BEFORE THE PUBLIC SERVICE COMMISSION
FOR THE STATE OF MISSOURI

In the Matter of KCP&L Greater Missouri Operations Company for Authority to Implement Rate Adjustments Required by 4 CSR 240-20.090(4) and the Company's Approved Fuel and Purchased Power Cost Recovery Mechanism.	)))))	Case No. EO-2008-0216

REPLY BRIEF OF
KCP&L GREATER MISSOURI OPERATIONS COMPANY

KCP&L Greater Missouri Operations Company, formerly known as Aquila, Inc. (also referred to as "GMO" or "Company") states the following as its Reply Brief.

Commission rules regarding a true-up are irrelevant to this case. Nevertheless, Public Counsel and the Industrial Intervenors endeavor to cloud the real issue before the Commission by urging the Commission to find that true-up rules prevent GMO from calculating any fuel and fuel-related costs prior to August 1, 2007. Such a finding not only has no basis in the Court of Appeals' Order remanding this cause to the Commission, but it would also constitute retroactive ratemaking contrary to the explicit findings of the Court of Appeals in its Order.

No prior statement by Aquila or statement by Staff can change the fact that a refund of charges after July 5, 2007 would constitute retroactive ratemaking. Nor does an FAC effective date that falls on a date other than the first of the month frustrate any statutory requirement of an accurate true-up. What's more, any order directing a refund of costs collected after the July 5, 2007 effective date of the FAC tariffs clearly would be confiscatory and a violation of Missouri law. While the Company does not agree that any refund is appropriate, if the Commission determines that such refund is necessary, it should authorize an Accounting Authority Order ("AAO") that would include all of the accumulations determined by this Commission to be necessary as a result of the Court of Appeals' Order.

I. The Calculation of Fuel Costs Beginning on August 1, 2007 Has No Basis in the Court of Appeals' Order on Remand.

It is of utmost importance to note what the Court of Appeals ordered. In reversing the Commission's Order Approving Tariff to Establish Rate Schedules for Fuel Adjustment Clause, Case No. EO-2008-0216 (Feb. 14, 2008) ("February 2008 Order"), the Court of Appeals found that "only costs incurred after the effective date of an appropriate tariff may be recovered under a fuel adjustment clause." State ex rel. Ag Processing, Inc. v. PSC, 311 S.W.3d 361, 366 (Mo. App. W.D. 2010). In so finding, the Court held that the Commission's February 2008 Order violated the prohibition against retroactive ratemaking because it permitted the calculation of fuel costs before the FAC tariffs became effective on July 5, 2007. Id. at 367. Reversing that February 2008 Order, the Court remanded the cause "for further proceedings consistent with this opinion." Id.

So too is it of utmost importance to note what the Court of Appeals did not order. In their Initial Brief, the Industrial Intervenors clearly are wrong when they state that their "position has been expressly adopted by the Court of Appeals when it rejected the initial position advanced by GMO and Staff." See Industrial Intervenors' Initial Brief at 15. In reversing the Commission's February 2008 Order, the Court of Appeals did not hold that the accumulation of costs after the July 5, 2007 tariff effective date was retroactive ratemaking. Nowhere did the Court hold that there was an over-collection of costs after July 5. Nowhere did the Court order a refund of any costs accumulated after July 5. Nowhere did the Court adopt the Industrial Intervenors' position that the FAC tariffs could not become effective until August 1, 2007.

Nevertheless, the Industrial Intervenors claim that "the evidence indicates that GMO unlawfully collected $8,794,838 for the period of June 1 through August 1, 2007." See Industrial Intervenors' Initial Brief at 4. This statement is manifestly untrue. The Court of Appeals plainly

recognized the lawfulness of GMO's FAC tariffs as of their July 5 effective date, holding that "any adjustment to the cost of electricity based on electricity that had already been consumed by Aquila customers prior to the effective date clearly constitutes retroactive ratemaking." Id. at 367.

The Court of Appeals' Order is short and it is simple. The Commission has been charged with the task of rectifying the 34 days of calculation of fuel and fuel-related costs between June 1 and July 4, 2007 that the Court found constituted retroactive ratemaking. Nevertheless, Public Counsel and the Industrial Intervenors craftily attempt to insert into the Court's opinion an extraneous and irrelevant concern regarding the Commission's true-up rules. In so doing, Public Counsel and the Industrial Intervenors obscure the simple matter of rectifying 34 days of retroactive ratemaking. The Commission need not be swayed by this maneuver.

II. Ordering a Refund of Fuel and Fuel-Related Costs Calculated After July 5, 2007 Would Violate the Ban on Retroactive Ratemaking.

