the guest rooms because the refund amount is not supported by competent and substantial evidence, in that KCP&L failed to produce evidence that one square foot of guest room used the same amount of

electricity as one square foot of the rest of the hotel, and there was no evidence as to the amount of electrical usage of any identifiable portion of the hotel.

Even if this Court finds that the Hyatt was reselling electricity, the evidence in this case does not allow any refund to be awarded. Since KCP&L did not establish by substantial and competent evidence any amount for a refund, the awarding of a refund was erroneous. *J.B. Vending Co., Inc. v. Director of Revenue*, supra.

KCP&L provided no evidence of actual usage of electricity in any room or at any time. Rather, its refund request was based upon the ratio of the guest rooms versus the total amount of square footage of the hotel. This pro rata figure was then multiplied by the total electricity used, and reduced by the vacancy rate. [T. 44] That was not sufficient, because KCP&L failed to produce evidence that this method was based on any substantial and competent evidence.

The inadequacy of the evidence was proven by the discrepancies in what little evidence KCP&L presented. At the hearing, KCP&L produced four conflicting figures for the square footage of the part of the hotel that should be used in calculating the pro rata and refund amount. [LF 23-24] The Commission eventually used the lowest figure, leading to a refund amount of \$41,589.14. [LF 24] The Commission picked the lowest figure does not make the calculation accurate. The Commission's approach assumes that each square foot of the hotel uses the same amount of

electricity. There was no evidence to support that assumption. And the assumption ignores evidence that is in the record, such as the fact that the non-guest part of the hotel includes seven restaurants, a laundry, a spa, and a vending machine on every floor — all using electricity. KCP&L offered no evidence that the square foot method even reasonably, let alone precisely, approximates the electricity used by the guest rooms.

Further, KCP&L's witness, Carol Welch, candidly testified that in calculating the refund request, she did not look at the actual usage of the appliances. She did not know how much electricity was used in the restaurants, nor how much electricity was used in the guest or meeting rooms. She did not even take into consideration the electricity used by the laundry or the restaurant. [T. 54-55] Larger appliances, used in the restaurants and laundry— ovens, stoves, refrigerators, freezers, washers and dryers— logically use more electricity than the smaller items, such as light bulbs and televisions found in a hotel room.

Rather than addressing those issues, Ms. Welch admitted that in calculating the refund she assumed that one 12' by 12' guest room used the same amount of electricity as any other 12' by 12' room. [T. 55] Neither of KCP&L's other witnesses provided a factual basis for Ms. Welch's conclusions.

Further, Howard Breeding, the Director of Engineering for the Hyatt, testified that in preparing for the refund claim, no one asked how much energy the laundry used. He also did not know how much energy the thermostats or the compressors used. [T.39]

Surprisingly, Mr. Breeding could not even testify with certainty as to the amount of the hotel that made up guest and banquet rooms. [T. 41] Similarly, the controller for the Hyatt, Mike Anwar, did not know if the laundry was in the square footage for the guest rooms or not. [T. 25]

Finally, in calculating the refund, KCP&L failed to take into consideration whether or not KCP&L received a 2% discount for timely filing its sales tax payments. [T. 58-60] Since there was no testimony from KCP&L about timely filing, this fact could not be factored into the refund amount.

In short, the Commission had no evidence before it as to the amount of electricity that any appliance, any room, or any area of the Hyatt consumed. Nor did the Commission have any evidence that a guest room used the same amount of electricity as any other part of the hotel. Therefore, instead of basing the amount of the refund on substantial and competent evidence, the Commission's approach arbitrarily assumes that for the same amount of space occupied by a kitchen or a laundry, guest rooms will use the same amount of electricity. Given that the Hyatt has

significant amounts of common area, seven restaurants, a laundry, and a spa, there was no evidence upon which the Commission could form a basis that the square foot method approximates the actual electricity used by the guest rooms. Therefore, the Commission's decision was not based on substantial and competent evidence, as required by *J.B. Vending Co., Inc. v. Director of Revenue*, supra.

Although the amount of the refund was reduced by the vacancy rate of 30%, even this figure is uncertain. None of KCP&L's witnesses testified as to the vacancy rate. The evidence on this point comes from the answers to interrogatories, Respondent's Exhibit A, p. 6. KCP&L did not specifically list each room that was vacant, saying it would be burdensome. Instead, it stated: "The Hyatt has an average vacancy rate of 30%." No evidence was submitted that the refund period was an average one for vacancies, nor was there evidence that meeting rooms share the same vacancy rate as guest rooms. Again, there was a lack of specific proof upon which the Commission could award any refund.

The Commission cited *Dick Proctor Imports v. Director of Revenue*, 746 S.W.2d 571 (Mo. banc. 1988), noting that the Commission may make as close an approximation as it can. [LF 23] But the Commission's reliance on *Proctor* falters at two points. First, it assumes that there is enough evidence to support an

approximation. Here, there was insufficient evidence to support the approximation method submitted by KCP&L.

Second, *Proctor* requires that doubt “be resolved against [the taxpayer] at whose door the uncertainty can be laid.” *Id.* at 575. The lack of substantial and competent evidence noted above should have raised significant and serious doubts in the Commission’s mind as to KCP&L’s approximation method for calculating a refund. Using the *Proctor* approach, the doubts should have been resolved against the taxpayer, KCP&L. Because KCP&L failed to establish how much electricity is used by any room, it therefore failed to show that its square footage method accurately approximates any electricity used by any of the guest room area. Therefore, absent proof and resolving doubts against the taxpayer, no refund should have been awarded by the Commission.

This Court should overturn the Commission decision and award no refund. KCP&L failed to show that the square foot method is a reasonable approximation for determining a refund. Due to this uncertainty, this Court should reverse the Commission and award no refund.

Conclusion

Because the Hyatt rented hotel rooms, rather than reselling electricity to its guest, KCP&L is not entitled to the refund that it seeks, and the decision of the Commission should be reversed.

Even if this Court finds that the Hyatt resold electricity when it rented a hotel room, KCP&L did not establish the amount of the refund by substantial and competent evidence. Therefore, the Commission's decision awarding a refund to KCP&L should be reversed.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 8th day of March, 2002, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 5,672 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

Assistant Attorney General