The Court of Appeals held that the February 2008 Order constituted retroactive ratemaking because the order permitting the recovery of fuel costs beginning on June 1, 2007 was not issued in the Aquila Rate Case until June 29, 2007 and did not become effective until July 5, 2007. See 311 S.W.3d at 365-67. The Court found that such retroactive ratemaking violates the filed rate doctrine, which "precludes a regulated utility from collecting any rates other than those properly filed with the appropriate regulatory agency." Id. at 365. In so holding, the Court criticized the Commission for disregarding "the filed rate doctrine, and the prohibition on retroactive ratemaking," and for focusing "on the language of its own [true-up] regulations." Id. at 367.

Yet Public Counsel and the Industrial Intervenors here make those same mistakes. Arguing that the initial Accumulation Period properly begins on August 1, 2007, in spite of the July 5, 2007 effective date of the FAC tariffs, Public Counsel and the Industrial Intervenors

focus on the Commission's true-up rules to the detriment of the filed rate doctrine and the prohibition on retroactive ratemaking.

As a regulated public utility, GMO is bound by its tariffs which have the force and effect of law. See Bauer v. Southwestern Bell Tel. Co., 958 S.W.2d 568, 570 (Mo. App. E.D. 1997). So too are GMO's customers presumed to know, and are bound by, the content and effect of its published tariffs. Id. Because the filed rate doctrine precludes GMO from collecting any rates other than those filed with the Commission, any refund of costs calculated under FAC tariffs that are properly filed and in effect at the time of such calculation would constitute the very retroactive ratemaking or retroactive rate alteration that is the basis of the Court's remand to the Commission. See 311 S.W.3d at 365. Ordering a refund of such amounts "would clearly be confiscatory and to order an offset of this refund by what a 'reasonable rate' would have been would be (retroactive) rate making at the order of this court, something we cannot do." State ex rel. Utility Consumers Council of Missouri, Inc. v. PSC, 585 S.W.2d 41, 58 (Mo. en banc 1979). What's more, Public Counsel and the Industrial Intervenors justify their attempt at retroactive ratemaking using the very same true-up rules that the Court criticized the Commission for using as the foundation for its attempted retroactive ratemaking. See 311 S.W.3d at 367.

While the Company firmly stands by, and never has swayed from, its position that under the specific facts of this case there was no retroactive ratemaking, it is clear that the Court of Appeals held that the only period of time for which any adjustment or refund issue exists is the 34 days between June 1 and July 4, 2007. See 311 S.W.3d at 367. As the Court determined that "[n]othing in the Commission's Order even attempts to justify its disregard of the applicable statutory language and the prohibition on retroactive ratemaking," so too do Public Counsel and the Industrial Intervenors fail to justify their total disregard of the tariff's plain language. The tariff is clear that it became effective July 5, 2007, and the refund of any sums accumulated on

July 5 or later would violate the filed rate doctrine and its various components, including the ban on retroactive ratemaking.

III. Aquila's Prior Statements Are Irrelevant to the Issues Now Before the Commission, and Regardless of the Statements of Any Party, a Refund of Costs After July 5, 2007 Would Constitute Retroactive Ratemaking.

The Industrial Intervenors make much of prior statements by Aquila, and erroneously read into these statements a conclusion that GMO once held the opinion that its FAC could not commence until August 1, 2007. See Industrial Intervenors' Initial Brief at 12-13. Not only do the Industrial Intervenors inaccurately interpret "may be" statements as determinative, but they also fail to provide the Commission with the full context of the statements they quote. Viewed through the lens of history, it is understandable why Aquila urged the Commission to approve the tariffs as quickly as possible in order to avoid any future controversy. The tariff filings in late May and June of 2007 followed the litigation of a highly contested and complex rate case which focused, in particular, on the meaning and effect of the controversial new statute, Section 386.266.

Aquila was naturally concerned that any suggestion of retroactive ratemaking be avoided in the approval of its tariffs, and therefore urged the Commission to quickly approve its FAC tariffs. The FAC that was established under Section 386.266 and that was implemented pursuant to the Commission's May 2007 Order in Case No. ER-2007-0004, as well as the February 2008 Order in this case, did not become effective until 34 days after it was intended to take effect on June 1, 2007 because of last-minute changes to the tariff. See Rush Direct at 3-4 (Hearing Ex. 1); Rush Direct Sch. TMR-1 (Hearing Ex. 1); see also GMO Initial Brief Exhibits 4-6.

In any case, prior statements by Aquila cannot change the fact that a refund of charges after July 5, 2007 would constitute retroactive ratemaking. Similarly, statements by Staff witness Roos regarding the commencement of a true-up year have nothing to do with the issue of

rectifying 34 days of retroactive ratemaking that is now before the Commission, and any refund of charges after July 5, 2007 would still constitute retroactive ratemaking, regardless of Mr. Roos' statement.

IV. An FAC That Commences on a Date Other Than the First of the Month Does Not Frustrate Any Statutory Requirements.

Public Counsel's and the Industrial Intervenors' assertion that it would be impossible for the Commission to meet the statutory requirement of Section 386.266.4(2) to conduct an accurate true-up of an FAC that commences on a day other than the first of the month is plainly wrong. See Industrial Intervenors' Initial Brief at 10-11; Public Counsel's Initial Post-Hearing Brief at 3-6. As Staff pointed out in its Initial Brief, the Commission has issued orders making FACs effective on dates other than the first of the month in a number of recent cases. See Second Initial Brief After Remand of Staff at 2-3. Last year, the Commission approved The Empire District Electric Company's ("Empire") tariffs (File No. YE-2011-0092), including its FAC tariffs, to become effective on September 10, 2010. See Order Granting Motion for Expedited Treatment and Approving Tariff in Compliance with Commission Order, Case No. ER-2010-0130 (Sept. 1, 2010).

As recently as June 1, 2011, the Commission approved a Global Agreement which contained a mid-month effective date for Empire's FAC tariffs in its 2011 rate case. See Order Approving Global Agreement, Case No. ER-2011-0004 (June 1, 2011). Just ten days ago, the Commission approved Empire's tariffs (File No. YE-2011-0615), including its FAC tariffs, which have an effective date of June 15, 2011. See Order Approving Tariff Filings in Compliance with Commission Order (June 7, 2011).

It is entirely clear that the Commission is not prohibited from determining an effective date of an FAC tariff on a day other than the first day of a month. While Public Counsel and the

Industrial Intervenors cite certain language from a recent Commission decision in Case No. ER-2010-0356, in which the Commission denied GMO's motions for expedited treatment with regard to FAC tariffs because those tariffs did not commence on the first of the month, Public Counsel and the Industrial Intervenors omit the Commission's determination that it is not bound in any way to approve FAC tariffs effective only on the first of the month. The Commission stated,

> The Commission does agree, however, with GMO's next argument that the Commission is not prohibited from determining a different effective date of a tariff [i.e., other than on the first day of the month] if good cause exists to do so. [Order of Clarification and Modification at ~~8~~ 9, Case No. ER-2010-0356 (May 27, 2011)].

Because the Commission found in that case that GMO will not be harmed by the delay in the commencement of the FAC tariffs, as the current FAC will remain in effect until replaced by the new tariff sheets, it determined that GMO did not have good cause to expedite the effective date of the FAC tariffs.

On the facts of this case, good cause exists to begin the accumulation and calculation of costs, approved by the Commission and deemed prudent by Staff, no later than July 5, 2007 when the Commission's Order of June 29, 2007 that approved the FAC tariff sheets became effective. See File No. EO-2009-0115; Tr. at 149; Rush Direct Sch. TMR-1 (Hearing Ex. 1). There was no prior FAC that would remain in effect until replaced by the FAC tariffs at issue here. A July 5, 2007 start date for the initial Accumulation Period results in credit amounts, including interest through December 31, 2010, of $1,975,363 for MPS and $484,626 for L&P. See Rush Rebuttal at 3 (Hearing Ex. 2); Roos Rebuttal at 2 (Hearing Exs. 6 and 7). An August 1, 2007 start date for the initial Accumulation Period results in credit amounts, including interest through December 31, 2010, of $7,084,354 for MPS and $1,710,484 for L&P. Id. Thus, GMO would be harmed by any delay in the start of the initial Accumulation Period.

What's more, no witness has stated that the true-up of the FAC in this case is inaccurate. Rather, Staff and GMO agree that Staff's methodology for calculating fuel and fuel-related costs for the first four days of July 2007 is reasonable. See Tr. at 155; Rush Rebuttal at 2-3 (Hearing Ex. 2); Roos Rebuttal at 3 (Hearing Ex. 6). Staff witness Roos believes Staff's method used to calculate those costs was "the most reasonable." See Tr. at 155.

Though the final figure reached is an "approximation," it is a reasonable one and can certainly be found to be accurate for the purposes of satisfying Section 386.266.4(2). "The general rule is that, where more accurate information is unavailable, estimates should be considered." Report and Order, BPS Tel. Co. v. Voicestream Wireless Corp., Case No. TC-2002-1077, 2005 Mo. PSC LEXIS 139 *50 (Jan. 29, 2005). See also State ex rel. Martigney Creek Sewer Co. v. PSC, 537 S.W.2d 388, 396 (Mo. 1976). Accordingly, the Commission has found in a number of prior instances that the use of approximations where actual figures are unavailable is reasonable.[1]

V. Any Order Directing a Refund or an Adjustment After the July 5, 2007 Effective Date of the FAC Tariffs Clearly Would Be Confiscatory.

The Court of Appeals remanded this cause to the Commission to rectify the collection of costs for 34 days that the Court found to be retroactive ratemaking. As GMO explained in its Initial Post-Hearing Brief, because no stay has been ordered and no party has posted a suspending bond, and because the costs accumulated under these tariffs were found by Staff and the Commission to be prudent, GMO has a due process right to the moneys that were paid under the FAC beginning on June 1, 2007. See GMO's Initial Post-Hearing Brief at 9-11. It is even

[1] See Report and Order, BPS Tel. Co. v. Voicestream Wireless Corp., Case No. TC-2002-1077, 2005 Mo. PSC LEXIS 139 *50 (Jan. 29, 2005); Report and Order, In re Proposed Tariff of Southwestern Bell Tel. Co., Case No. TT-98-97, 1998 Mo. PSC LEXIS 50 *36 (Sept. 29, 1998); Report and Order, In re Missouri Gas Energy, Case Nos. GR-98-140, GT-98-237, 1998 Mo. PSC LEXIS 56 *24 (Sept. 2, 1998).

more obvious that the refund of costs collected after the July 5, 2007 effective date of GMO's FAC tariffs would be confiscatory.

Indeed, due process prevents any court or legislative body from taking money collected by a utility pursuant to lawful rates, as those funds are the property of the utility. Lightfoot v. City of Springfield, 236 S.W.2d 348, 354 (Mo. 1951); City of Joplin v. PSC, 186 S.W.3d 290, 299 (Mo. App. W.D. 2005). The Commission, like Missouri courts, is "bound by Missouri case law which provides that, in the absence of a stay fund, monies collected by utilities under lawful rates cannot be refunded without due process implications." Id. Because GMO's FAC tariffs, effective July 5, 2007, have the full force and effect of the law, GMO must collect, and customers must pay, those rates. See Bauer v. Southwestern Bell Tel. Co., 958 S.W.2d 568, 570 (Mo. App. E.D. 1997). The Court of Appeals found no over-collection or under-collection of costs after July 5. Thus, costs collected pursuant to those lawful tariff rates are the property of GMO, and their refund would be confiscatory and a violation of Missouri law.

VI. The Commission Should Issue an Accounting Authority Order to GMO Regarding Any Amounts That Are Contained in a Refund or an Adjustment.

While the Company does not agree that any refund is appropriate, if the Commission determines that such refund is necessary, it should authorize an AAO that would include all of the accumulations determined by this Commission to be necessary as a result of the Court of Appeals' Order on Remand. This request is neither "bold" nor "egregious." Rather, GMO has clearly cited to and explained the applicability of the Commission regulation adopting the Uniform System of Accounts ("USOA") prescribed by the Federal Energy Regulatory Commission, 4 CSR 240-20.030. See also 18 CFR part 101 (1992), General Instruction 7 (GMO Initial Post-Hearing Brief Exhibit 1).

The USOA recognizes that special accounting treatment, what this Commission refers to as an AAO, may be appropriate when accounting for extraordinary items of profit or loss. See Tr. at 166. The significant statutory change in the manner in which fuel and fuel-related costs are recovered after the passage of Senate Bill 179, which became Section 386.266, was an extraordinary and singular event. Aquila was the first Company to implement an FAC under the new Section 386.266, and any refund or adjustment ordered in this case, due to the specific facts of this case, would also be an extraordinary and singular event. Under the facts of this case, permitting GMO to defer to Account 182.3, Other Regulatory Assets, all unrecovered costs directly related to the FAC remand is consistent with the Commission's prior granting of AAOs for "extraordinary items" as defined in the USOA.

WHEREFORE, the Company requests that the Commission find that it did not engage in retroactive ratemaking and that the calculation of fuel costs within the initial Accumulation Period should begin on June 1, 2007. Should the Commission determine that it did engage in retroactive ratemaking, the Company requests that the Commission find that it does not have authority to order a refund or adjustment regarding any over-collection that occurred in the initial Accumulation Period. Should the Commission find that it does have authority to order a refund or adjustment, the Company requests that the Commission use a July 5, 2007 start date for the initial Accumulation Period, and credit amounts, including interest through December 31, 2010, of $1,975,363 for MPS and $484,626 for L&P. Finally, the Company requests that the Commission issue an Accounting Authority Order to GMO regarding any amounts that are contained in a refund or adjustment.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 17th day of June, 2011 copies of the foregoing have been mailed, transmitted by facsimile, or emailed to all counsel of record.

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